

Tulsa Law Review

Volume 19 | Number 2

Winter 1983

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Tom Arnold

University of Tulsa, College of Law, mark-arnold@utulsa.edu

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Recommended Citation

Tom Arnold, *Public Trusts in Oklahoma*, 19 *Tulsa L. J.* 192 (1983).

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PUBLIC TRUSTS IN OKLAHOMA

M. Thomas Arnold*

Professor Arnold discusses the creation, amendment, operation, funding and possible uses of public trusts in Oklahoma. He first discusses formation and amendment of a public trust and then analyzes the operation of public trusts in Oklahoma and the various methods which may be employed to fund them. Next, he focuses on how a public trust may own and operate a public utility and the ability of the public trust to engage in business for a public purpose. Finally, he examines the Interlocal Cooperation Act in relation to public trusts. Professor Arnold concludes that the public trust can be a useful tool for rendering services to the public or for developing industry.

I. INTRODUCTION

The Oklahoma Public Trust Act provides for the creation of trusts with the state, any county, or any municipality as beneficiary and authorizes these public trusts to issue obligations and provide funds for the furtherance of any approved purpose of their beneficiaries.¹ The trustee of a public trust is "an agency of the state and the regularly constituted authority of the beneficiary for the performance of the functions for which the trust [is] created."² The Local Industrial Development Act allows "any municipality and any county to use a trust created under [the] Public Trust Act for the purposes of securing or

* Associate Professor of Law, University of Tulsa College of Law; A.B., M.A., Ohio University; J.D., The University of Michigan Law School.

1. OKLA. STAT. tit. 60, § 176(a) (1981). Prior to 1976, the statute permitted the formation of a public trust with "the state, or any county, municipality, political or governmental subdivision, or governmental agency of the state as the beneficiary." See 1970 Okla. Sess. Laws ch. 319, § 1, pp. 588-89.

The Oklahoma Supreme Court has indicated that a public trust formed pursuant to the Public Trust Act may have multiple or successive beneficiaries. *Board of County Comm'rs v. Warram*, 285 P.2d 1034, 1040-41 (Okla. 1955).

2. OKLA. STAT. tit. 60, § 179 (1981).

developing industry.”³ The public trust is a legal entity separate from its beneficiary and, thus, debts of the public trust are not obligations of the beneficiary.⁴ This article will discuss a number of topics relating to the formation, amendment, operation, funding and possible uses of public trusts in Oklahoma.⁵

II. FORMATION AND AMENDMENT OF PUBLIC TRUSTS

A. Formation

A public trust may be created by written instrument or by will,⁶ and may be created by a private individual. The creation of a public trust requires the express approval of the Oklahoma legislature and the governor if the state of Oklahoma is the beneficiary.⁷ If the beneficiary of the trust is a county or municipality, the express approval of two-thirds of the membership of the governing body of the beneficiary county or municipality is required.⁸ A public trust becomes effective upon acceptance of the beneficial interest therein by the governor of Oklahoma, if the state is the beneficiary, or by the governing body of the county or municipality which is the beneficiary.⁹

If the state of Oklahoma is the beneficiary, there are two additional requirements for the formation of a public trust. First, the Oklahoma attorney general must determine that the trust is in proper form and compatible with Oklahoma law.¹⁰ In addition, the trustees must adopt bylaws for the administration of the trust and submit them in writing to the governor. The bylaws become effective only upon ap-

3. *Fort v. Oklahoma Indus., Inc.*, 385 P.2d 470, 475 (Okla. 1963).

4. *See Morris v. Oklahoma City*, 299 P.2d 131, 136-37 (Okla. 1956); *Board of County Comm'rs v. Warram*, 285 P.2d 1034, 1040-41 (Okla. 1955).

5. In writing this article, the author has relied on the Oklahoma statutes, the available case law, and a number of opinions of the Oklahoma attorney general. The author recognizes that opinions of the attorney general are not binding authority. They do, however, serve as persuasive authority on a number of questions not dealt with by the case law. *Cf. Democratic Party of Okla. v. Estep*, 652 P.2d 271, 274-75 (Okla. 1982) (“Public officials act at their peril when their action is in contravention of an opinion by the attorney general.”); *National Cowboy Hall of Fame and Western Heritage Center v. State ex rel. Okla. Human Rights Comm'n*, 579 P.2d 1276, 1279 (Okla. 1978) (“In analyzing the weight to be given to an Attorney General’s opinion, it is to be noted such opinions are persuasive authority.”).

6. OKLA. STAT. tit. 60, § 177 (1981).

7. *Id.* § 176(a).

8. *Id.*

9. *Id.* § 177; *cf. In re Fort Cobb, Okla., Irrigation Fuel Auth.*, 468 F. Supp. 338 (W.D. Okla. 1979) (failure of governing body of municipality to accept beneficial interest in public trust was fatal defect preventing creation of valid trust).

10. OKLA. STAT. tit. 60, § 177 (1981).

proval by the governor.¹¹

After the trust interest has been accepted, and if the state is the beneficiary, the trust is approved by the attorney general, the Public Trust Act requires that "the [trust] instrument or will, together with the written acceptance of the beneficial interest and approval of the Attorney General endorsed thereon, shall be recorded. . . ."¹²

B. *Amendment*

The amendability of a public trust depends upon the terms of the instrument creating the trust and general principles of trust law. As to the terms of the trust agreement, the Oklahoma attorney general has rendered an opinion that "[n]o statute gives the board of trustees of a public trust the authority to amend the instrument by which the trust was created."¹³ The opinion concluded that "whether such a power resides in the trustees is in the first instance a question of fact dependent upon the precise terms of the instrument of creation."¹⁴

As to general principles of trust law, in 1968 the Oklahoma Supreme Court decided a case dealing with the amendment of a public trust.¹⁵ The court referred to the provision in the Oklahoma Trust Act providing that "any trust may be revoked by the trustor upon the written consent of all living persons having vested or contingent interest therein."¹⁶ The court stated:

Since an alteration, amendment, revision, or modification of a provision of an instrument creating a trust, in effect, revokes a portion of the trust, we hold that any trust which may be revoked entirely in the manner provided [by the above quoted

11. *Id.* § 176(b).

12. *Id.* § 177. The recording is "in the office of the county clerk of each county wherein is situated any real estate, or any interest therein, belonging to [the] trust, as well as in the county wherein is located the trust property or wherein are conducted its principal operations." *Id.* If the state of Oklahoma is the beneficiary, then a certified copy of the instrument or will creating the trust and the instrument of acceptance must be filed with the Oklahoma Secretary of State. *Id.*

13. Op. Att'y Gen. No. 82-34, at 9 (Okla. 1982) (to be published at 14 Op. Att'y Gen. — (Okla. 1982)).

14. *Id.*

15. *Morrison v. Ardmore Indus. Dev. Corp.*, 444 P.2d 816 (Okla. 1968).

16. OKLA. STAT. tit. 60, § 175.41 (1981).

For purposes of this article it is necessary to differentiate court decisions relying on the Oklahoma Trust Act, OKLA. STAT. tit. 60 §§ 175.1-.54 (1981) in situations where the Public Trust Act does not have an applicable provision on which the court may base its opinion as opposed to decisions strictly relying on the provisions of the Public Trust Act, OKLA. STAT. tit. 60 §§ 176-180.4 (1981).

See infra notes 84-85 and accompanying text and notes 127-130 and accompanying text for examples of cases relying on the Oklahoma Trust Act.

provision] may be altered, amended, revised, modified, revoked, or terminated, in part, in the same manner.¹⁷

Thus, a public trust could be amended by the trustor with the consent of all the beneficiaries.

The amendment of a public trust with the state of Oklahoma as a beneficiary involves an additional consideration. The Public Trust Act provides: "No public trust in which the State of Oklahoma is the beneficiary may be amended without a two-thirds ($\frac{2}{3}$) vote of approval of the trustees of such trust. Provided, that any such amendment is subject to the approval of the Governor of the State of Oklahoma."¹⁸ Apparently this provision does not authorize the amendment of public trusts with the state as beneficiary. Instead, it merely states that if such a public trust can be amended, then a two-thirds vote of approval of the trustees and the approval of the governor are required. The amendability of the trust would still depend upon the terms of the instrument creating the trust and general principles of trust law.

