



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA **FILED**
SUPREME COURT
STATE OF OKLAHOMA

JUL 12 2023

JOHN D. HADDEN
CLERK

IN THE MATTER OF THE APPLICATION)
OF THE OKLAHOMA TURNPIKE)
AUTHORITY FOR APPROVAL OF NOT)
TO EXCEED \$500,000,000 OKLAHOMA)
TURNPIKE SYSTEM SECOND SENIOR)
LIEN REVENUE BONDS, SERIES 2022)

No. 120619

Received:	7-12-23
Docketed:	[Signature]
Marshal:	
COA/OKC:	
COA/TUL:	

REPLY TO OTA'S RESPONSE
TO THIS COURT'S MAY 30, 2023 ORDER

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TABLE OF CONTENTS

Procedural and Factual Background 1

Arguments and Authorities 2

 CAN THESE ROADS BE BUILT WITHOUT BUREAU
 PERMISSION AND COMPLY WITH STATUTORY REQUIREMENTS 2

 THE NOTICE GIVEN FOR THIS PROCEEDING
 WAS INSUFFICIENT TO COMPLY WITH 69 O.S. §1718 5

 EXPIRATION OF THE BOND COUNCIL'S PROVISIONAL
 APPROVAL DID NOT MOOT THE ISSUES IN THIS CASE 6

Conclusion 8

Certificate of Mailing 9

INDEX OF AUTHORITIES

Statutes and Case Law

69 O.S. §1705(e)(20)	3, 4
69 O.S. § 1718	5, 6
69 O.S. § 1732	4
<i>State of Oklahoma ex rel., Oklahoma Firefighters Pension and Retirement System v. City of Spencer, Oklahoma, et al.</i> , 2009 OK 73 at ¶ 4	6, 7

Supplemental Materials

Bureau of Reclamation Use Authorization Compatibility Evaluation	2
Declaration of Amy Cerato, Ph.D., P.E.	3, 4
Letter from the Bureau of Reclamation to OTA dated February 28, 2023	2, 3
Letter from the Council of Bond Oversight dated February 8, 2023	2, 7

Procedural and Factual Background

This Court's original jurisdiction was invoked by the Oklahoma Turnpike Authority ("OTA") on August 10, 2022 by filing its *Application for the Assumption of Original Jurisdiction and Petition for Validation of Not to Exceed \$500,000,000 Oklahoma Turnpike System Second Senior Lien Revenue Bonds, Series 2022 Proposed to Be Issued by the Oklahoma Turnpike Authority*. This filing was preceded by months of objections at the Council of Bond Oversight to the incurring of debt by OTA secured by, among other things, the proposed Access Oklahoma Turnpikes; and the filing of two lawsuits in Cleveland County District Court: *Pike Off OTA, Inc., et al. v. Oklahoma Turnpike Authority, Case No. CV-2022-1692*, and *Kirschfield, et al. v. Oklahoma Turnpike Authority, et al., Case No. CV-2022-1905*. With the exception of *Kirschfield v. OTA* which focuses on alleged Open Meeting Act Violations, the other objections have focused primarily on the objections raised by the Protestants in this case.

The Protestants' objections were briefed and presented at a hearing before this Court's Referee on September 13, 2022. Following that hearing this Court accepted original jurisdiction on October 10, 2022, and this Court requested supplemental briefs and set this matter for oral argument before the Court *en banc* on November 28, 2022.

On January 17, 2023 the Federal Bureau of Reclamation denied permission for OTA to build the South Extension across land owned by the Bureau. The Bureau held out the possibility that OTA might get permission to cross easements controlled

by the Bureau, but cautioned that such permission “. . . would require close coordination with Reclamation throughout the planning, design and construction process.” See, letter from the United States Department of the Interior, Bureau of Reclamation attached to OTA’s Response Brief as Ex. G. ¹

On February 8, 2023 the Council of Bond Oversight notified OTA by letter that the conditional approval of the bond offering before this Court was scheduled to expire on February 5, 2023, and that OTA had not sought the available 180 day extension of that approval; and therefore, the approval had expired.²

On May 30, 2023 this Court ordered OTA to respond to the Bureau’s refusal of permission to cross its lands and the expiration of the Bond Council’s conditional approval. On June 26, 2023 this Court granted leave to the Protestants to file Replies to OTA’s Response to the May 30, 2023 Order.

