COUNTY ROADS-USE OF COUNTY RIGHT-OF-WAY

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COUNTIES ARE SUBDIVISIONS OF THE STATE

- Have only those powers granted by Constitution, Statute, or implicit in grant of express powers. *Canales v. Laughlin*, 214 S.W. 451 (Tex. 1948).
- §251.003 Transportation Code-"The Commissioners Court of a county may make and enforce all necessary rules and orders for the construction and maintenance of public roads."

2

COUNTY AUTHORITY TO "SET FEE"

- §251.016 Transportation Code: The commissioners court of a county may exercise general control over all roads, highways, and bridges in the county.
- §251.017 Transportation Code: "The commissioners court of a county may set a reasonable fee for the county's issuance of a permit authorized by this chapter for which a fee is not specifically prescribed. The fee must be set and itemized in the county's budget as part of the budget preparation process."

3

AG OPINION GA-1013-JULY 22, 2013

- Re: Whether a commissioners court may require a permit and charge a fee for installing an access point to a county road.
- SUMMARY-Transportation Code sections 251.003 and 251.016 authorize a commissioners court to require permits for the construction within the county right-of-way of access points to county roads. Section 251.017 authorizes a commissioners court to set a reasonable fee for such permits.

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OTHER SPECIFIC ROAD "FEES" AUTHORIZED BY STATUTE

- *§181.131 Local Government Code-Fee must be set before 10/1st to be effective 1/1 following year.*
  - *Fee may not be higher than is necessary to provide the service.*
  - *Notice must be posted by publication and posting*
- *§285.002 Transportation Code-Road side vendors fee.*
- §623.018-Superheavy or Oversize Vehicles (Subject to §623.011 State Permit, with exceptions)

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OTHER ROAD RELATED "FEES"

- §232.005-Subdivision Platting fee-may include roads the county may (not required) elect to maintain.
- §256.001 et seq, Transportation Code: Tax based revenues and fees that eventually come back to county in some proportion must be allocated by the Comm. Court. in formulation of the budget.

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CROSSING/CUT PERMIT

- §240.907 Local Government Code.
  - Provides authority for a permit fee of $500.00 to "cut" a county road, which is defined to be "the act of excavating or cutting the surface of a county road."
  - In addition to the permit fee, the county is entitled to recover the cost to repair damage to the road because of the cut.
  - Attorney General says fee cannot be charged for "boring a road", since there is no surface excavation.
  - But does GA-1013 suggest a fee can be set for crossing a road, boring or not?

7

UTILITY USE OF RIGHT OF WAY GENERALLY REQUIRED TO GIVE NOTICE PRIOR TO INSTALLATION

- Utilities identified in Chapter 181 of the Utilities Code may use the County Right-of-Way.
- Water Corporations providing water/sewer to end users may use County Right-of-Way. (§49.220 Water Code, 552.104 Local Gov't Code).
- Common Carriers (oil pipelines transporting hydrocarbons to end users) may use the County Right-of-way. (§111.020 Natural Resources Code.
- Gas Corporations (gas pipeline transporting gas to end users) may use the County Right-of-Way. (§181.005 Utilities Code).
- Telephone companies are not required to give notice, but cannot "inconvenience" the public.

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LIMITS/CONCERNS

- Pipelines have a duty to "restore the right-of-way to their former condition", but a contract to acknowledge and affirm this duty is recommended.
- If county widens the right of way, or alters the drainage of a road, it may require the utility to relocate the utility line with 30 days advance notice, at the cost of the utility.
- Generally, the use by a utility cannot "inconvenience" the primary use of the right-of-way for vehicular traffic. 282 S.W.3d 59 (Tex. 2009) SWBell v. Harris County Toll Road Auth.
- Application of the "Digtess" notice requirement of 251.151 Utilities Code, and the "24 Inch" exception for routine maintenance. Of 251.156

9

SALTWATER DISPOSAL LINE

- §91.901-905 Texas Natural Resources Code now gives "saltwater pipeline facility" the right to lay lines through, along, across or over a public road, ***if*** the operator complies with all rules of TxDot, and county regulations, and the operator "ensures" that the road are promptly restored to their former condition of usefulness.
- ***The County may charge a lease fee.***
- This right extends not only to "outflows" of saltwater, but "inflows" of treated water for fracking operations.

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HOW *DAVIS V. HALE* APPLIES TO RIGHT-OF-WAY USE BY OTHER PERSONS/ENTITIES

- *Hale County v. Davis*, 572 S.W.2d 63 held that the County had no authority to grant easement for private use of the county right-of-way.
  - Legislative authority to "public" users, i.e. utilities, etc., to use the right-of-way required.
  - Private use, including non-utility oil and gas developers, or private individuals wanting to run lines down right-of-way, are not authorized.

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REGULATION OF ROW SIGHT LINES

§255.002 Transportation Code gives county authority to regulate the sight distance for an intersection. The Commissioners Court should hold a public hearing, advertise the hearing pursuant to §251.152 Transportation Code, and:

1. Define appropriate sight distances;
2. Prohibit an obstruction of the sight line distance by vegetation, or other item (except a building or structure) if the obstruction is a traffic hazard.
3. Require removal of the obstruction.
4. Once adopted, the policy should be enforced. It can include fences, mail-boxes, etc. See AG Opinion GA-0693.

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TRAFFIC CONTROL

Following a public hearing, pursuant to §251.152 Transportation Code, a County may:

1. Impose altered speed limits on a county maintained road, to no lower than 30 MPH, unless in a residential district, alley or beach, and then 20 MPH.
2. Erect Stop signs on county maintained roads. Must have an Order and sign erected in conformity with Uniform Manual on Traffic Control Devices.
3. Authorize gates and cattle guards. 251.009, 251.010. Requires specifications.
4. Allow closure for festival of county maintained road. 251.158. Requires notice and public hearing in advance.

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AVOID SEISMIC

AG. Opinion MW-1413 holds that a county Commissioners Court is without authority to grant use of the county road right-of-way for seismic exploration of adjoining land.

1. May constitute a trespass of private land. Valuable oil/gas rights may be affected.
2. No statutory authority for such a permit.
3. Right to grant an easement for oil/gas exploration belongs only to the mineral estate owner.
4. Most counties do not own anything but a surface easement, not title, so no capacity to allow use of right-of-way for this purpose.

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Section §111.020 of the Natural Resources Code, relied upon by most pipeline utilities when these sorts of dispute arise, is rather broad, and there is no doubt that common carriers transporting gas by pipeline are entitled to use the county right of way, subject to some limitation. The authority given to a gas pipeline carrier to use the public right of way must be read in conjunction with the duties imposed upon such carriers.

