



DEPARTMENT OF JUSTICE

GENERAL COUNSEL DIVISION  
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Salem, Oregon 97310  
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January 14, 1992

*Matt, copies to  
Region Utility Spec.  
Low*

J.X. Wilson  
Region 5 Engineer  
Highway Division  
3012 Island Avenue  
LaGrande, OR 97850

RIGHT OF WAY ADMINISTRATIVE  
**RECEIVED**

JAN 15 1992  
A ME MS PM MA  
R&U A/R ACCO PC CU F

Re: City Utilities on State Highways  
DOJ File No.734-650-0093

Dear Mr. Wilson:

You requested that I review a 1985 Memorandum from Jack L. Sollis, former Chief Counsel to the Highway Division, concerning a city waterline located on highway right of way. In that instance, the state had taken over a county road for a state highway. The waterline was located on the county road at the time of the transfer, but the exact legal status was unknown. Mr. Sollis found that since the waterline was obviously legally located on the county road, absent it being under state permit, expenses of relocation for state highway purposes were the responsibility of the state.

I was ready to send you a long letter explaining how the Oregon Supreme had come to the opposite conclusion and had found that public utilities were obligated to move at their own expense, when I discovered ORS 366.321. It appears that the legislature may have adopted this statute in response to State Highway Commission v. Clackamas Water District, 247 Or 216, 428 P.2d 395 (1967), and countermanded the impact of the court's decision.

I have enclosed a copy of ORS 366.321. That statute supports the conclusions of the 1985 memorandum. A public utility, not under permit, and allowed on or under city street or county road right of way prior to the right of way being taken over as a state highway, cannot be forced to be relocated without reimbursement of relocation expenses. The legislature has made this a state expense, and has relieved the municipalities and districts of this burden they had at common law.

J.X. Wilson  
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In conclusion, unless these utilities are placed under permit, the expense of relocation is the state's and must be taken into account when considering highway projects. Note that this statute applies to public utilities as identified in the statute, and not to private ones. Clackamas Water District should still control in those cases. See also Northwest Natural Gas Co. v. City of Portland, 300 Or 291, 711 P.2d 119 (1985).

Sincerely,

~~DALE K. HORMANN~~

Dale K. Hormann  
Assistant Attorney General  
Finance and Government Section

DKH:dkh/bjs/JGG01F21  
Enclosure

c: (w/encls.) Highway Division:  
William Anhorn, Deputy State Highway Engineer  
Rod Henry, Assistant R/W Manager ✓  
Matt Caswell, Utility Engineer, R/W Section



STATE OF OREGON

INTEROFFICE MEMO

**FILE COPY**

TO: File

DATE: January 16, 1985

FROM: Jack L. ~~Sollis~~  
Assistant Attorney General

SUBJECT: Northwest Hooker Avenue-NE Alameda Section  
Oakland Shady Highway, Oregon 99  
Proposed Highway Improvement Project F-55(9)  
Status of 20-Inch City of Rosebury Waterline  
Located on Highway Right-of-Way

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In reviewing the history of the location of this waterline on the State highway, it is clear that the waterline was located on the County road right-of-way before the County road became a State highway. The waterline was first located on County road right-of-way in the early 1900's. The first line was a 16-inch wooden line and was replaced in 1936 by a 20-inch steel line. The County road was taken over as a State highway about 1919. When the waterline was changed from a wooden to a steel line in 1936, no action was taken by the Highway Division in requiring a permit or any other conditions relating to the location of the waterline on State highway right-of-way.

It is clear that the waterline was legally located on the County road before it was taken over as a State highway, and the exact legal status of the right of the waterline to be on the County road right-of-way has been lost in antiquity.

In view of the facts that I have been able to determine, it appears the waterline was legally located on County road right-of-way when the County road was taken over as a State highway, it has never been placed under a permit by the Highway Division requiring the City to pay for the relocation of the waterline and, therefore, it is my opinion that absent the waterline being there illegally and absent a permit by the Highway Division to require them to relocate at their expense, the relocation of the waterline will have to be at the expense of the Highway Division.

NOTE

I should bring to the attention of anyone reading this memo that there are many other facilities that were legally on County road right-of-way when they were taken over by State highways which have not been placed under a permit, and because they were there legally and have not been placed under a permit, the Highway Division will be required to pay if they have to be relocated. It would seem to me to be worthwhile to spend some time searching out these facilities and placing them under a permit.

NOTE

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**ORS 366.321 Expense of relocating municipal facilities payable by department; exceptions.**

(1) When location, construction, relocation, reconstruction, maintenance or repair of a state highway requires relocation of any facilities placed or maintained in or on a public right of way by any municipal corporation, or a district or authority established under ORS chapter 264, 450, 451, 523 or 545, the Department of Transportation shall pay the municipal corporation, district or authority whose facilities are so required to be relocated the reasonable expenses of relocation, less any benefits and salvage of the relocation.

(2) Subsection (1) of this section shall not apply to:

(a) Facilities located in or on the right of way of a state highway under permits issued by the department upon the condition that the permittee would bear the cost of any relocation; or

(b) Facilities located in or on the right of way of a state highway where the municipal corporation, district or authority established under ORS chapter 264, 450, 451 or 545, has placed such facilities in or on the right of way of the state highway without a permit from the Oregon Transportation Commission or has refused to execute a permit as required by law or commission regulations. However, this paragraph shall not apply where such municipal corporation, district or authority has located facilities in or on the right of way of a city street or county road with the permission of the governing body of such city or county before such city street or county road was selected and designated a state highway by the Department of Transportation pursuant to ORS 366.290 or 373.010. [1967 c.272 s.1; 1975 c.587 s.1; 1975 c.782 s.51a]