Arguments and Authorities

CAN THESE ROADS BE BUILT WITHOUT BUREAU PERMISSION AND COMPLY WITH STATUTORY REQUIREMENTS

OTA’s Reply brief reverts to its traditional argument that route design is its job – in its sole discretion. However, statutory construction and authorizing bond

¹ This letter was originally accompanied by the full Bureau of Reclamation Use Authorization Compatibility Evaluation – Oklahoma Turnpike Authority, East-West Connector and South Extension. This is a 46 page statement of the Bureau’s conclusions and the process for arriving at these conclusion. It is not included with this Brief in an attempt to keep this briefing as streamlined as this Court appears to want. However, it is available online at file:///C:/User/LAW/Turnpike%20Defense/Bureau%20of%20Reclamation%20Evaluation.pdf.

² See, February 8, 2023 letter attached to OTA’s Response Brief as Exhibit C.

offerings is this Court's job. OTA's Response pays very little attention to the changes to the route that the denial of Bureau permission to cross its fee title land will require, and it simply assumes that it will receive permission to cross any and all Bureau easements. Consequently, it makes no mention of the changes that will be required if permission to cross easements is not forthcoming.

Attached to this Reply as Exhibit A is a sworn Declaration from a Professor of Civil Engineering and a licensed Engineer, Prof. Amy Cerato. According to her calculations if the Bureau denies permission to cross its easements, both the South Extension and the East-West Connector will have to be significantly changed – and changed in ways that bring it into conflict with the authorizing statute 69 O.S. §1705(e)(20) and (28).

It is easy to see how refusal to cross lands around Lake Thunderbird would effect the South Extension, and according to Prof. Cerato the denial of permission to cross fee title lands forces the South Extension to the West a mile, and denial of permission to cross easements would force it West 2.5 miles. *See*, Declaration of Amy Cerato at ¶3, attached as Ex. A.

Moving a highway 2.5 miles closer to the more densely populated City areas is not insignificant, and since the Bureau specified in its January 17, 2023 letter (attached as Ex. G to OTA's Response) that "Such easement crossings would require close coordination with Reclamation throughout the planning, design, and construction process." it hardly seems a given that such permission can be counted on. This is particularly true, since there is no indication that OTA has begun "close

coordination with Reclamation” despite being far enough along in the planning process to be asking this Court to approve bonds to be secured by this new alignment.

It is important to remember the effect of 69 O.S. §1732 which limits even the Legislature’s ability to stop the construction of a turnpike once bonds secured by it have been sold. So, once this Court authorizes these bonds (and they are re-authorized by the Bond Council) and those bonds are issued and sold – this route *must* be built – no matter what permission is or is not forthcoming from the Bureau of Reclamation.

The effect of denial of authorization to cross Bureau fee title lands and easements is less obvious on the East-West Connector. As originally planned the East-West Connector begins in the West at I-44 and runs eastward, roughly parallel with Indian Hills Road (the de facto border between Norman and Moore), until it meets the South Extension. At that point the East-West Connector, turns North and East and connects the South Extension with the Kickapoo Turnpike at I-40.

According to Prof. Cerato’s conclusions, the East-West Connector could be forced North as far as SE 89th Street in Oklahoma City. See, Declaration of Amy Cerato at ¶ 4 attached hereto as Ex. A. That would make it difficult to cross I-35 “in the vicinity of Moore and Norman” as required by 69 O.S. §1705(e)(20).