There is a likely exception to the statutory requirement of approval by two-thirds of the trustees and the governor for amendment of a public trust whose beneficiary is the state of Oklahoma. This requirement was added to the Public Trust Act by an amendment in 1976.¹⁹ Prior to 1976, no special conditions were imposed upon amendment of public trusts in which the state of Oklahoma was a beneficiary.²⁰ The Oklahoma Supreme Court has held that a statute should be given prospective application only unless a contrary legislative intent is expressed clearly in or necessarily implied from the language.²¹ It is likely, therefore, that trusts created prior to the amendment of the Act are not subject to the new conditions imposed by the 1976 amendment.

17. 444 P.2d at 820. Interestingly, the court did not refer to or rely on language in the Public Trust Act which, at the time in question, provided: "Any [public] trust may be terminated by agreement of the trustee, or if there be more than one, then all of the trustees, and the governing body of the beneficiary, with the approval of the Governor of the State of Oklahoma . . ." 1951 Okla. Sess. Laws ch. 4, § 5, p. 167. This provision was continued when the Act was amended in 1970. *See* OKLA. STAT. tit. 60, § 180 (1981). One may question whether this provision also gives the named parties the power to amend the trust on the theory that an amendment, in effect, terminates a portion of the trust.

18. OKLA. STAT. tit. 60, § 176(c) (1981).

19. 1976 Okla. Sess. Laws ch. 222, § 1, p. 356.

20. *See* 1970 Okla. Sess. Laws ch. 319, § 1, pp. 588-90, containing no language pertaining to amendment of a public trust.

21. *Benson v. Blair*, 515 P.2d 1363, 1365 (Okla. 1973). *See generally* 13 OKLA. DIGEST *Statutes* §§ 261-278 (West 1968 & Supp. 1983).

III. OPERATION OF PUBLIC TRUSTS

A. *Selection of Trustees*

The method of selection of the trustees of a public trust depends upon the identity of the beneficiary. If the beneficiary is the state of Oklahoma, then the trust must have five trustees appointed by the governor of the state of Oklahoma with the advice and consent of the Oklahoma Senate.²² This method of selecting trustees applies to the appointment of the initial trustees, their replacements at the end of their terms, and vacancies created by death, resignation, or otherwise.²³

This statutory requirement of appointment by the governor with advice and consent by the senate may not apply universally. Prior to its amendment in 1976, the Public Trust Act provided that the appointment, succession, powers, duties, term, and manner of removal of trustees of public trusts was controlled by the terms of the instrument or will creating the trust.²⁴ This provision applied to all public trusts, including those with the state of Oklahoma as a beneficiary. A statute is generally given prospective operation only, unless a contrary legislative intent is expressed clearly in or necessarily implied from the language of the statute.²⁵ The current provision governing selection of trustees of trusts with the state as a beneficiary covers "[a]ny public trust that *hereafter* names the State of Oklahoma as the beneficiary"²⁶ The use of the word "hereafter" in the statute suggests an intent that the statute be given prospective operation only. Therefore, it seems likely that trusts with the state as a beneficiary formed prior to the statutory amendment are governed by the terms of the instrument or will creating the trust on the question of selection of trustees.

If the beneficiary of a public trust is a county or municipality, then the instrument or will creating the trust shall provide for the appointment, succession, terms and manner of removal of the trustees. Except for judicial removal of a trustee for cause, these provisions of the instrument or will are controlling.²⁷ Thus, greater flexibility in structuring the manner of selection of trustees is possible for public trusts with a county or municipality as the beneficiary.

22. OKLA. STAT. tit. 60, § 178(B) (1981).

23. *Id.*

24. 1970 Okla. Sess. Laws ch. 319, § 3, p. 590.

25. *See supra* note 21 and accompanying text.

26. OKLA. STAT. tit. 60, § 178(B) (1981) (emphasis added).

27. *Id.* § 178(C).

B. *Trustee Conflicts of Interest*

The Oklahoma Constitution contains a provision making conflicts of interest through self-dealing a felony,²⁸ and the Oklahoma statutes provide a penalty for a violation of this provision.²⁹ The Oklahoma Supreme Court has held that this constitutional provision is not violated when a public official of a beneficiary government serves as a trustee of a public trust³⁰ because “[p]ublic officers of a beneficiary governmental entity are contemplated as possible Trustees of public trusts. . . .”³¹

The constitutional conflicts of interest prohibition would be applicable, however, to prohibit *self-dealing* by a trustee of a public trust regardless of whether that trustee was also a public official of the beneficiary government. In addition, the Public Trust Act itself includes a prohibition against direct or indirect self-dealing by trustees. Violations of this prohibition are grounds for removal of a trustee and render unenforceable the contract involved.³²

The conflicts of interest provision in the Public Trust Act, unlike that in the Oklahoma Constitution, purports to exempt five categories of contracts from the self-dealing prohibition.³³ The most important exemption covers contracts secured by competitive bidding after a public invitation to bid, provided the trust records reflect that the trustee’s interest has been fully and publicly disclosed.

The five exemptions found in the Public Trust Act apparently conflict with the express constitutional prohibition against self-dealing by public officials. The Oklahoma attorney general has, for this reason, rendered an opinion that the exemptions in the Public Trust Act violate the Oklahoma Constitution.³⁴

In summary, a trustee of a public trust is prohibited from direct or indirect self-dealing by the conflicts of interest provisions of the Oklahoma Constitution and of the Public Trust Act. These provisions

28. OKLA. CONST. art. 10, § 11.

29. OKLA. STAT. tit. 21, § 341 (1981).

30. *Halstead v. McHendry*, 566 P.2d 134, 138 (Okla. 1977); *Woodward v. City of Anadarko*, 351 P.2d 292, 297-98 (Okla. 1960).

31. *Halstead v. McHendry*, 566 P.2d at 138. *Cf.* OKLA. STAT. tit. 60, § 178(A) (1981) (“Trustees, who are public officers, shall serve without compensation, but may be reimbursed for actual expenses incurred in the performance of their duties as trustees.”).

32. OKLA. STAT. tit. 60, § 178.8 (1981).

33. *Id.*

34. 12 Op. Att’y Gen. 243, 251 (Okla. 1980).

do not, however, prohibit a public official of a beneficiary government from serving as a trustee of a public trust.

C. *Dual Office Holding*

The Oklahoma statutes prohibit dual office holding.³⁵ It seems likely that this prohibition applies to trustees of public trusts. The Oklahoma attorney general has rendered an opinion reaching this conclusion.³⁶ The opinion relies in large part on an Oklahoma Supreme Court case which described trustees of public trusts as "public officers".³⁷ In addition, the attorney general's opinion referred to language in the Public Trust Act stating: "The trustee, or trustees . . . shall be an agency of the State *and the regularly constituted authority of the beneficiary* for the performance of the functions for which the trust shall have been created."³⁸

As discussed above, the Oklahoma Supreme Court has decided that an individual may lawfully serve as an official of a beneficiary government and as a trustee of a public trust. The court has stated: "Public officers of a beneficiary governmental entity are contemplated as possible Trustees of public trusts" ³⁹ However, the court, in reaching that conclusion, did not mention the dual office prohibition. Nor did the court discuss the question of whether a trustee of a public trust could hold a public office other than one under the beneficiary of the public trust.

The Oklahoma attorney general opinion, currently the only authority on the question, concluded that the holding of a public office of a beneficiary government by a public trustee does not violate the dual office holding prohibition,⁴⁰ but that the holding of any other public

35. OKLA. STAT. tit. 51, § 6 (1981) (Some exceptions are the notaries public and State Textbook Committee members).

36. Op. Att'y Gen. No. 82-35 (Okla. 1982) (to be published at 14 Op. Att'y Gen. — (Okla. 1982)).

37. *Id.* at 2; see *State ex rel. Cartwright v. Oklahoma Indus. Auth.*, 629 P.2d 1244, 1250 (Okla. 1981). The court also referred to public trust trustees as "public officials." *Id.* at 1249.