§ 111.020. Pipeline on Public Stream or Highway

(a) Subject to the provisions of Subsection (b) of this section, all common carriers are entitled to lay, maintain, and operate along, across, or under a public stream or highway in this state pipelines, together with telegraph and telephone lines incidental to and designed for use only in connection with the operation of the pipelines.

(b) The right to run a pipeline or telegraph or telephone line along, across, or over a public road or highway may be exercised only on condition that:

(1) it does not interfere with traffic on the road or highway;

(2) the road or highway is promptly restored to its former condition of usefulness;

(3) the restoration of the road or highway is subject also to the supervision of the commissioners court or other proper local authority; and

(4) no pipes or pipelines are laid parallel with and on a public highway closer than 15 feet from the improved section of the highway except with the approval and under the direction of the commissioners court of the county in which the public highway is located.

(c) The common carrier shall compensate the county or road district, respectively, for any damage done to the public road in the exercise of the privileges conferred.

(d) A person may acquire the right conferred in this section by filing with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights acquired, it becomes a

common carrier subject to the duties and obligations conferred or imposed by this chapter.

Other statutory provisions are also applicable:

§ 181.005. Authority to Lay and Maintain Lines

(a) A gas corporation has the right to lay and maintain lines over, along, under, and across a public road, an interurban railroad, a street railroad, a canal or stream, or a municipal street or alley and over, under, and across a railroad or a railroad right-of-way only if:

(1) the pipeline complies with:

(A) all safety regulations adopted by the Railroad Commission of Texas and all federal regulations relating to pipeline facilities and pipelines; and

(B) all rules adopted by the Texas Department of Transportation or the Railroad Commission of Texas and all federal regulations regarding the accommodation of utility facilities on a right-of-way, including regulations relating to the horizontal or vertical placement of the pipeline; and

(2) the owner or operator of the pipeline ensures that the public right-of-way and any associated facility are promptly restored to their former condition of usefulness after the installation or maintenance of the pipeline.

(b) The right granted by Subsection (a) relating to the use of a municipal street or alley is subject to the payment of charges in accordance with Section 121.2025 of this code and Sections 182.025 and 182.026, Tax Code.

(c) In determining the route of a pipeline within a municipality, a gas corporation shall consider using existing easements and public rights-of-way, including streets, roads, highways, and utility rights-of-way. In deciding whether to use a public easement or right-of-way, the gas corporation shall consider whether:

(1) the use is economically practicable;

(2) adequate space exists; and

(3) the use will violate, or cause the violation of any pipeline safety regulations.

(d) The Texas Department of Transportation may require the owner or operator of a pipeline to relocate the pipeline:

(1) at the expense of the owner or operator of the pipeline, if the pipeline is located on a right-of-way of the state highway system;

(2) at the expense of this state, if the pipeline is located on property in which the owner or operator of the pipeline has a private interest; or

(3) in accordance with Section 203.092, Transportation Code, at the expense of this state, if the pipeline is owned or operated by a gas utility as defined by Section 181.021 of this code or a common carrier as defined by Chapter 111, Natural Resources Code.

(e) Rules adopted by the Texas Department of Transportation regarding horizontal and vertical placement of pipelines must be reasonable and, for rights-of-way of the state highway system, must provide an appeals process through the Texas Department of Transportation.

Section §181.005 provides that a gas pipeline may use the public right of way "only if" the pipeline complies with "all safety regulations adopted by the Railroad Commission of Texas and all federal regulations relating to pipeline facilities and pipelines."

So, the question is not as much as what authority the County has , as what duties the utility has in regard to the use of the right of way.

In looking at the regulations adopted by the state and federal entities, of particular note are the provisions of 49 CFR 192-195 of the Federal regulations: pipelines must be buried at sufficient depths to provide safety from being damaged by ordinary surface use, and particularly under roadways, to sustain the loads imposed by that traffic.

State regulations are also applicable: While 43 TAC Section 21 gives rights of public right of way use to utilities (43 TAC 21.36), it also imposed standards upon the pipeline carrier:

TAC Section 21.37 pertains to design, TAC Section 21.38 pertains to construction and maintenance standards, and specifically, and TAC Section 21.40 requires "encasement" where pipelines cross highways.

Further, a pipeline utility has to give notice in advance of reworking the line as required by Section 181.024 of the Utilities Code. The County has authority to designate a location…and to impose reasonable requirements that are not in conflict with state law. I do not think the existing regulation imposes any requirement beyond a restatement of state law. Should the County at some future date determine to change the location of traffic lanes, or to widen the county right of way, the County may require, after notice to the utility of 30 days written notice, the relocation at the utilities' cost of their transmission line.

§ 181.024. Notice to State or County

(a) A gas utility proposing under this subchapter to locate a gas facility in the right-of-way of a state highway or a county road not in a municipality shall give notice of the proposal to:

(1) the Texas Transportation Commission if the proposal relates to a state highway; or

(2) the commissioners court of the county if the proposal relates to a county road.

(b) On receipt of the notice, the Texas Transportation Commission or the commissioners court may designate the location in the right-of-way where the gas utility may place the gas facility.

282 S.W.3d 59
Supreme Court of Texas.

SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC TEXAS, Petitioner,
v.
HARRIS COUNTY TOLL ROAD AUTHORITY and Harris County, Respondents.

No. 06–0933. | Argued Jan. 15, 2008. | Decided April 3, 2009.

Synopsis

Background: Telephone company brought action against county for reimbursement of facility relocation costs necessitated by construction of tollway. The County Civil Court at Law No. 1, Harris County, Jack Cagle, J., granted company's motion for summary judgment, and county appealed. The Houston Court of Appeals, 263 S.W.3d 48, Jane Bland, J., reversed and rendered judgment for county.

Holdings: On petition for review, the Supreme Court, Jefferson, C.J., held that:

[1] whatever property interest company had in public **right-of-way** on which its facilities were located, that interest did not include right, under Takings Clause of State Constitution, to require county to pay for relocation of company's facilities; and

[2] statute requiring that a county include cost of relocating or adjusting an eligible **utility** facility in expense of **right-of-way** acquisition did not clearly waive governmental immunity.

Judgment of Court of Appeals affirmed.

Attorneys and Law Firms

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Opinion

Chief Justice JEFFERSON delivered the opinion of the Court.

A telephone company that was forced to relocate its facilities due to road construction demanded reimbursement from the county and its toll road authority. Neither our statutes nor our constitution, however, authorize the relief sought. Because the **utility** has no vested property right to relocation of its facilities at county expense, and because the Legislature has not waived the governmental entities' immunity from suit, we affirm the court of appeals' judgment.