In its Response OTA assumed permission to cross easements, although there is no sign that they are collaborating closely enough with the Bureau to make that happen. It also failed to address the very real shifts caused by just the denial of the

right to cross the Bureau's title lands.

Yet, it is clear from the map and the discussion in Prof. Cerato's Declaration that these are issues this Court must be comfortable with in order to do its job of statutory interpretation and authorizing of turnpike bonds. Since OTA has failed to address these issues in its Reply, it seems clear that this Court should set this matter for a second evidentiary hearing to determine the actual course of the relevant turnpike routes both in light of the denial of permission to cross title lands and in the event permission is denied to cross Bureau easements as well.

**THE NOTICE GIVEN FOR THIS PROCEEDING
WAS INSUFFICIENT TO COMPLY WITH 69 O.S. §1718**

OTA was required by statute to provide notice of this proceeding to "inform all persons interested that they may file protests against the issuance of the bonds". 69 O.S. §1718. It is not disputed that OTA published a notice in a qualifying newspaper. The question is, how much can the routes change after that notice was published and still give notice to all interested persons?

At the time that the notice of this proceeding was published, the South Extension was expected to run down through Norman East of E. 72nd Street, and the East-West Connector was to run roughly along Indian Hills Road. In light of the Bureau of Reclamation's refusal to allow crossing of title lands, and the possibility that the Bureau may decline to allow crossing of its easements; the question becomes was someone who lives a mile or two from the expected route for the South

Extension on notice that they and their home could be impacted – and even taken – by these Turnpikes?

A more interesting question is whether someone who lives along S.E. 89th Street in Oklahoma City was on notice that the Indian Hills alignment could wind up taking their home or business. OTA's Response refers to shifts of a couple hundred yards – not a couple of *miles*. There is essentially no authority on how "all persons interested" is to be defined or ascertained. However, that notice is illusory if it only provides notice to people whose homes will be perfectly safe once the route shifts and fails to give notice to people whose homes will ultimately be directly in the path of these turnpikes but who appeared safe at the time notice was published,

This case presents a rare opportunity for this Court to explain what exactly is required to give the notice required by §1718 and, as a consequence, how far along in the planning process OTA needs to be before it brings bond issues to fund new roadways before this Court.

EXPIRATION OF THE BOND COUNCIL'S PROVISIONAL APPROVAL DID NOT MOOT THE ISSUES IN THIS CASE

On February 5 when the Bond Council's provisional approval of the bonds at issue expired, this case remained viable. First of all, mootness requires that the Court be unable to provide any effective relief. *State of Oklahoma ex rel., Oklahoma Firefighters Pension and Retirement System v. City of Spencer, Oklahoma, et al.*, 2009 OK 73 at ¶ 4. The case at bar is to validate a bond offering – except there is no

bond offering. What is actually before this Court is a set of terms for a bond offering. The bonds won't exist until some time after they are validated. This Court can still validate those terms – or, it can refuse to do so on the basis that the South Extension is not authorized by statute or the Outer Loop segments can no longer be bonded, or even, because it is not certain that the East-West Connector will conform to its statutory description if permission to cross easements is denied by the Bureau of Reclamation. All of those options constitute effective relief.

Even if this Court did not believe it could provide effective relief, Oklahoma recognizes two exceptions to the mootness doctrine. The first is when the appeal presents a question of broad public interest. Given the attendance at court hearings, the live streaming of hearings and the quantity of news coverage this case would certainly seem to qualify.

The second exception is when the challenged event is “capable of repetition, yet evading review”. *Oklahoma Firefighters*, 2009 OK 73 at ¶4. If expiration of bond council conditional approval were sufficient to moot this case, then any bond approval case that takes more than a year to decide would become moot. Granted, this is the first Turnpike bond case that has taken close to a year to decide, but that does not mean it will be the last. Pike-Off has been transparent enough with its organization, fund raising, allocation of tasks and overall coordination that this case is unlikely to be the last well defended turnpike bond case.