38. Op. Att'y Gen. No. 82-35, at 2 (Okla. 1982) (to be published at 14 Op. Att'y Gen. — (Okla. 1982)) (quoting OKLA. STAT. tit. 60, § 179 (1981) (emphasis in opinion); see also OKLA. STAT. tit. 60, § 179 (1981); see also *supra* notes 30 & 31 and accompanying text.

39. *Halstead v. McHendry*, 566 P.2d at 138; see also *supra* notes 30 & 31 and accompanying text.

40. Op. Att'y Gen. No. 82-35 (Okla. 1982) (to be published at 14 Op. Att'y Gen. — (Okla. 1982)). The facts upon which the opinion was rendered involved a trustee of a public trust with a municipality as the beneficiary. The trustee also served as a commissioner of the municipality's urban renewal authority. The attorney general opined that this arrangement violated the dual office holding prohibition. *Id.* at 9, 11; 14 Op. Att'y Gen. —

office would violate the prohibition.⁴¹ The opinion notes that the Oklahoma Supreme Court cases which have approved of public officials serving as trustees of public trusts involved trustees who were public officials of the beneficiary.⁴² Thus, these cases did not sanction service by other public officials as trustees. The opinion also recognizes that these cases did not discuss the dual office holding prohibition.⁴³ These cases did, however, state or imply that service as trustee by a public official of the beneficiary government is lawful.⁴⁴ According to the attorney general opinion, the arrangement could not have been legal if it violated the dual office holding prohibition.⁴⁵

D. Oversight of Public Trusts

The activities of a public trust are potentially subject to public scrutiny. For example, the activities of a public trust with the state of Oklahoma as the beneficiary are subject to monitoring by a legislative oversight committee.⁴⁶ In addition, every public trust is required to have an annual audit of the funds, accounts, and fiscal affairs of the trust.⁴⁷ The audit must be ordered within thirty days of the close of the trust's fiscal year.⁴⁸ The audit must be done by a certified public accountant, a certified municipal accountant, or a licensed public accountant and must be certified with an unqualified opinion. The audit must conform to standards set by the State Auditor and Inspector and a copy of the audit must be filed with the State Auditor and Inspector. Where the state of Oklahoma is a beneficiary, one copy of the audit must be filed with the governor and one copy with the legislative oversight committee. Where the beneficiary is a county or municipality, a copy of the audit must be filed with the respective beneficiary government. All required copies must be filed within ninety days following the close of the trust's fiscal year.⁴⁹

41. *Id.*

42. *Id.* at 4-6; 14 Op. Att'y Gen. ___. The Oklahoma cases are *Halstead*, 566 P.2d 134; *Woodward*, 351 P.2d 292.

43. Op. Att'y Gen. No. 82-35 at 4-6 (Okla. 1982) (to be published at 14 Op. Att'y Gen. ___. (Okla. 1982).

44. *Id.* at 4, 5; 14 Op. Att'y Gen. ___.

45. *Id.* at 4, 14 Op. Att'y Gen. ___.

46. OKLA. STAT. tit. 60, § 178.1 (1981). The Act provides for a committee of six members, three from the Oklahoma Senate and three from the Oklahoma House. The Senate members are appointed by the President Pro Tempore and the House members by the Speaker of the House. *Id.*

47. *Id.* § 180.1.

48. *Id.*

49. *Id.* § 180.2(a).

Meetings of the trustees of a public trust are open to the public, and the records of a public trust are subject to inspection by members of the public. The Public Trust Act provides:

Meetings of trustees of all public trusts shall be open to the public to the same extent as is required by law for other public boards and commissions. Such meetings shall also be open to the press and any such equipment deemed necessary by the press to record or report the activities of the meetings. . . . Records of the trust and minutes of the trust meetings of any public trust shall be written and kept in a place, the location of which shall be recorded in the office of the county clerk of each county, wherein the trust instrument shall be recorded.⁵⁰

The Local Industrial Development Act provides that with regard to trusts created pursuant to it:

All meetings of the trustees shall be open to the public to the same extent as is required by law of meetings by other boards and commissions, and all records of the trustees shall be public records as provided by law and shall be kept either in the office of the city clerk or the county clerk, as the case may be.⁵¹

Recently, the Oklahoma Supreme Court indicated that the above quoted provision of the Public Trust Act was to be liberally construed.⁵² The court stated that the term "records" in the Public Trust Act included any "document, book, paper, photograph, microfilm, sound recording, or other material, regardless of physical form or characteristics, made or received in connection with a transaction of official business."⁵³ In addition, it held that the records or copies thereof must be kept in one location,⁵⁴ and must be available for inspection during "those hours during which persons in the community keep similar businesses open for the transaction of business."⁵⁵

50. *Id.* § 178(D).

51. *Id.* tit. 62, § 662.

52. State *ex rel.* Cartwright v. Oklahoma Indus. Auth., 629 P.2d 1244, 1248 (Okla. 1981).

53. *Id.* at 1248 (relying on OKLA. STAT. tit. 67, § 153(b), the definition of "records" for purposes of the Preservation of Essential Records Act, and OKLA. STAT. tit. 25, § 2, which provides: "Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.")

54. 629 P.2d at 1250.

55. *Id.* at 1251.

E. *Competitive Bidding*

The Public Trust Act, the Local Industrial Development Act, and the Public Competitive Bidding Act of 1974 all have provisions dealing with competitive bidding which may be applicable to a public trust.⁵⁶ The Public Trust Act requires that “[c]ontracts for construction, labor equipment, material or repairs in excess of Two Thousand Dollars (\$2,000.00) shall be awarded by public trusts to the lowest and best competitive bidder”⁵⁷ The Public Trust Act requirement of competitive bidding is not applicable to the contracts of industrial and cultural trusts. In addition, contracts may be made without competitive bidding or public notice if the trustees find that an immediate emergency exists and an immediate expenditure of trust funds in excess of two thousand dollars is necessary “in order to avoid loss of life, substantial damage to property, or damage to the public peace or safety”⁵⁸

Although industrial trusts are exempt from the competitive bidding requirements of the Public Trust Act, the Local Industrial Development Act provides that contracts “for the payment of Five Hundred Dollars (\$500.00) or more for the purchase of any materials, equipment, or supplies or for the construction of facilities . . . shall be made only . . . to the lowest and best bidder . . .”⁵⁹ after public advertising. Trusts formed under the Local Industrial Development Act would be subject to this competitive bidding requirement.

In addition, all public trusts are subject to the Public Competitive Bidding Act of 1974.⁶⁰ That Act applies to public construction contracts exceeding \$7500 by public agencies⁶¹ and defines public agency to include “any public trust.”⁶² In addition, the Act expressly states: “This act shall apply to contracts made by a public trust created pursuant to the Local Industrial Development Act.”⁶³ Further, this Act would be applicable to cultural trusts even though they are exempted

56. OKLA. STAT. tit. 60, §§ 176-180.4 (1981); *id.* tit. 62, §§ 651-64; *id.* tit. 61, §§ 101-36. Additionally, the provisions of both the Public Trust Act and the Local Industrial Development Act pertaining to revenue bonds generally require the sale of bonds by competitive bidding after public advertising. *See* OKLA. STAT. tit. 60, § 176(e) (1981); *id.* tit. 62 § 655(c).

57. OKLA. STAT. tit. 60, § 176(f) (1981).

58. *Id.*

59. *Id.* tit. 62, § 662.

60. *Id.* tit. 61, §§ 101-136.

61. *See id.* § 102(4), 103.

62. *Id.* § 102(3).