I

Background

Southwestern Bell ("SBC") provides local telephone service in Harris County and throughout Texas. SBC maintains underground telecommunications facilities in the public **right-of-way** along the Westpark Tollway (formerly Westpark Road) pursuant to section 181.082 of the Texas **Utilities** Code. *See* TEX. UTIL.CODE § 181.082 ("A telephone ... corporation may install a facility of the corporation along, on, or across a public road, a public street, or public water in a manner that does not **inconvenience** the public in the **use** of the road, street, or water.").

When the Harris County Toll Road Authority and Harris County ("Harris County") began construction of the Westpark Tollway in 2001, they required SBC to relocate its facilities in the **right-of-way** along Westpark Road. SBC did so and ***61** billed the county for its costs. Harris County refused to pay, and this suit followed. In the trial court, SBC asserted both a claim for reimbursement under

Transportation Code section 251.102 and a claim for inverse condemnation under article I, sections 17 and 19 of the Texas Constitution. *See* TEX. CONST. art. I, §§ 17, 19; TEX. TRANSP. CODE § 251.102. The parties filed cross-motions for summary judgment, and the trial court denied Harris County's motion and granted SBC's. The court of appeals reversed, holding that Harris County was immune from suit on the statutory claim and that SBC had no vested property interest in the **right**-**of**-**way** for the purposes of article I, section 17 of the Texas Constitution. 263 S.W.3d 48, 52. We granted SBC's petition for review.[1] 51 Tex. Sup.Ct. J. 77 (Nov. 2, 2007).

II

SBC's Takings Claim[2]

[1] [2] [3] [4] SBC contends that it is entitled to compensation for its relocation expenses under article I, section 17 of the Texas Constitution, which provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public **use** without adequate compensation being made, unless by the consent of such person...." TEX. CONST. art. I, § 17. Governmental immunity "does not shield the State from an action for compensation under the takings clause." *Gen. Servs. Comm'n v. Little–Tex Insulation Co.,* 39 S.W.3d 591, 598 (Tex.2001). To recover on an inverse condemnation claim, a property owner must establish that "(1) the State intentionally performed certain acts, (2) that resulted in a 'taking' of property, (3) for public **use**." *Id.* Although the first and third elements are present here, Harris County asserts, and the court of appeals held, that SBC does not have a vested property interest in the public **right**-**of**-**way** on which its facilities are located. We conclude that whatever interest SBC has, that interest did not include the right to require the county to pay for relocation of its facilities.

A

Common–Law Rule

The United States Supreme Court, in a case similar to this one, rejected a takings claim brought by a gas company forced to relocate its pipes to accommodate improvements to the city's drainage system.

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to **use** the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria.*

***62** *New Orleans Gas Light Co. v. Drainage Comm'n of New Orleans,* 197 U.S. 453, 462, 25 S.Ct. 471, 49 L.Ed. 831 (1905).[3]

[5] Thus, under the "long-established common law principle ... a **utility** forced to relocate from a public **right-of-way** must do so at its own expense." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.,* 464 U.S. 30, 34, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983). We have said that "[i]n the absence of assumption by the state of part of the expense, it is clear that [**utility** companies] could be required to remove at their own expense any installations owned by them and located in public **rights** of **way** whenever such relocation is made necessary by highway improvements." *State v. City of Austin,* 160 Tex. 348, 331 S.W.2d 737, 741 (1960); *see also* 2–28 SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW, § 28.09[3] (2d ed. 2008) ("Under the traditional common law rule, and in the absence of an agreement or statute to the contrary, whenever state or local authorities make reasonable requests of a public **utility** to relocate, remove or alter its structures or facilities, the **utility** must bear the cost of doing so, even though the public **utility** may be operating pursuant to franchise from the local government.").

B

Utility Code Section 181.082

SBC argues that, notwithstanding this general rule, the statutory permission for it to "install a facility ... in a manner that does not **inconvenience** the public in the **use** of the road, street, or water," TEX. UTIL.CODE § 181.082, grants it a property interest on which a takings claim may be based. While we have characterized a railroad's interest granted by a local franchise as an "easement" for taxation purposes, *Tex. & Pac. Ry. Co. v. City of El Paso,* 126 Tex. 86, 85 S.W.2d 245, 248 (1935), that does not answer whether SBC's interest, arising from section 181.082, gives rise to its compensable takings claim. According to SBC, this statute, originally enacted in 1874, granted telephone companies "[i]n effect, ... a private easement." But, as a noted treatise recognizes:

> The authorization to maintain rails, etc., in a particular part of the highway is not an easement or any other estate or interest in the land so occupied. On the contrary, it is merely a license to share in the public easement, and consequently a corporation maintaining rails, pipes, and wires in a public highway is not entitled to compensation for an invasion under legislative authority of the portion of the highway occupied by its structures. Consequently, this license may not be arbitrarily revoked as long as the highway remains public, and the enjoyment thereof cannot be interfered with for purely private ends. ***Yet when the continued undisturbed existence of the licensed structure does interfere with some other public need, the disturbance or removal of the structures or an alteration of their location is not a taking or even a damaging of property.*** The permission to **use** the highway for such structures has been granted upon an implied condition that the structures shall not interfere, either at the time that they are placed in position or thereafter, with any other public **use** to which the legislature sees fit to devote the way. When the condition takes effect, the privilege ceases to exist; it is not ***63** taken or damaged. To hold otherwise and to say that whenever, under the statutory permission, a gas pipe is laid in a public way the pipe cannot be disturbed, even to make such changes as are required by public travel, is to make what is merely a subordinate **use** paramount to the great important **use** for which the land is taken.

2–5 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.03[5][e] (3d ed. 2006) ("NICHOLS ON EMINENT DOMAIN") (emphasis added and citations omitted); *see also W. Union Tel. Co. v. Tarrant County,* 450 S.W.2d 763, 765–66 (Tex.Civ.App.-Fort Worth 1970, writ ref'd n.r.e.) (rejecting telegraph company's takings claim, despite the fact that lines had been installed forty-three years earlier pursuant to section 181.082's predecessor; right to **use** the streets was a "permissive right" not a "vested" one, and **utility** had to bear its own relocation costs).

[6] We recognized as much in 1913, when we held that the limiting language in the grant to telephone companies was "qualified by this important language, 'in such manner as not to incommode the public in the **use** of such road, streets and waters.' " *Brownwood v. Brown Tel. & Tel. Co.,* 106 Tex. 114, 157 S.W. 1163, 1165 (1913). We concluded that "[t]he effect of the limiting clause is to declare the right of the public to be superior to the rights granted to the corporation." *Id.* "The main purposes of roads and streets are for travel and transportation, and while public **utilities** may **use** such roads and streets for the laying of their telegraph, telephone and water lines, and for other purposes, such **uses** are subservient to the main **uses** and purposes of such roads and streets." *City of San Antonio v. Bexar Metro. Water Dist.,* 309 S.W.2d 491, 492 (Tex.Civ.App.-San Antonio 1958, writ ref'd). When a telephone company installs its lines pursuant to the statutory grant, "there is an implied condition that the facilities shall not interfere with the public **use**, either at the time they are placed in position or thereafter." *City of Grand Prairie v. Am. Tel. & Tel. Co.,* 405 F.2d 1144, 1146 (5th Cir.1969) (noting that rule requiring **utilities** to relocate at their own expense is "generally accepted as the prevailing view").