The case at bar received provisional approval from the bond council on August 9, 2022. According to the letter attached to OTA's Reply as Ex. C, the 180

day approval period that began running on August 9, 2022 could have been extended once for an additional 180 days. If that had been done, the approval would still have expired on August 5, 2023 – less than a month from now. Even if this court decides this case today, a timely Motion for Rehearing would easily take this case beyond August 5, 2023.

If this court were to find that expiration of bond council approval mooted a bond validation proceeding, then any time a party made inconsistent arguments or was unprepared to defend its position, it could avoid the possibility of any adverse findings by simply keeping the case alive for 360 days.

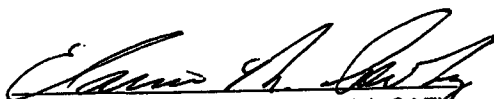
For these reasons the Petitioners do not believe that the expiration of Bond Council approval has mooted any of the issues before this Court.

Conclusion

OTA's refusal to deal with the Bureau of Reclamation in a timely and responsible manner is putting this State on a \$5 Billion road to who knows where. This action was brought before necessary permissions were attained and before the routes were sufficiently drawn to insure that the pool of people who got notice of this proceeding might actually resemble the pool of people who would need notice by the time the routes are ready for construction.

Prior to the discovery that the routes as proposed might not actually be the routes that would be built, there was no dispute over the validity of the route for the East-West Connector. That is no longer true. Before this Court can decide the validity of the bonds, it must first figure out where these routes will actually be built,

and that is going to require a second evidentiary hearing.



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Certificate of Mailing

I hereby certify that on this 12th day of July, 2023 a true and correct copy of the foregoing document was sent by U.S. Mail, postage prepaid to the following persons:

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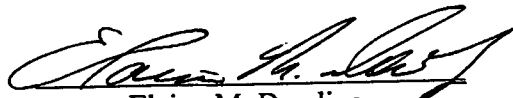
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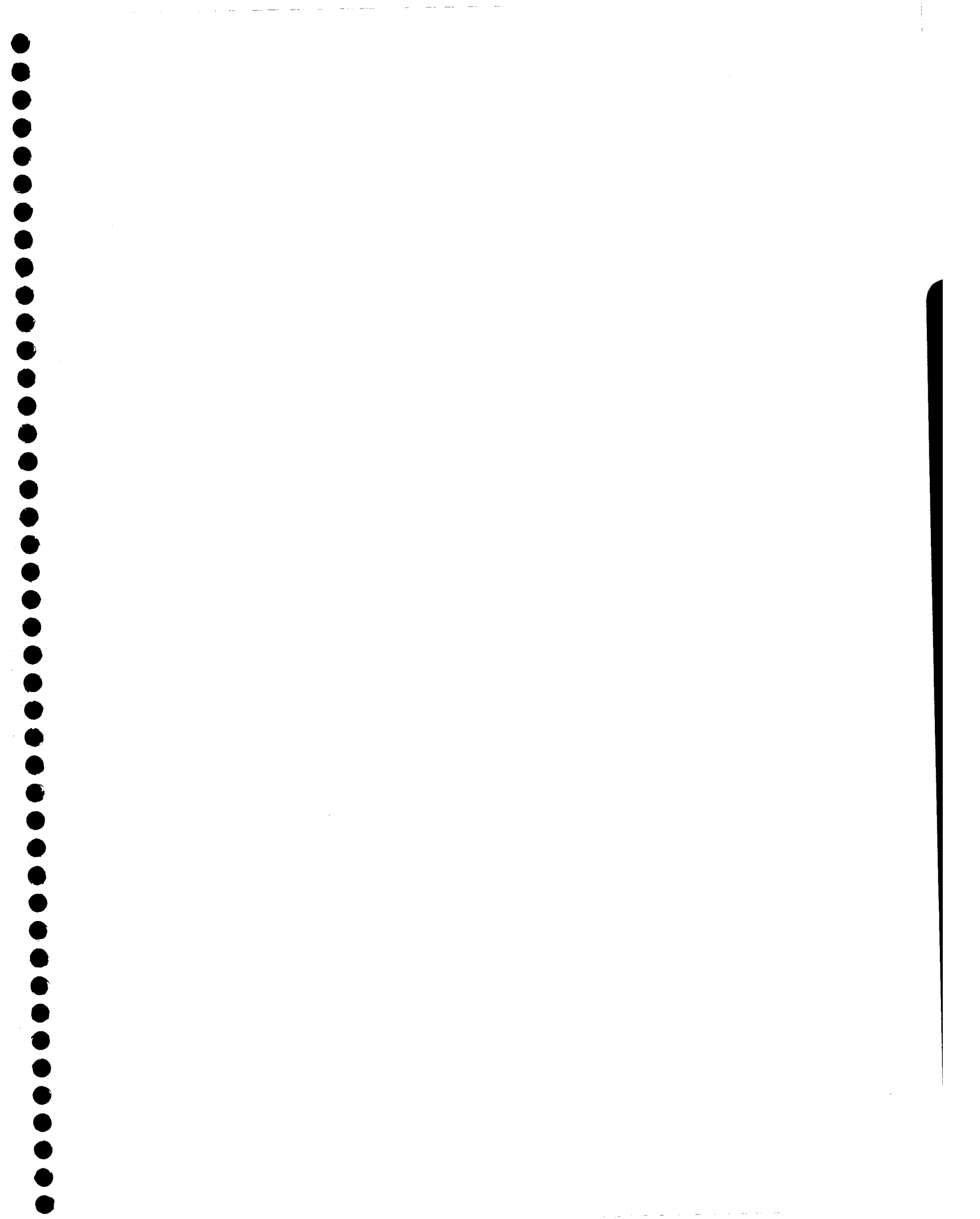
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Elaine M. Dowling