63. *Id.* § 127.

from the competitive bidding requirement of the Public Trust Act.⁶⁴

F. *Limits on the Use of Public Trust Funds and Assets*

In Oklahoma a public trust may be formed for "the furtherance and accomplishment of any authorized and proper public function or purpose of the state or of any county or municipality . . . with the state, or any county or municipality as the beneficiary."⁶⁵ Thus, limits on the permissible functions and purposes of the state, counties or municipalities may also impose limits on the allowable functions and purposes of a public trust. The Oklahoma Constitution prohibits the state, counties and municipalities from aiding sectarian or religious purposes or institutions, or from making gifts of assets to private organizations. These limits would also apply to public trusts with the state, a county or a municipality as a beneficiary. The Oklahoma Constitution provides:

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.⁶⁶

The Oklahoma attorney general has rendered an opinion that the issuances of bonds by and use of the revenues of a public trust to provide funds for a sectarian institution would violate this constitutional provision.⁶⁷ The opinion stated:

Since it cannot be presumed that the Oklahoma Legislature acted contrary to its duty under [the Oklahoma Constitution] to give effect to the provisions of the Oklahoma Constitution . . . it must be concluded the Legislature did not intend, directly or indirectly, to aid sectarian institutions by enacting the public trust statutes.⁶⁸

In addition to prohibiting public aid for religious and sectarian purposes, the Oklahoma Constitution prohibits gifts by the state, counties and municipalities to any private organization.⁶⁹ Thus, it is clear

64. See 10 Op. Att'y Gen. 642 (Okla. 1978) (cultural trust subject to Public Competitive Bidding Act of 1974).

65. OKLA. STAT. tit. 60, § 176(a) (1981).

66. OKLA. CONST. art. II, § 5.

67. 13 Op. Att'y Gen. 518 (Okla. 1981).

68. *Id.* at 521 (citations omitted).

69. OKLA. CONST. art. X, § 14 provides, in part: "Taxes shall be levied and collected by

that the state of Oklahoma may not make a donation of funds, or a gift of property to a private organization without violating the Oklahoma Constitution. This is true regardless of how worthy the purposes of the gift and of the private organization. The state may, however, make use of a private agency for a public purpose if such is done in a proper manner, i.e., through a contractual arrangement. The attorney general of Oklahoma rendered an opinion in 1972 that stated:

The cases . . . clearly indicate that "in a proper manner" is interpreted as meaning that an appropriation can never take the form of a gift. In order for an appropriation to be validly made to a private agency it must not only be for a public purpose, but it must be made in such a manner as to insure that primary control over expenditures will always lie in the State. The agency must be under a contractual obligation to perform the requisite contractual provisions as stipulated by the State in a manner designated and approved by the State. The agency's activities, expenditures, and procedures must be conducted in such a manner as to insure State supervision and the State must retain the power to terminate its relationship with the private agency if it determines that the private agency has not satisfactorily fulfilled its obligations.⁷⁰

The principles of law regarding receipt of funds by private organizations from local governments are similar to these pertaining to receipt of state funds. Gifts are prohibited. The Oklahoma attorney general rendered an opinion in 1980 that the Oklahoma Constitution prohibits not only direct use of municipal funds for the benefit of a private group, but also indirect expenditures through the use of municipal labor and equipment to make improvement on property owned by a church, nonprofit corporation or other private entity solely for the benefit of the owner of the property.⁷¹

Even though gifts or donations by local governments are prohibited by the Oklahoma Constitution, local governmental funds can be

general laws, and for public purposes only" In addition, article X, § 15 provides, in part: "nor shall the State become an owner or stockholder in, nor make donation by gift, subscription . . . to stock, by tax, or otherwise, to any company, association, or corporation." Finally, article X, § 17 provides: "The Legislature shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual."

70. 5 Op. Att'y Gen. 237, 239 (Okla. 1972).

71. 12 Op. Att'y Gen. 75, 77-78 (Okla. 1980).

lawfully expended pursuant to a contractual arrangement with a private agency in furtherance of a public purpose. The attorney general of Oklahoma has rendered an opinion that Federal Revenue Sharing funds of the city of Lawton could not be directly appropriated to a nonprofit charitable corporation.⁷² The opinion stated, however, that the funds could be expended by means of a contractual arrangement made with the nonprofit corporation in furtherance of a public purpose.⁷³ The opinion relied partially on the provision in the Oklahoma statutes permitting a city "to make all contracts and do all other acts in relation to the property and affairs of the city, necessary to the good government of the city, and to the exercise of its corporate and administrative powers."⁷⁴

It is significant that a similar statutory provision pertaining to counties exists. It provides:

Each organized county within the State shall be a body corporate and politic and as such shall be empowered for the following purposes:

. . . .

4. To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of corporate or administrative power.⁷⁵

In addition, the Oklahoma attorney general has rendered an opinion which states that "[t]here is no question that a direct appropriation by the county excise board to a private corporation is prohibited by the [Oklahoma] Constitution."⁷⁶ However, the opinion went on to state that "nothing in [the constitutional prohibition] precludes a county from acquiring services from a private entity for the benefit of the aged, infirm or unfortunate inhabitants of the county *on a contract basis*."⁷⁷

The principles applicable to the receipt by a private entity of state and local governmental funds are probably also applicable to the receipt of funds or other property from a public trust. The Oklahoma attorney general has rendered an opinion stating that a public trust organized to function as a municipal water utility could not lawfully do-

72. 10 Op. Att'y Gen. 196, 197 (Okla. 1977).

73. *Id.* at 198.

74. *Id.* at 197 (citing OKLA. STAT. tit. 11 § 568 (1971) (repealed 1977)). The current provision can be found at OKLA. STAT. tit. 11, § 22-101(4) (1981).

75. OKLA. STAT. tit. 19, § 1(4) (1981).

76. 9 Op. Att'y Gen. 332, 332 (Okla. 1976).

77. *Id.* at 333 (emphasis added).

nate water to a charitable organization.⁷⁸ The opinion reasoned that if the public trust were state in nature, then the constitutional provision prohibiting gifts of funds or property by the state to private organizations would be applicable; if municipal in nature, the constitutional prohibition of gifts by municipalities would be applicable. Either way, the result would be the same.⁷⁹

In summary, public trusts are prohibited from aiding sectarian or religious purposes or institutions, and from making gifts of trust property or funds to private organizations.

IV. FUNDING OF PUBLIC TRUSTS

A. *Power to Borrow and Give Security*

A public trust may be granted the power by the trust instrument to borrow money, issue obligations and secure such obligations through pledge or mortgage of trust property. The Oklahoma attorney general has rendered an opinion stating that "it is clear that the Legislature recognized notes as one type of authorized obligation which a public trust could issue."⁸⁰ In rendering the opinion, the attorney general relied on language in the Public Trust Act providing that "[e]xpress trusts may be created to *issue obligations* and to provide funds for the furtherance and accomplishment of any authorized and proper public function or purpose of the state or of any county or municipality. . ."⁸¹ The attorney general also relied on other language of the Public Trust Act referring to the issuing of "bonds, notes, or other evidences of indebtedness."⁸² This opinion appears to be correct, and the same conclusion would be justified as to bonds and other evidences of indebtedness. If a county or municipality is a beneficiary of the trust, then the Public Trust Act requires approval of any indebtedness or obligation by a two-thirds vote of the beneficiary prior to creation of the indebtedness or obligation.⁸³ The question of whether a public trust may pledge or mortgage trust property as security for an indebtedness was answered affirmatively by the Oklahoma Supreme Court in 1955.⁸⁴ The court

78. 13 Op. Att'y Gen. 214 (Okla. 1981).

79. *Id.* at 215.

80. 10 Op. Att'y Gen. 571, 572 (Okla. 1978).

81. 10 Op. Att'y Gen. 571, 572 (Okla. 1978) (quoting OKLA. STAT. tit. 60, § 176(a) (Supp. 1977)) (emphasis added).

82. *Id.* (quoting OKLA. STAT. tit. 60, § 178.2 (Supp. 1977)).

83. *Id.* § 176(d).