SBC asserts that telephone companies are different from other **utilities**, pointing to section 181.082's silence on relocation costs, and cites other statutes explicitly requiring **utilities** to pay relocation costs in certain situations. *See, e.g.,* TEX. UTIL.CODE §§ 181.025(b) (relocation of gas facility), 181.046(b) (relocation of electric lines). There are also statutes, however, mandating the converse. *See, e.g.,* TEX. TRANSP. CODE § 227.029(*l*) (providing that "the department, as part of the cost of the project, shall pay the

cost of the relocation ... of a public **utility** facility"); *id.* § 251.103 (providing that "a county may pay for relocation of a water line" under certain circumstances, provided the water district agrees to repay the funds within twenty years and with interest). Regardless, the statute's silence on relocation costs would mean that the common law rule applied, not that the county was responsible for relocation costs. Moreover, none of our cases supports the distinction SBC proposes. If telephone companies were somehow different, we would not have said in *City of Austin*—a case in which Southwestern Bell Telephone Company was a respondent-that "[i]t is clear that respondents could be required to remove at their own expense any installations owned by them and located in public **rights** of **way** whenever such relocation is made necessary by highway improvements." *City of Austin,* 331 S.W.2d at 741.

***64** The State, as amicus curiae, contends that Texas law has authorized telegraph and telephone companies to **use** public roads for 136 years, and never in that time has there been a single decision under section 181.082 (or its predecessors) concluding that such **utilities** have a right in the public roads that is compensable under the Texas Constitution. Southwestern Bell's contentions, according to the State, would create a "newly minted property right." Based on the authorities outlined above, we agree. Under the traditional common-law rule—a rule unaltered by section 181.082–SBC would be required to bear its own relocation costs.

C

Transportation Code Section 251.102

SBC contends, however, that this rule does not apply when another statute "pointedly requires" a governmental entity to pay relocation costs. That, SBC argues, is the case with section 251.102. We have held, however, that "if a statute creates a liability unknown to the common law, or deprives a person of a common law right, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview." *Satterfield v. Satterfield,* 448 S.W.2d 456, 459 (Tex.1969). This is one such case.

[7] In its current form, section 251.102 provides that "[a] county shall *include* the cost of relocating or adjusting an *eligible* **utility** facility in the expense of **right**-**of**-**way** acquisition." TEX. TRANSP. CODE § 251.102 (emphasis added). "Eligible" is undefined, and the Fifth Circuit noted its ambiguity in this context. *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth.,* 436 F.3d 541, 545 (5th Cir.2006), *cert. denied,* 548 U.S. 907, 126 S.Ct. 2945, 165 L.Ed.2d 956 (2006) (noting that "we have examined the statute, as noted above, and find that the words 'eligible **utility** facility' remain ambiguous"). Originally enacted in 1963 as former article 6674n–3, the statute provided that "[i]n the acquisition of all highway **rights**-of-**way** by or for the Texas Highway Department, the cost of relocating or adjusting ***utility*** *facilities which cost may be eligible under the law* is hereby declared to be an expense and cost of **right**-**of**-**way** acquisition." Act of May 16, 1963, 58th Leg., R.S., ch. 240, § 1, 1963 Tex. Gen. Laws 654, 654 (emphasis added). The emergency provision of that Act stated that it was necessary "in order to clarify existing law as to the proper classification of costs incurred for the relocation or adjustment of **utility** facilities as a part of the acquisition of **right**-**of**-**way**." *Id.* § 4.

The statute was passed apparently in response to *Hardin County v. Trunkline Gas Co.,* 311 F.2d 882, 884 (5th Cir.1963), in which the court held that a county "was not obligated, indeed could not legally obligate itself, to pay" costs incurred by a gas company forced to extend the casing enclosing its pipelines when the state widened the highways. The Fifth Circuit held that the gas company's claim was not "a legal claim," as the county was not authorized "to contract to improve, construct or reconstruct a State highway ... [and was] expressly prohibited from expending county funds therefor." *Id.* at 883, 885. While the gas company's petition for writ of certiorari was pending, the Legislature passed what is now section 251.102. *Trunkline Gas Co. v. Hardin County,* 375 U.S. 8, 8, 84 S.Ct. 49, 11 L.Ed.2d 38 (1963) (granting certiorari and vacating judgment, noting that "it appear[s] that the State of Texas has passed a statute in connection with controversies of this kind since the petition for a writ of certiorari was filed in this Court"). On remand, the Fifth Circuit held that the newly enacted ***65** statute did not change the result, because "[t]he Legislature cannot, by curative statute, appropriation, or otherwise, authorize payment under a contract made without authority of law." *Hardin County v. Trunkline Gas Co.,* 330 F.2d 789, 793 (5th Cir.1964).

When the 68th Legislature adopted the County Road and Bridge Act (former Article 6702–1) in 1983, article 6674n–3 was the source law for section 4.303 of the new law, which stated that "[t]he county should include the cost of relocating or adjusting *eligible* **utility** facilities in the expense of **right**-**of**-**way** acquisition. (V.A.C.S. Art.

6674n–3.).” Act of May 20, 1983, 68th Leg., R.S., ch. 288, § 1, 1983 Tex. Gen. Laws 1431, 1489 (emphasis added). In 1995, section 4.303 was codified, without substantive change, as section 251.102 of the Texas Transportation Code. Act of May 1, 1995, 74th Leg., R. S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1159, 1871 (now codified at TEX. TRANSP. CODE § 251.102).

In one of only two decisions interpreting section 251.102,[4] the Fifth Circuit, in an *Erie*[5] guess about Texas law, held that “eligible **utility** facility” meant “eligible under the law,” which equated to a statutory right to reimbursement that operated prospectively, dealt with a matter in which the public has a real and legitimate interest, and was not fraudulent, arbitrary or capricious, based on our decision in *City of Austin. Centerpoint,* 436 F.3d at 549–50. *City of Austin,* however, involved a different statute—and one in which “eligible” was clearly defined. *City of Austin,* 331 S.W.2d at 740. The relevant statute in that case (passed six years before what is now section 251.102) provided that **utilities** required to relocate as part of the improvement of highways established as part of the National System of Interstate and Defense Highways, would do so “at the cost and expense of the State ... provided that such relocation was eligible for Federal participation.” Act of May 23, 1957, 55th Leg., R. S., ch. 300, § 4A, 1957 Tex. Gen. Laws 724, 729, *repealed by* Acts 1995, 74th Leg., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1031, 1970 (current version at TEX. TRANSP. CODE § 203.092(a)(1)). The statute was passed

> for the purpose of securing the benefits of the Federal–Aid Highway Act of 1956, which authorize[d] the **use** of Federal funds to reimburse the state for the cost of relocating **utility** facilities in the same proportion as such funds are expended on a given project, with the proviso that Federal money shall not be **used** for that purpose when payment to the **utility** violates either state law or a legal contract between the **utility** and the state.