DECLARATION OF AMY CERATO, PH.D, P.E.

STATE OF OKLAHOMA)
) SS.
COUNTY OF CLEVELAND)

The undersigned, pursuant to 12 O.S. Sec. 426, states as follows.

1. My name is Amy Cerato and I have been a licensed professional engineer in the state of Oklahoma (PE #23099) since 2007 specializing in the practice of Geotechnical Engineering and have my own consulting firm Cerato Geotechnical Engineering, PLLC. I have worked on roadway subgrade design and within the transportation engineering industry for nearly two decades. I earned a PhD in Civil Engineering, a Master’s in Geology and have been working as professor in the School of Civil Engineering and Environmental Science at the University of Oklahoma since 2005. My home at 906 80th Ave SE, Norman, OK was directly in the path of the Oklahoma Turnpike Authority’s (OTA) initially proposed southern extension route until the Bureau of Reclamation (BoR) denied the OTA passage over their fee title lands at the Norman Project (Lake Thunderbird) in December 2022. I am the current President of the non-Profit group Pike Off OTA, Inc. My professional civil engineering judgment presented herein is objective.

2. The Norman Project was authorized in 1960 “for the principal purposes of storing, regulating, and furnishing water for municipal, domestic and industrial use and for controlling floods, and.... for the additional purposes of regulating the flow of the Little River, providing for the conservation and development of fish and wildlife, and of enhancing recreational opportunities.” (Public Law 86-529, 74 Stat. 255). The Norman Project was completed in 1965 and is owned by the United States (U.S.) and administered by the BoR. At the Norman Project, BoR holds fee title to lands necessary for permanent structures; lands which would become inundated when Lake Thunderbird is in the flood control pool; lands needed for public access or for operation and maintenance of the Norman Project; and additional lands for present and future public requirements for outdoor recreation and fish and wildlife benefits.