84. Board of County Comm'rs v. Warram, 285 P.2d 1034 (Okla. 1955).

relied on a provision in the Oklahoma Trust Act permitting a trustee to secure a debt with trust property if authorized by the trust instrument.⁸⁵

In summary, if it is desired that the trustees have the power to borrow and to secure the debt with trust property, the trust instrument must authorize the trustee to do so.⁸⁶ If the beneficiary of the trust is a county or municipality, authorization by the governing board of the beneficiary will also be necessary to create an indebtedness or obligation.

B. *Revenue Bonds*

The Oklahoma Constitution places debt limitations on both the state and its political subdivisions.⁸⁷ The Oklahoma Supreme Court has made it clear that these constitutional debt limits are not violated by the issuance of revenue bonds by a public trust with the state or a political subdivision as beneficiary if the state or political subdivision is not obligated on the bonds.⁸⁸

Both the Public Trust Act⁸⁹ and the Local Industrial Development Act⁹⁰ authorize the issuance of revenue bonds by public trusts. The requirements of the two laws differ. These requirements will not be discussed in detail in this article. If a public trust contemplates the issuance of revenue bonds, the provisions of both Acts should be examined and compared.⁹¹

One important difference between the provisions of the two Acts should be noted. Under the Public Trust Act no indebtedness or obligation can be created by a public trust, the beneficiary of which is a county or municipality, "until such indebtedness or obligation has been

85. 285 P.2d at 1041 (relying on OKLA. STAT. tit. 60, § 175.24 (1951)). See also 10 Op. Att'y Gen. 571 (Okla. 1978) (notes of public trust may be secured by personal property of trust, relying on *Warram*).

86. 10 Op. Att'y Gen. 571 (Okla. 1978) ("[a] question concerning the powers of the trustees of a public trust always involves a question as to whether trustees were granted such powers in its trust instrument.").

87. See OKLA. CONST. art. X, §§ 23, 25, 26, 27.

88. *Morris v. Oklahoma City*, 299 P.2d 131 (Okla. 1956); *Board of County Comm'rs v. Warram*, 285 P.2d 1034 (Okla. 1955).

89. OKLA. STAT. tit. 60, §§ 176-180.4 (1981).

90. *Id.* tit. 62, §§ 651-664.

91. The issuance of revenue bonds by a public trust also has implications under both the Oklahoma Uniform Securities Act and the Federal Securities Act of 1933. A detailed discussion of securities law issues is beyond the scope of this article. It should be noted, however, that any offer or sale of securities, such as revenue bonds by a public trust, should only be made after consultation with an attorney familiar with both the securities laws and the facts concerning the contemplated securities issue.

approved by a two-thirds ($\frac{2}{3}$) vote of the governing body of the beneficiary."⁹² Voter approval, however, is not necessary. The Local Industrial Development Act "allows any municipality and any county to use a trust created under the Public Trust Act for the purposes of securing or developing industry."⁹³ A major difference in the procedure for issuing revenue bonds under the Local Industrial Development Act is that, unlike the Public Trust Act, it requires "the approval of a majority of the qualified electors of the municipality or county voting at an election called for that purpose."⁹⁴ The election requirement of the Local Industrial Development Act makes the Public Trust Act provisions on issuance of revenue bonds comparatively less onerous. An important question, then, is when does each Act apply.

One could argue that the provisions of the Local Industrial Development Act apply to all industrial revenue bonds issued by a public trust with a municipality or county as a beneficiary. This essentially was the position of the plaintiff in a case decided by the Oklahoma Supreme Court in 1963.⁹⁵ The plaintiff contended that the Local Industrial Development Act supersedes the Public Trust Act to the extent that the financing of improvements and facilities for attracting and developing industry is concerned.⁹⁶ The court rejected the plaintiff's argument holding that: "At no point in the Local Industrial Development Act is it specifically stated that such act supersedes any other act. In fact, the language of . . . that act indicates otherwise."⁹⁷ The court continued: "We have held previously under the Public Trust Act . . . that approval of the electors is not required for the issuance of revenue bonds."⁹⁸ In conclusion, the court noted:

[The] Local Industrial Development Act allows any municipality and any county to use a trust created under such Public Trust Act for the purpose of securing or developing industry. In the event a municipality or county desires that a trust created or used by it shall raise funds by the issuance and sale by the trust of its revenue bonds, then in such event the electors of the municipality or county must approve the issuance of such bonds. The trust formed in the instant case is not one

92. OKLA. STAT. tit. 60, § 176(d) (1981).

93. *Fort v. Oklahoma Indus., Inc.*, 385 P.2d 470, 475 (Okla. 1963).

94. OKLA. STAT. tit. 62, § 654 (1981).

95. *Fort*, 385 P.2d 470.

96. *Id.* at 472.

97. *Id.* at 473.

98. *Id.* at 474.

created by Oklahoma City [the beneficiary] or presently being used by it for any purposes of such City as provided in the Local Industrial Act . . . and, therefore, is not governed by the provisions of such Local Industrial Development Act

In the instant case it was not the municipality or county which created the trust, but rather a private corporation, nor is Oklahoma City presently using the trust for industry-getting purposes. The Local Industrial Development Act applies only to trusts created by municipalities or counties.⁹⁹

The court thus relied heavily on the fact that Oklahoma City was not the creator of the public trust of which it was the named beneficiary. It also spoke of the fact that the trust was not "used" by Oklahoma City for industrial development purposes. From the language of the opinion, it appears that this observation was not meant to imply that the trust was inactive, or that it was not being employed for business-attracting purposes, but rather, that the trust was being "used" by some party other than Oklahoma City. It is speculative whether this conclusion was drawn from the fact that Oklahoma City was not the creator of the trust or whether it was based upon observations by the court regarding the identity of the trustees or upon still other factors. In a subsequent case also decided by the Oklahoma Supreme Court, the question of the applicability of the election requirement of the Local Industrial Development Act was raised again.¹⁰⁰ This case involved a public trust created by the Ardmore Industrial Corporation in which the city of Ardmore, Oklahoma was the beneficiary. The mayor of Ardmore was one of five voting trustees and the city manager was one of two non-voting trustees. The purposes of the trust clearly included industrial development and the trustees admitted that they intended to issue the \$73,000,000 aggregate principal amount of industrial development bonds provided for in the bond indenture without an election.¹⁰¹ The supreme court quickly disposed of the plaintiff's argument that an election was required, stating: "We conclude that . . . the Local Industrial Development Act . . . has no application to the situation presented by the pleadings in this case."¹⁰² The court did not specify why the Local Industrial Development Act was inapplicable. How-

99. *Id.* at 475.

100. *Morrison v. Ardmore Indus. Dev. Corp.*, 444 P.2d 816 (Okla. 1968).

101. *Id.* at 818-19.

102. *Id.* at 821.

ever, its conclusion does appear to be based, at least in part, on the fact that the city of Ardmore did not create the trust.

In sum, the identity of the creator of a public trust appears to be a significant factor in determining whether the election requirement of the Local Industrial Development Act applies. Therefore, the issuance of industrial development bonds by a public trust created by a municipality or county will certainly require an election. The issuance of such bonds by a public trust created by some other party might not. However, an attempt by a municipality or county to avoid compliance with the Local Industrial Development Act by simply requesting that another party—for example a private citizen or a nonprofit corporation—create a public trust with the city or county as the beneficiary for the purpose of issuing industrial revenue bonds would probably be unsuccessful. The acts of such other party would likely be imputed to the municipality or county. Finally, it seems clear that the election requirement, in any event, only applies to bonds issued for the purpose of industrial development and not to bonds issued for other purposes.

C. *Receipt of Government Funds*

There would seem to be no prohibition against a public trust receiving funds from the federal government if such receipt is authorized by the instruments or articles creating the trust. In addition, the Oklahoma statutes provide:

The municipal governing body may receive funds for and participate in any federal program, and may cooperate with the United States Government and any agency or instrumentality thereof, in the manner authorized and provided by federal law and regulation. In doing so, a municipality may perform all necessary functions and take all necessary actions for accomplishing such federal purposes and programs, as agent of the federal government, notwithstanding any provisions of state law.¹⁰³

Since the Public Trust Act permits the formation of a trust for “the furtherance and accomplishment of any authorized and proper public function or purpose” of the beneficiary,¹⁰⁴ it would seem that a public trust with a municipality as a beneficiary could be authorized to act as an agent of the federal government for purposes of federal programs.