City of Austin, 331 S.W.2d at 740 (citing U.S.C. § 123).[6] ***66** The **utilities**’ (Southwestern Bell Telephone Company among them) eligibility for reimbursement was undisputed; the only issue we considered was whether the State’s payment of relocation costs would be an unconstitutional donation for a private purpose. We concluded that it would not be and, in doing so, noted:

> In the absence of assumption by the state of part of the expense, it is clear that respondents could be required to remove at their own expense any installations owned by them and located in public **rights** of **way** whenever such relocation is made necessary by highway improvements.... While public **utilities** may **use** [roads and streets] for laying their lines, such **use** is subject to reasonable regulation by either the state, the county or the city, as the case may be. The **utility** may always be required, in the valid exercise of the police power by proper governmental authority, to remove or adjust its installations to meet the needs of the public for travel and transportation
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> ....
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> Compensation is not required to be made for damage or loss resulting from a valid exercise of the police power.

Id. at 741–43; *see also id.* at 746 (noting that “[n]o part of the expense will be paid by the state, of course, if the relocation is not eligible for Federal participation”). In concluding that the reimbursement of relocation costs was not an unconstitutional gift, we relied on three factors: the statute operated prospectively, dealt with a matter in which the public had a real and legitimate interest, and was not fraudulent, arbitrary, or capricious. *Id.* at 743.

In *CenterPoint,* the Fifth Circuit examined these three factors to conclude that the relocation costs were *eligible,* rather than *constitutional*—a rationale the court of appeals in this case then adopted. *CenterPoint,* 436 F.3d at 549–50; 263 S.W.3d at 58–60. Harris County asserts-and the State agrees—that the Fifth Circuit’s interpretation is incorrect. Instead, Harris County argues, “eligible **utility** facility” in section 251.102 means that the project in question is eligible for federal participation or the **utility** has a compensable property interest in the land occupied by the **utility**, based on the current version of the statute we construed in *City of Austin* and the caselaw at the time section 251.102 was originally enacted. *See* TEX. TRANSP. CODE § 203.092(a)(1) and (2) (providing that a “**utility** shall make a relocation ... at the expense of this state if ... relocation of the **utility** facility is required by improvement of a highway in this state established ... as part of the National System of Interstate and Defense Highways and the relocation is *eligible* for federal participation” or “the **utility** has a compensable property interest in the land occupied by the facility to be relocated”) (emphasis added); *City of Austin,* 331 S.W.2d at 746 (reimbursement required if relocation was eligible for federal participation); *Magnolia Pipe Line Co. v. City of Tyler,* 348 S.W.2d 537, 543 (Tex.Civ.App.-Texarkana 1961, writ ref’d) (reimbursement required if **utility** had purchased easements from private owners).

Harris County’s argument is plausible, if too narrow. Section 251.102 does not define what is “eligible”; it merely states that counties shall include relocation costs for such facilities. Other statutes clearly speak to the subject. As noted, relocation costs must be paid if the relocation “is ***67** eligible for federal participation,” if “the **utility** has a

compensable property interest in the land occupied by the facility to be relocated," or, under certain circumstances, if the project involves improvement of "a segment of the state highway system that was designated by the commission as a turnpike project or toll project before September 1, 2005." TEX. TRANSP. CODE § 203.092(a)(1), (2), and (3). Yet another statute provides for discretionary reimbursement by the highway department if the commission finds that relocation is essential to the timely completion of the project, continuous **utility** service is essential to the public well-being, the **utility's** ability to operate would be adversely affected if it paid the relocation cost, and the **utility** and the department agree regarding appropriate safeguards, minimization of disruption, and choice of contractors. *Id.* § 203.0921. Still another provides that "a county may pay for relocating a water line" under certain circumstances, provided the water district agrees to repay the funds within twenty years and with interest. *Id.* § 251.103. Section 203.094, dealing with timely relocations, speaks to a **utility** that is "eligible for reimbursement under section 203.092 or that is eligible for reimbursement under applicable law and the policies of the department for the cost of relocating facilities." *Id.* § 203.094. Each of these statutes describes various scenarios under which **utilities** might be eligible for reimbursement of relocation costs.

These laws indicate that, when the Legislature has determined that the government should pay a **utility's** relocation costs, the statutes clearly delineate classes of relocations that are eligible for reimbursement. By contrast, section 251.102 contains no such definition. If the Legislature intended for counties to pay all **utility** relocation costs, it would have been a simple matter to so state. *See, e.g.,* TEX. TRANSP. CODE § 227.029(*l*) (providing that "the department, as part of the cost of the project, shall pay the cost of the relocation ... of a public **utility** facility"); *id.* § 366.171 (stating that regional tollway authorities "shall pay the cost of relocation" of a "public **utility** facility"); *id.* § 370.170(h) (regional mobility authority "shall pay the cost of relocation" of a "public **utility** facility"). Instead, the statute provides only that the county "include" relocation cost in acquisition expenses, and only for those **utilities** that are "eligible." *Id.* § 251.102. SBC's relocation costs in this case are not clearly within the statute's purview, and SBC cites no other provision that would make it "eligible."[7] *Satterfield,* 448 S.W.2d at 459.

SBC asserts that Harris County ignores the "equities of requiring toll road users, rather than the general public, to pay the true costs of constructing a toll road." While requiring reimbursement of **utility** relocation costs for toll roads may be the better policy, that is a decision for the Legislature. Moreover, mandating reimbursement under section 251.102 would mean that all counties would have to reimburse all **utility** relocation costs for all acquisition projects, not just toll roads. Absent a clearer indication from the Legislature, we cannot conclude that this is what the statute requires.