In addition to fee title lands, BoR also acquired two types of easements for the Norman Project; flowage easements and pipeline easements. The flowage easements allow private landowners to continue to use their property for purposes that would not interfere with BoR easement rights but generally restrict landowners from changing the topography of the land encumbered by the easement or constructing buildings and other features within the easements. BoR also acquired easements for the pipelines that bring water to the cities of Midwest City, Del

City and Norman. The fee title boundaries, flowage and pipeline easements are shown with the initially proposed OTA Southern Extension superimposed in Figure 1.

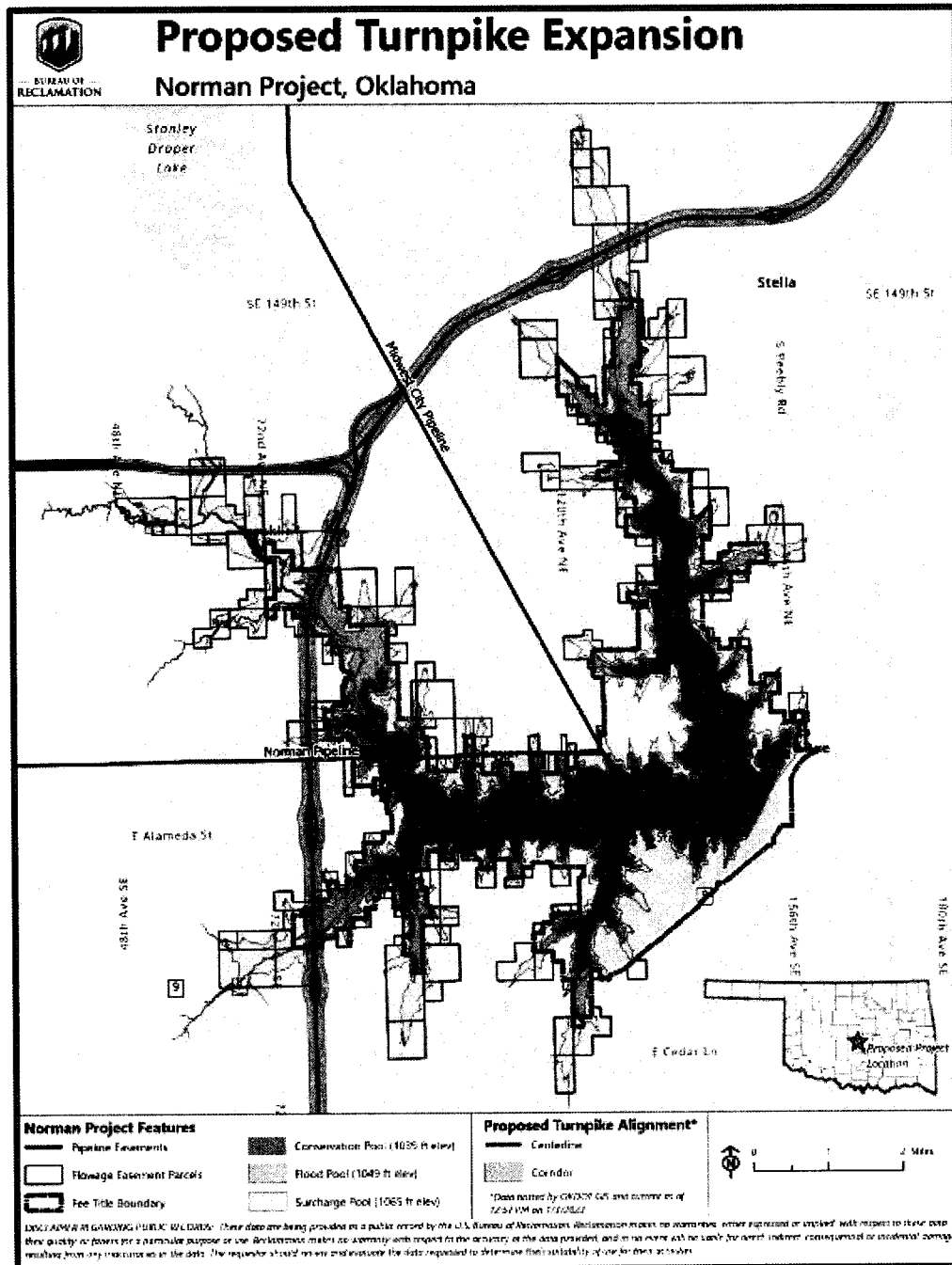


Figure 1. Proposed OTA Turnpike Alignment Across Reclamation's Norman Project, Oklahoma.