103. OKLA. STAT. tit. 11, § 22-126 (1981).

104. *Id.* tit. 60, § 176(a) (1981).

There would also appear to be no problem with the state providing, and a public trust accepting, state funds if the trust is authorized to do so. This conclusion is supported by the language of the Public Trust Act which provides that "[t]he trustee, or trustees . . . shall be an agency of the state. . . ."¹⁰⁵

The Public Trust Act does provide that "no funds of said beneficiary derived from sources other than the trust property, or the operation thereof, shall be charged with or expended for the execution of said trust, except by express action of the legislative authority of the beneficiary prior to the charging or expending of the funds."¹⁰⁶ This would require the Oklahoma legislature to specifically approve the spending of state funds by a public trust which has the state as a beneficiary. Presumably this provision does not require express action by the Oklahoma legislature prior to the spending of state funds by a public trust which has a county or municipality as its beneficiary. It is likely, however, that the state's budget procedures would bring to the legislature's attention any state monies headed for such trusts.

Finally, there would seem to be nothing preventing a municipality or a county from providing funds to a public trust of which it is a beneficiary to be expended for a valid purpose of the municipality or county. Indeed, the Public Trust Act seems to recognize this in providing, as mentioned above, that the funds of the beneficiary derived from sources other than trust property, or the operation thereof, shall not be expended without express action by the legislative authority of the beneficiary.¹⁰⁷ The conclusion that a municipality or county can appropriate money to a public trust of which it is the beneficiary is supported by

105. *Id.* § 179.

106. *Id.* § 176(a).

107. *Id.* The requirement that no funds of the beneficiary other than those derived from trust property or the operation of trust property can be expended without the approval of the governing body of the beneficiary is buttressed by other statutory provisions. First, the Oklahoma statutes dealing with municipal corporations provide:

Any act of a municipal governing body which provides . . . for appropriating money shall not be valid unless a majority of all the councilmembers or trustees vote in favor of the action. The municipal governing body may not appropriate or draw any order on the treasurer for money unless the same has been appropriated in the manner provided by law or ordered in pursuance of some object provided by law.

Id. tit. 11, § 17-101. Second, the Oklahoma statutes dealing with counties provide:

It shall be [the county treasurer's] duty to receive all monies belonging to the county from whatever source they may be derived, and other monies which by law are directed to be paid to him, and all monies received by him for the use of the county shall be paid by him only on the warrants of the board of county commissioners, drawn according to law, and all other monies shall be paid over by him as provided by law.

Id. tit. 19, § 623.

other language of the Public Trust Act. It provides that "[t]he trustee, or trustees . . . shall be . . . the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created."¹⁰⁸

V. OWNERSHIP AND OPERATION OF PUBLIC UTILITIES BY PUBLIC TRUSTS

A. *Constitutional and Statutory Considerations*

The provisions of the Oklahoma Constitution dealing with municipal corporations prohibit the surrendering of the power to fix charges for public services.¹⁰⁹ These provisions require approval of a majority of the qualified electors of a municipal corporation before a franchise can be granted, extended or renewed, and limit such grants, renewals and extensions to a maximum of twenty-five years.¹¹⁰ In addition, the granting of exclusive franchises is prohibited.¹¹¹

The Oklahoma Supreme Court has decided a case involving the application of the above constitutional provisions to a public trust formed to construct, maintain and operate a gas utility.¹¹² The public trust had several towns and cities as beneficiaries. These beneficiaries had surrendered the right to control or direct the trustees or the trust. The court stated that a public trust is a separate legal entity from the beneficiary thereof.¹¹³ As a result, the court determined that the power to regulate rates had been surrendered, an exclusive franchise had been granted, a franchise in excess of twenty-five years had been granted, and voter approval of the granting of a franchise had not been obtained,¹¹⁴ all in violation of the Oklahoma Constitution.

In a subsequent case, the Oklahoma Supreme Court dealt with a lease of a city-owned utility to a public trust.¹¹⁵ The court stated, "We do not believe that a lessee of a city-owned utility is required to obtain a franchise in order to operate the city-owned public utility within the

108. *Id.* tit. 60, § 179 (1981). *Cf.* *Arthur v. City of Stillwater*, 611 P.2d 637 (Okla. 1980) (suggesting city sales tax revenues may be paid to public trust for proper municipal purpose, but holding direct payment of revenues to public trust, without deposit in general fund and appropriation by city commissioners, violates Oklahoma statutes).

109. OKLA. CONST. art. XVIII, § 7.

110. *Id.* § 5(a).

111. *Id.* § 7.

112. *State v. Garrison*, 348 P.2d 859 (Okla. 1959).

113. 348 P.2d at 863.

114. *Id.* at 864-65.

115. *Meder v. Oklahoma City*, 350 P.2d 916 (Okla. 1960).

corporate limits of said city."¹¹⁶ The court noted that: "It is not contended that the *City* would be required to obtain a franchise to *operate* its own utility."¹¹⁷ According to the court, the duty to operate the public utility had been delegated to the trust.¹¹⁸ The court held, however, that a lease provision that the city would not acquire or permit to be acquired or operated any competing facilities violated a provision of the Oklahoma Constitution which, in essence, gives the electors of the municipality the right to demand a vote on such a question.¹¹⁹ The court also decided that the power to regulate charges for a public service had not been surrendered. "Our attention is not invited to any constitutional or statutory provisions which prevents [sic] a city from fixing the rates and charges for services performed by a *city-owned* utility."¹²⁰

If a municipality contemplates the sale or lease of a municipally owned utility to a public trust, the Oklahoma statutes may require an election on the question. The Oklahoma statutes provide:

No public utility owned by any municipality . . . shall be sold, conveyed, leased or otherwise disposed of by the municipal governing body unless such sale, lease, conveyance, or other disposal of such utility shall be authorized by the vote of a majority of the registered voters of the municipality voting on the question at an election to be held for such purpose.¹²¹

In addition, the sale or lease must be to the highest and best bidder, if satisfactory to the governing body.¹²² An exception to the election requirement is provided: "Any municipality governed by charter, when authorized by such charter, may sell, convey or lease any public utility owned by the municipality without conducting an election . . ."¹²³ Whether the authority to sell, convey or lease a municipally owned utility is granted by election or by charter, the constitutional requirement for a vote on the question of granting a franchise if one is necessary is still applicable.

116. *Id.* at 921.

117. *Id.* (emphasis in original).

118. 350 P.2d at 922.

119. *Id.* at 923 (relying on OKLA. CONST. art. XVIII, § 5(b)).

120. 350 P.2d at 923 (emphasis in original).

121. OKLA. STAT. tit. 11, § 35-202 (1981). The election requirement is applicable to municipally owned utilities with a cash value in excess of \$10,000. *Id.* § 35-201.

122. *Id.* § 35-203(3).

123. *Id.* § 35-201.

B. *Jurisdiction of Corporation Commission*

The Oklahoma statutes define a "public utility" for purposes of Corporation Commission jurisdiction as follows:

The term "public utility" . . . shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.

- (a) For the conveyance of gas by pipeline.
- (b) For the production, transmission, delivery or furnishing of heat or light with gas.
- (c) For the production, transmission, delivery or furnishing electric current for light, heat or power.
- (d) For the transportation, delivery or furnishing of water for domestic purposes or for power.¹²⁴

The Corporation Commission's authority to supervise public utilities is very broad.¹²⁵ However, the supervisory powers of the Corporation Commission do have their limits. The Oklahoma Supreme Court has stated:

Although the Corporation Commission has general supervision over all public utilities, the Constitution does not clothe it with the general power of internal management and control incident to ownership. The Commission has the power to supervise and regulate the *public duties and obligations* of such utilities but is not empowered to substitute its judgment for that of the utilities concerning their internal

124. *Id.* tit. 17, § 151 (1981).