D

Ad Valorem Taxation

SBC also argues that if its facilities are property for purposes of ad valorem taxation, they are property for purposes of a ***68** takings claim. *See City of Fort Worth v. Sw. Bell Tel. Co.,* 80 F.2d 972, 975 (5th Cir.1936) (concluding that "[i]f the right to maintain the company's poles, wires, and conduits ... is property for purposes of protection, it is property for purposes of taxation"). The court of appeals, however, correctly noted that *City of Fort Worth* involved taxation, not inverse condemnation, and that the case "expressly recognized that the predecessor to section 181.082 at issue in that case reserved 'a supervision through the municipality as to the placing and alteration of the [**utility's**] fixtures.' " 263 S.W.3d at 68 n. 13 (quoting *City of Fort Worth,* 80 F.2d at 976); *see also W. Union,* 450 S.W.2d at 766 (holding that telegraph company had to relocate at its own expense; authorities cited regarding ad valorem taxation were inapposite). Thus, while SBC has a property interest in its facilities, that interest is subject to the terms of the original grant. When, under a valid exercise of the police power, the facilities **inconvenience** the public, they must be moved at SBC's expense. While our answer might be different if SBC faced the complete removal of its facilities, rather than their relocation, that is not the case here. *See, e.g.,* 2–5 NICHOLS ON EMINENT DOMAIN § 5.03 ("Where the change requires not merely the relocation of the facilities, but the complete removal of the facilities from the **right** of **way**, compensation must be made."); *City of Louisville v. Cumberland Tel. & Tel. Co.,* 224 U.S. 649, 659, 32 S.Ct. 572, 56 L.Ed. 934 (1912) ("It is claimed that in consequence of these laws the street rights granted the Ohio Valley Telephone Company have been withdrawn, or at least made subject to municipal revocation.").

III

SBC's Statutory Claim

[8] [9] Many of the same reasons apply to bar SBC's direct claim under the statute. SBC contends that section 251.102 waives Harris County's governmental immunity and requires reimbursement of relocation costs. But as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity "because this allows the Legislature to protect its policymaking function." *Tex. Natural Res. Conservation Comm'n v. IT–Davy,* 74 S.W.3d 849, 854 (Tex.2002) (citations omitted) (collecting cases). Any such waiver must be clear and unambiguous. TEX. GOV'T CODE § 311.034 ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *Tooke v. City of Mexia,* 197 S.W.3d 325, 328–29 (Tex.2006).

As outlined above, section 251.102 falls short of meeting these exacting demands. While we have on rare occasions found waiver of sovereign immunity absent "magic words," we have required clear indications of legislative intent to waive immunity under these circumstances:

First, a statute that waives the State's immunity must do so beyond doubt, even though we do not insist that the statute be a model of "perfect clarity." For example, we have found waiver when the provision in question would be meaningless unless immunity were waived.

> Second, when construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity.
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> ....
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> Finally, we are cognizant that, when waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources ***69** from the reach of judgment creditors. Therefore, when deciding whether the Legislature intended to waive sovereign immunity and permit monetary damages against the State, one factor to consider is whether the statute also provides an objective limitation on the State's potential liability.

Wichita Falls State Hospital v. Taylor, 106 S.W.3d 692, 697–98 (Tex.2003) (citations omitted).

We recently confronted a similar issue in *Texas Department of Transportation v. City of Sunset Valley,* 146 S.W.3d 637, 642 (Tex.2004). That case involved Transportation Code section 203.058(a), which provides:

> If the acquisition of real property, property rights, or material by the department [of transportation] from a state agency under this subchapter will deprive the agency of a thing of value to the agency in the exercise of its functions, *adequate compensation* for the real property, property rights, or material *shall be made.*

TEX. TRANSP. CODE § 203.058(a) (emphasis added). We determined that section 203.058 did not waive governmental immunity. *Sunset Valley,* 146 S.W.3d at 642–43. As we observed, the statute's language did not clearly indicate the Legislature's intent to waive immunity, but instead merely required the Department of Transportation to make "adequate compensation" **using** certain accounting procedures. *Id.* at 642. (citations omitted). And while "the statute imposes a financial obligation on the State," this "does not in itself mean that the Legislature intended to create a private right of action, as evidenced by the fact that the statute expressly vests the power to determine adequate compensation in the General Land Office." *Id.* at 642–43. Further, the statute was not meaningless without a waiver of immunity because it "provide[d] a mechanism by which state agencies may ensure budgetary protection when property is transferred between them." *Id.* at 643.

SBC has not argued that section 251.102 contains "magic words," but rather that it requires reimbursement of **utility** relocation costs and thus necessarily waives immunity. But as discussed above, section 251.102 does not clearly require that SBC be reimbursed, nor, as the court of appeals correctly observed, is the statute meaningless absent a waiver of immunity:

> The statute merely states that a county, at the time it acquires a **right-of-way** to accommodate county road construction, must include the cost of relocating eligible **utility** facilities as part of its expense in acquiring the **right-of-way**. That is, the county must budget not only for the cost of acquiring the **right-of-way**, but it must also earmark funds to be paid to eligible **utilities** should they relocate their facilities to accommodate road construction. Section 251.102's requirement that funds be earmarked is a less apparent expression of a private right of action than that found lacking by the Texas Supreme Court in *Sunset Valley. Compare* TEX. TRANSP.CODE ANN. § 203.058(a) ("[A]dequate compensation for the real property ... *shall be made.*") (emphasis added) *with id.* § 251.102 ("A county *shall include the cost* of relocating ... an eligible **utility** facility in the expense of **right-of-way** acquisition.") (emphasis

added).

263 S.W.3d at 63. The Legislature may require counties to earmark funds for a particular purpose without necessarily creating a private right of action, because, for example, it expects counties to comply, or because it considers the costs of litigation overly burdensome. *See, e.g., Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 375 (Tex.2006). And, as explained ***70** more fully above in our "takings" analysis, when we compare those statutes that explicitly provide for relocation reimbursements, the Legislature regularly attaches specific criteria that are absent here. *See Wichita Falls State Hosp.,* 106 S.W.3d at 697–98.

SBC nevertheless contends that our precedent supports a reimbursement action like this one. In *City of Austin,* 331 S.W.2d at 742, we considered whether a statute requiring reimbursement of certain **utility** relocation costs was an unconstitutional gift or donation. SBC contends that we would not have reached the merits in that case if the State had been immune from suit. *City of Austin,* however, did not address the state's immunity from suit, as it was a declaratory judgment action filed *by* the state. *Id.* at 740. Moreover, although the Fifth Circuit's recent decision in *CenterPoint,* 436 F.3d 541, discussed reimbursement of **utility** relocation costs pursuant to the same statute at issue here, that case did not discuss immunity, as Harris County waived immunity from suit under that court's "waiver-by-removal" rule. *See CenterPoint,* 436 F.3d at 543; *Meyers v. Tex.,* 410 F.3d 236, 256 (5th Cir.2005).

Because section 251.102 does not clearly waive governmental immunity, and because Harris County has not otherwise waived its immunity from suit, SBC's statutory reimbursement claim is barred.

IV

Conclusion

We affirm the court of appeals' judgment. TEX.R.APP. P. 60.2(a).