3. I performed an alternative route analysis to determine the impact on the location of the Southern Extension of the fee title lands denial and the impact if permission is not obtained to cross flowage easements. The route would have to be moved one mile west of its current location

to avoid all fee title lands, which would be at the ½ section line between 60th and 72nd Streets in East Norman. In order to avoid all flowage easements, the route would have to be moved at least 2.5 miles west to 48th Street in East Norman and as the route progressed south, could settle near the ½ section line between 48th and 60th Streets. The OTA historically prefers to create new alignments along ½ section lines. This route would obviously be significantly different than the one originally proposed, along with new sets of engineering and environmental challenges and impacted citizenry.

4. Not only is the Southern Extension affected by the BoR fee title land and/or flowage easement denial, but the currently designated east-west connector will have to shift north by at least 1.5 miles to avoid all federal interests and detrimental impacts to Lake Thunderbird (Figure 1). That pushes the East-West Connector north to near SE 89th street within Oklahoma City, which is a mere 0.5 mile south of I40, which drops south once it clears the Oklahoma City Metro on the East side. This would be an unnecessarily destructive and duplicative engineering design within sight-distance of a high-capacity parallel-running interstate. In addition, the route must turn south almost immediately to avoid Lake Stanley Draper. Current highway horizontal curve design taking into consideration the high-speed toll road requirements, would push the route within a 0.5 mile (or closer) of Lake Stanley Draper on the southwest side (still in OKC proper). After the route cleared Lake Stanley Draper, it would immediately be forced into a reverse S-turn around the SW and S side of Lake Stanley Draper near SE 149th Street to avoid more flowage easement and title lands of Lake Thunderbird. This could locate even more of the route through the City of Oklahoma City and continue through the heart of Moore between SE 149th (labeled SE 19th Street in Moore) and SE 164th (labeled SE 34th in Moore). Even if the route drops south of SE 34th it could require removal of several OKC and Moore public schools, OKC and Moore Fire Stations, Belmar Golf Course, Moore-Norman Technology Campus, several cemeteries, historical and archeological sites and churches, for example. It would also displace multiple high-density housing subdivisions. In the mid-90s, OTA, ODOT and ACOG produced a Preliminary Evaluation Report that agreed that a route that close to Lake Stanley Draper and through Moore was undesirable due to significant social/economic factors, the “proximity to the Stanley Draper reservoir,” and “13 historical and archeological sites.” Thirty years later, the social and economic factors would be even greater. The new route location through OKC and Moore might not even be legal in statute.

5. My conclusions for the impact on the east-west corridor if the BoR were to fully deny the OTA passage over the flowage easements are that, 1) the OTA's east-west connector would be pushed north to within 0.5 mile of I40 for several miles and 2.) the route would have to sharply curve south to narrowly avoid Lake Stanley Draper, and 3.) the route would bisect lands in OKC and Moore and/or move diagonally southwest toward I35, and 4.) the resulting proposed connection to I-35 may be in a new location and 5.) the crossing (or not crossing) of the South Canadian River detail (including costly bridges and flood control) may change. From an engineering standpoint, the route becomes increasingly redundant, potentially unfeasible for the OTA to build, and remains excessively destructive without sufficient justification for its necessity.

I, Amy Cerato, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct. (Executed without notary pursuant to 12 O.S. § 426.)

Dated: 7/11/2023 at Norman, Oklahoma.

___/s/ Amy Cerato _____

Amy B. Cerato, Ph.D., P.E. (PE #23099)