125. The Oklahoma statutes provide:

The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission.

Id. tit. 17, § 152.

management and control.¹²⁶

In 1970 the Oklahoma Supreme Court considered the question of whether a public trust was subject to the statutory provision giving the Corporation Commission jurisdiction over all "public utilities."¹²⁷ The court noted that "[t]he trustees of a trust created for furtherance of public functions are 'an agency of the State and the regularly constituted authority of the beneficiary (county or municipality) for the performance of the functions for which the trust shall have been created.'"¹²⁸ According to the court, the Corporation Commission's contention that it had jurisdiction rested on the assumption that, "[t]he Legislature created 'an agency of the state' (the trustees) and gave that agent the authority to perform the functions for which the trust was created and at the same time left the newly created agency under the control of another state agency, the Corporation Commission."¹²⁹ The court, however, did not agree with the commission's argument as to the Legislature's intent and decided that since the Public Trust Act was "silent as to what tribunal may hear complaints regarding the administration of these [public] trusts, it must be assumed the Legislature intended that the district courts would exercise judicial supervision over these trusts, as in other trusts."¹³⁰

Subsequent to this decision, the Oklahoma statutes were amended to expressly bring some public trusts within the jurisdiction of the Corporation Commission. The relevant provision now reads, in part, as follows:

A. The Corporation Commission shall have rate-making authority and general jurisdiction over all supply systems of natural gas, steam heat and steam serving the general public notwithstanding operation thereof by a trust, authority, cooperative and subsidiary created for the benefit or furtherance of a public function pursuant to a trust or public trust, unless the said body operating said system has financing or is in the process of financing the acquisition, improvement or extension of the said system with a loan from the United States of America and is a nonprofit trust.

B. The Corporation Commission shall also have general su-

126. *Oklahoma Gas & Elec. Co. v. Corporation Comm'n*, 543 P.2d 546, 551 (Okla. 1975) (emphasis added).

127. *Oklahoma County Util. Servs. Auth. v. Corporation Comm'n*, 478 P.2d 352 (Okla. 1970).

128. *Id.* at 353 (quoting OKLA. STAT. tit. 60, § 179 (1961)).

129. 478 P.2d at 354.

130. *Id.*

pervision over any person or entity to whom the function of operating a natural gas, steam heat or steam supply system has been delegated by such a trust, authority, cooperative or subsidiary. Provided nothing herein shall be construed to apply to a public trust whose board of trustees is composed of elected officials or is elected by the customers or a majority of which is composed of members selected by the governing bodies of municipalities in which the public trust operates, or members which it serves, and which board of trustees has the authority to establish and regulate its own rates.¹³¹

The Oklahoma Supreme Court ruled in 1980 that this provision was constitutional and held that the Oklahoma legislature could confer jurisdiction upon the Corporation Commission to fix the rates of a public trust that distributes natural gas.¹³²

In addition, the Public Trust Act was amended in an attempt to include some public trusts within the Corporation Commission's jurisdiction. The pertinent provision reads, in part, as follows:

A. The Corporation Commission shall have general supervision over trusts created for the benefit and furtherance of a public function pursuant to Title 60 of the Oklahoma Statutes, Sections 176 et seq., where:

1. The trust has multiple beneficiaries; and
2. A water supply system is operated by the trust or a person or entity to which such function has been delegated; and
3. The water supply system is operated in a county having a population in excess of five hundred thousand (500,000) persons according to the most recent Federal Decennial Census; and
4. The beneficiaries do not regulate the rates, charges and practices of the water supply system.

B. The Corporation Commission shall also have general supervision over any person or entity to whom the function of operating a water supply system has been delegated by such a trust.¹³³

This particular provision was held to be unconstitutional by the

131. OKLA. STAT. tit. 17, § 160.1(A), (B) (1981).

132. *See* Southeastern Okla. Dev. & Gas Auth. v. Oklahoma Corp. Comm'n, 606 P.2d 574 (Okla. 1980).

133. OKLA. STAT. tit. 60, § 180.4 (1981).

Oklahoma Supreme Court in 1974.¹³⁴ The court took judicial notice of the fact that at that time only Oklahoma County met the population requirement.¹³⁵ The court held that the population requirement was not a proper and legitimate classification since it bore no reasonable relationship to the object to be accomplished by the provision. Thus, the court held that the provision was an unconstitutional special law and conferred no jurisdiction on the Corporation Commission.¹³⁶

In sum, the current jurisdiction of the Corporation Commission is limited to some public trusts supplying natural gas, steam heat or steam to the general public. It is clear, however, that the Oklahoma legislature has the constitutional authority to increase the jurisdiction of the Corporation Commission over public trusts.

VI. ENGAGING IN BUSINESS FOR A PUBLIC PURPOSE

A. *In General*

The Oklahoma Public Trust Act permits the creation of trusts "for the furtherance and accomplishment of any authorized and proper public function or purpose of the state or of any county or municipality . . . with the state, or any county or municipality as the beneficiary thereof."¹³⁷ Thus, a determination of the proper purposes of a public trust requires a determination of the appropriate functions or purposes of its beneficiary.

The Oklahoma Constitution provides that "[t]he right of the State to engage in any occupation or business for public purposes shall not be denied nor prohibited, except that the State shall not engage in agriculture for any other than educational and scientific purposes and for support of its penal, charitable, and educational institutions."¹³⁸ If the state is the beneficiary of a public trust, it is clear that the trust can engage in any business for a public purpose except agriculture. In 1970 the Oklahoma Supreme Court rendered an opinion involving the question of whether a public trust with the state of Oklahoma as beneficiary

134. See *Oklahoma County Util. Services Auth. v. Corporation Comm'n*, 519 P.2d 919 (Okla. 1974).

135. *Id.* at 921.

136. *Id.* at 922. The specific constitutional provision found to be violated was OKLA. CONST. art. V, § 59.

137. OKLA. STAT. tit. 60, § 176(a) (1981).

138. OKLA. CONST. art. II, § 31. Cf. *Shipp v. Southeastern Okla. Indus. Auth.*, 498 P.2d 1395, 1399 (Okla. 1972) (Oklahoma is a sovereign state possessing all power and authority of a sovereign except as limited by Oklahoma and United States Constitutions).

could build and operate a parking facility for a public purpose.¹³⁹ In holding that it could, the court stated:

Our Constitution, Art. 2 § 31, states that, "The right of the state to engage in any occupation or business for *public purposes* shall not be denied nor prohibited," (emphasis supplied) except in certain situations not applicable here.

. . . .

However, the present situation is not one where the State itself will actually engage in the business of constructing and operating the parking facility. This will be done by the Trust. Under the provisions of [the Public Trust Act], the Trust "shall be an agency of the State and the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created."¹⁴⁰

If a county or municipality is the beneficiary of a public trust, it is not clear whether the trust can engage in business for a public purpose. As to municipalities, the Oklahoma Constitution provides that "[e]very municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said corporation."¹⁴¹ One possible reading of the phrase "which may be engaged in . . . by virtue of a franchise from said corporation" is that municipalities may engage in only those businesses which, if done by a private interest, would require a franchise. It is unclear which enterprises this reading would permit, although it is clear that enterprises traditionally considered to be public utilities would be permissible.¹⁴²

It could be argued that in some cases a broader authority to engage in business for a public purpose could be given to home rule cities. The Bill of Rights of the Oklahoma Constitution provides for the "right of the State to engage in any occupation or business for public purposes."¹⁴³ Professor Merrill has written that the legislature has authority under this provision to vest that right in municipalities as agencies of the state.¹⁴⁴ He suggests that the charter of a home rule city is equivalent to a grant from the legislature: "[I]t seems clear that such a

139. See Application of Southern Okla. Dev. Trust, 470 P.2d 572 (Okla. 1970).

140. 470 P.2d at 574 (emphasis in original). The court also stated that "there can be no doubt that the parking facility is for 'public purposes.'" *Id.*

141. OKLA. CONST. art. XVIII, § 6.

142. See Merrill, *The Constitutional Rights of Oklahoma Cities*, 21 OKLA. L. REV. 251, 265-66 (1968).

143. See *supra* notes 138-40 and accompanying text.

144. See Merrill, *supra* note 142, at 269.

charter could give authority to the city . . . to engage in any business or occupation, as fully as the legislature might do."¹⁴⁵ He notes that there is an absence of case law supporting this interpretation but points out that the efficacy of comprehensive city charters which contain clauses conferring upon the cities full discretion as to public enterprise has been recognized "over and over again" by the Oklahoma Supreme Court.¹⁴⁶ If Professor Merrill's view were adopted by the Oklahoma courts, a home rule city could engage in any type of enterprise for a public purpose as long as the charter authorized such activity. It follows that a public trust with that city as beneficiary could be authorized by the trust instrument to do so also.