Parallel Citations

52 Tex. Sup. Ct. J. 579

Footnotes

1 The State of Texas and GTE Southwest Incorporated d/b/a Verizon Southwest submitted amicus curiae briefs.

2 As a rule, we decide constitutional questions only when we cannot resolve issues on nonconstitutional grounds. *In the Interest of B.L.D.,* 113 S.W.3d 340, 349 (Tex.2003). Because there is some overlap between SBC's takings claim and Harris County's alleged immunity, and because SBC's waiver-of-immunity claim fails for the reasons discussed below, we address the issues in reverse order.

3 *Damnum absque injuria,* or *damage sine injuria,* means a "[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." BLACK'S LAW DICTIONARY 420–21 (8th ed.2004).

4 The second is the court of appeals' decision in this case. 263 S.W.3d 48.

5 *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

6 Texas was one of sixteen states to pass such a statute in response to the Federal–Aid Highway Act of 1956. The Act had originally been intended to reimburse **utility** relocation costs only in those states in which, by statute or practice, the common law rule had been altered. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.,* 464 U.S. 30, 39, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) ("The question of **utility** reimbursement was, thus, left to the laws of the individual States, with no congressional displacement of those laws."). Instead, sixteen states responded to the Act by passing legislation authorizing reimbursement of **utility** relocation costs whenever a project was eligible for federal reimbursement. *Id.* at 40 n. 17, 104 S.Ct. 304. The Senate Public Works Committee expressed concern over this "drastic change in existing practices," noting that " 'the **use** of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.' " S. REP. NO. 1407, 85th Cong., 2d Sess., 28 (1958); *Norfolk Redevelopment,* 464 U.S. at 40, 104 S.Ct. 304.

7 In light of our conclusion on this issue, we do not reach Harris County's argument that section 251.102 is inapplicable because the county did not "acquire" any property in connection with this construction project.

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Hale County, Texas et al, Appellants v. HAROLD G. Davis, Appellee

No. 8914

Court of Civil Appeals of Texas, Seventh District, Amarillo

572 S.W.2d 63; 1978 Tex. App. LEXIS 3702

September 18, 1978

SUBSEQUENT HISTORY:
[1]**

Rehearing Denied October 16, 1978.

PRIOR HISTORY:
From the District Court of Hale County, 64th Judicial District

COUNSEL:
Sheehan & Dubuque, Inc., William H. Sheehan and Steven M. Smoot, Dumas, for Gene and J. H. Kurklin. Law Offices of Bob Gibbins; Bob Gibbins, Austin, for Hale County, Texas.

Day, Owen, Lyle & Voss, Gene V. Owen and Rudd F. Owen, Plainview, for appellee.

OPINIONBY:
REYNOLDS

OPINION:

[*64]

The primary issue in this appeal is the validity of a pipeline easement granted by a county in the subsurface of a county road owned by one individual for the private use of another. The trial court held the easement to be a nullity, ordered the pipeline removed, and permanently enjoined the nonowner use of the subsurface for private pipeline purposes. We affirm.

Harold G. Davis is the fee simple owner of the south one-half of Section Four, Block C-2, Hale County, Texas. Gene Kurklin and his father, J. H. Kurklin, own the northwest one-quarter of the same section. The west boundary line of Section Four is approximately in the middle of a county road which exists as a prescriptive easement along the entire length of the western side of the section.

The Kurklins have a **[**2]** pipeline easement extending across Davis' land outside the road area. A six-inch steel pipe in the easement transported irrigation water from wells on the Kurklins' land to J. H. Kurklin's land situated directly south of Davis' land. Due to the monthly expense of $ 1,000 to $ 1,200 associated with pumping the irrigation water across Davis' land, Gene Kurklin sought, and offered to pay to secure, the permission of Davis to lay a pipeline down the county road. Davis refused permission.

[*65] Gene Kurklin then sought an easement from Hale County. On 9 February 1976, the county commissioners court granted to Gene Kurklin an easement for an irrigation water pipeline along, upon or across either side of the county road, conditioned that the pipe is buried thirty-six inches underground. A similar easement was granted 10 May 1976 for a gas pipeline to be buried thirty inches underground.

When installation began on or about the first of June, Davis requested that the work cease, but the pipelines were installed at a depth of four feet some ten to twelve feet east of the center line of the county road. The installed water pipeline is a twelve-inch plastic pipe carrying the same **[**3]** amount of water that formerly was pumped across Davis' land through the six-inch line, which now is used only to transport excess tailwater and rainwater collected in a lake. The installed pipelines, costing in excess of $ 24,000, are for the exclusive use and benefit of the Kurklins, but they do not obstruct the use of the county road.

Davis brought this suit against Hale County and the Kurklins. He sought a judgment declaring that the February 1976 easement is a nullity and the pipelines a

purpresture, ordering the pipelines removed, and fixing his damages.

Hearing the cause without the intervention of a jury, the trial court declared the February 1976 easement a nullity and the pipelines a purpresture, ordered the pipelines removed, and permanently enjoined the Kurklins from using that portion of the county road within the boundary lines of Davis' land to install, construct and maintain the pipelines for private purposes. All other relief was denied. Findings of fact and conclusions of law consistent with the foregoing recitation were filed.

Appealing, both Hale County and the Kurklins first take issue with the court's declaration that the pipelines are a purpresture. The **[**4]** Kurklins, quoting the definition of a purpresture from *Hill Farm, Inc. v. Hill County, Texas, 425 S.W.2d 414, 417 (Tex.Civ.App. Waco 1963), Aff'd, 436 S.W.2d 320 (Tex. 1969),* and characterizing a purpresture as a private appropriation of or an encroachment upon rights belonging to the public, assert that only the proper public authority, and not Davis as a private person, can maintain an action on account of a purpresture. Hale County joins in the assertion and further advocates that because of Davis' failure to affirmatively show the easement did not serve a public purpose, there is no support for the judgment based on a purpresture. These theories are not sufficient to invalidate the judgment rendered on the facts of this cause.

Davis, as the record establishes, owns the fee title to the land in which the pipelines were installed, subject only to the prescriptive easement for the county road. The rural road is one over which the commissioners court has general control, Tex.Rev. Civ.Stat.Ann. art. 2351, § 6 (1971), and, by virtue thereof, may authorize the use of the subsurface for purposes E. g., for pipelines that serve the public interest; yet, the fee owner, and not a **[**5]** stranger, has the right to use the subsurface in a manner that does not affect or impair the enjoyment of the public easement. *Hill Farm, Inc. v. Hill County, Texas, 436 S.W.2d 320, 323 (Tex. 1969).* The logically unavoidable corollary is that the county possesses no authority in law to grant an easement in the road's subsurface owned by an individual for the exclusive private use of a nonowner.

The court specifically found that the pipelines are for the exclusive use and benefit of the Kurklins. There is no challenge to this finding, and it is conclusive on appeal. Thus, any use of the subsurface that is not within the scope of the public interest is an infringement on Davis' rights for which he may maintain an action to compel the removal of the unauthorized installation, *Miguez v. Blake, 37 S.W.2d 234, 235* (Tex.Civ.App. San Antonio 1931, writ dism'd), and an action to secure injunctive relief. *Clutter v. Davis, 25 Tex.Civ.App. 532, 62 S.W. 1107, 1108* (1901, writ ref'd); *China-Nome Gas Company, Inc. v. Riddle,* **[*66]** *541 S.W.2d 905, 908* (Tex.Civ.App. Waco 1976, writ ref'd n. r. e.).

Conceding that the irrigation line is used solely to provide water for the Kurklins' **[**6]** land, Hale County nevertheless complains because the court refused to find that the public derived benefits from the easement. The premise is that the public interest is served by the saving of $ 1,000 to $ 1,200 worth of gas per month, deriving more tax from land with good water, and the showing that it is good for the economy of the county to have water on the land. No authority cited validates the premise.

While the circumstances of each case determine whether a public interest exists, the particular facts of this cause warrant the trial court's refusal to find that the public benefited from the easement. In the main, this is a private dispute stemming from the county's grant of an easement on one's land for the exclusive use and benefit of another. The easement is used to transport the same amount of water that was carried via the prior easement, and there is an absence of evidence that either more taxes are produced as a result of, or that the county's economy benefited from, this easement; instead, the evidence is that the Kurklins individually save $ 1,000 to $ 1,200 monthly in operating costs. The effect is that the Kurklins' private advantage does not serve a public **[**7]** purpose so as to justify an infringement on Davis' rights.

The Kurklins also contend that the court erred in granting the mandatory injunction because Davis had an adequate remedy at law, he failed to show irreparable harm, and the balancing of the equities preponderates in their favor. None of these equitable principles vitiates the injunction.

The contention presupposes that the Kurklins have, absent Davis' negation of the equitable principles, a right to maintain the easement. To the contrary, Davis as the fee owner has, and the Kurklins as strangers do not have, the right to the undisturbed possession and use of the subsurface. The injunction protects Davis' rights and does not enjoin the Kurklins from doing anything they have a lawful right to do. Long established is that the right of one to be left in the undisturbed possession of his property may be protected by injunction. See, e. g., *Sumner v. Crawford, 91 Tex. 129, 41 S.W. 994, 995 (1897).* This right is enforced by Tex.Rev. Civ.Stat.Ann. art. 4642, § 1 (1952), which provides that an injunction may be granted where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint **[**8]** of some act prejudicial to him. Because the right to injunctive relief is authorized

by statute, the statute controls, *Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 253 S.W. 1101, 1108 (1923),* and the equitable principles raised by the Kurklins have no application here. *Biggs v. Red Bluff Water Power Control Dist., 131 S.W.2d 274, 276* (Tex.Civ.App. El Paso 1939, writ ref'd). Moreover, it is elementary that a court, once having decided the merits of a cause of action, may issue a writ of injunction necessary to make its judgment effective. *City of Dallas v. Wright, 120 Tex. 190, 36 S.W.2d 973, 975 (1931).*

None of the points of error presents reversible error in the judgment rendered. The points are overruled.

The judgment of the trial court is affirmed.

Vernon's Texas Statutes and Codes Annotated

Utilities Code (Refs & Annos)

Title 5. Provisions Affecting the Operation of Utility Facilities

Chapter 251. Underground Facility Damage Prevention and Safety

Subchapter D. Requirements Relating to Excavation

V.T.C.A., Utilities Code § 251.156

§ 251.156. Other Exceptions to Duty of Excavators

Currentness

(a) Section 251.151 does not apply to:

(1) interment operations of a cemetery;

(2) operations at a secured facility if:

(A) the excavator operates each underground facility at the secured facility, other than those within a third-party underground facility easement or right-of-way; and

(B) the excavation activity is not within a third-party underground facility or right-of-way;

(3) routine railroad maintenance within 15 feet of either side of the midline of the track if the maintenance will not disturb the ground at a depth of more than 18 inches;

(4) activities performed on private property in connection with agricultural operations;

(5) operations associated with the exploration or production of oil or gas if the operations are not conducted within an underground facility easement or right-of-way;

(6) excavations by or for a person that:

(A) owns, leases, or owns a mineral leasehold interest in the real property on which the excavation occurs; and

(B) operates all underground facilities located at the excavation site; or

(7) routine maintenance by a county employee on a county road right-of-way to a depth of not more than 24 inches.

(b) If a person excepted under Subsection (a)(4) elects to comply with this chapter and the operator fails to comply with this chapter, the person is not liable to the underground facility owner for damages to the underground facility.

(c) In this section:

(1) “Agricultural operations” means activities performed on land and described by Section 23.51(2), Tax Code.

(2) “Routine maintenance” means operations, not to exceed 24 inches in depth, within a road or drainage ditch involving grading and removal or replacement of pavement and structures.

Credits

Added by Acts 1999, 76th Leg., ch. 62, § 18.17(a), eff. Sept. 1, 1999.

Current through the end of the 2009 Regular and First Called Sessions of the 81st Legislature

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Vernon's Texas Statutes and Codes Annotated

Utilities Code (Refs & Annos)
Title 5. Provisions Affecting the Operation of Utility Facilities
Chapter 251. Underground Facility Damage Prevention and Safety
Subchapter D. Requirements Relating to Excavation

V.T.C.A., Utilities Code § 251.151

§ 251.151. Duty of an Excavator

Currentness

(a) Except as provided by Sections 251.155 and 251.156, a person who intends to excavate shall notify a notification center not earlier than the 14th day before the date the excavation is to begin or later than the 48th hour before the time the excavation is to begin, excluding Saturdays, Sundays, and legal holidays.

(b) Notwithstanding Subsection (a), if an excavator makes a Saturday notification, the excavator may begin the excavation the following Tuesday at 11:59 a.m. unless the intervening Monday is a holiday. If the intervening Monday is a holiday, the excavator may begin the excavation the following Wednesday at 11:59 a.m.

(c) To have a representative present during the excavation, the operator shall contact the excavator and advise the excavator of the operator's intent to be present during excavation and confirm the start time of the excavation. If the excavator wants to change the start time, the excavator shall notify the operator to set a mutually agreed-to time to begin the excavation.

Credits

Added by Acts 1999, 76th Leg., ch. 62, § 18.17(a), eff. Sept. 1, 1999.

Notes of Decisions (3)

Current through the end of the 2009 Regular and First Called Sessions of the 81st Legislature

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