The Oklahoma Constitution has no provision dealing with the ability of counties to engage in business. A county is a political subdivision of the state and is generally held to have only those powers assigned to it by the state legislature.¹⁴⁷ The Oklahoma statutes do not appear to contain a general authorization for counties to engage in any and every type of business. Thus, a public trust with a county as the beneficiary could not be provided with a general authorization to engage in business, even business with a public purpose.

Finally, it should be noted that both the Public Trust Act and the Local Industrial Development Act expressly restrict a public trust's purposes and activities. A public trust shall not have any trust purpose, function or activity (1) in any wholesale outlet, unless located on the same premises with and a direct part of an industry; (2) in any retail outlet, unless operated in conjunction with and on the same premises as an industrial, manufacturing, cultural, recreational, parking, transportation or airport facility; or (3) in residential enterprises, subject to limited exceptions.¹⁴⁸ The Oklahoma attorney general has rendered an opinion that the phrase "retail outlet" as used in the restriction on public trust purposes and activities includes motels and restaurants.¹⁴⁹

145. *Id.*

146. *Id.* at 269-70.

147. *See* Tulsa Exposition & Fair Corp. v. Board of County Comm'rs, 468 P.2d 501 (Okla. 1970).

148. The Public Trust Act restriction on public trust purposes is OKLA. STAT. tit. 60, § 178.4 (1981). The Local Industrial Development Act restriction is *Id.* tit. 62, § 652. The exceptions to the restriction against residential purposes and activities are found at *Id.* tit. 60, § 178.6.

149. *See* Op. Att'y Gen. No. 82-81 (Okla. 1982) (to be published at 14 Op. Att'y Gen. — (Okla. 1982)).

B. *Securing or Developing Industry*

The Oklahoma legislature has expressly authorized municipalities and counties to engage in certain businesses. The Local Industrial Development Act provides, in part:

Any municipality and any county is hereby authorized to own, acquire, construct, reconstruct, extend, equip, improve, maintain, sell, lease, contract concerning, or otherwise deal in or dispose of any lands, buildings, or facilities of any and every nature whatever that can be used in securing or developing industry within or near the municipality or county.¹⁵⁰

In addition, the Act states that municipalities and counties are authorized "to use any available revenues for the accomplishment of the [above] purposes."¹⁵¹

The Oklahoma Supreme Court has held that a public trust with a municipality as beneficiary which had been formed pursuant to the Local Industrial Development Act could engage in the business of acquiring land, constructing an industrial building, and leasing the building to a manufacturing company.¹⁵² According to the court, under the Oklahoma Constitution the state cannot be prohibited from engaging in any business for a public purpose except agriculture.¹⁵³ The court held the public trust was a public corporation which had been delegated a state function. Therefore, it could engage in the authorized business for a public purpose.¹⁵⁴

This decision did not answer the question of whether a public trust with a municipality or county as beneficiary can engage in the activities authorized by the Local Industrial Development Act if the public trust is not formed pursuant to the Local Industrial Development Act. The answer would seem to be yes. As discussed above, a public trust can be formed under the Public Trust Act for the furtherance and accomplishment of any authorized and proper function of its beneficiary. The Local Industrial Development Act has authorized cities to engage in certain activities for the purpose of securing or developing industry. Thus, it would seem that a public trust could be formed under the Public Trust Act to engage in such activities. The Oklahoma Supreme Court appears to have adopted this position, although perhaps on dif-

150. OKLA. STAT. tit. 62, § 652 (1981).

151. *Id.* § 653.

152. *See* Harrison v. Claybrook, 372 P.2d 602 (Okla. 1962).

153. 372 P.2d at 605 (referring to OKLA. CONST. art. II, § 31).

154. 372 P.2d at 605.

ferent grounds. In a case involving a public trust formed under the Public Trust Act with development of industry as one of its purposes, the court stated:

An amendment to our State Constitution, Article 10, § 35, became effective May 1, 1962. That amendment authorized cities and towns to finance the acquisition and development of industry and industrial improvements and facilities through the means of the voting and issuance of revenue bonds. Since the adoption of such amendment and pursuant to the Public Trust Act . . . the developing and securing of industry is an authorized and proper function of the trustees of a public trust of which a municipality is the beneficiary.¹⁵⁵

C. *Taxation of Public Trust Property Leased to Private Industry*

The Oklahoma Constitution states that "all property . . . of this State, and of counties and of municipalities of this State . . . shall be exempt from taxation . . ." ¹⁵⁶ In addition, the Oklahoma statutes provide that all property of the state and of the counties, school districts, and municipalities of the state are exempt from taxation.¹⁵⁷ These provisions would exempt from taxation the property of a public trust.¹⁵⁸

A problem arises, however, when real property owned by a public trust is leased to a private business enterprise. The Oklahoma Public Trust Act provides that:

public trusts . . . issuing revenue bonds, notes or other evidences of indebtedness for industrial development purposes shall require the lessee of each industrial project owned by the public trust . . . to pay an annual sum in lieu of ad valorem taxes for each year following the tenth anniversary date of the issuance of such revenue bonds, notes or other evidences of indebtedness.¹⁵⁹

This section seems to be based on a legislative assumption that such real property is exempt from ad valorem taxes. The Oklahoma Supreme Court, however, ruled in 1980 that property titled to a public

155. *Fort v. Oklahoma Indus., Inc.*, 385 P.2d 470, 472 (Okla. 1963).

156. OKLA. CONST. art. X, § 6.

157. OKLA. STAT. tit. 68, § 2405(b) (1981).

158. *See General Motors Corp. v. Oklahoma County Bd. of Equalization*, ___ P.2d ___, 54 OKLA. B.J. 1351, 1352 (Okla. May 17, 1983) ("[T]he property belonging to a public trust is exempt from taxation—Art. 10, § 6, Okla. Const.") (dicta).

159. OKLA. STAT. tit. 60, § 178.7 (1981).

trust which was leased to a private concern would be subject to ad valorem tax if the private concern was the "owner" of such property.¹⁶⁰ According to the court, if the quantum of interest of the private parties in the property is sufficient to constitute "ownership," then the private parties are responsible for payment of ad valorem taxes on that interest.¹⁶¹ The court found that a lease agreement which required the private party to purchase, and the trust to sell property for one hundred dollars (\$100) at the termination of the lease was tantamount to an executory contract of sale.¹⁶²

The Oklahoma attorney general rendered an opinion in 1979 that any leasehold interest of a private party in public trust property is subject to ad valorem taxation.¹⁶³ The Oklahoma Supreme Court decision discussed above is narrower than the position of the attorney general. The court, in its opinion, expressly declined to approve or disapprove the attorney general opinion.¹⁶⁴

In 1983 the Oklahoma Supreme Court decided a case involving the validity of a purported tax abatement agreement between the state of Oklahoma and the lessee of an industrial facility financed by a public trust holding record title.¹⁶⁵ The lessee, who was to purchase the facility for one thousand dollars after the bonds issued by the public trust to finance the project were retired, admitted that the facility would be subject to ad valorem taxation but for the alleged agreement.¹⁶⁶ The court held that any tax abatement agreement would be unconstitutional and thus without effect.¹⁶⁷ In addition, the court rejected the argument that the state should be estopped from assessing ad valorem taxes on the lessee's property.¹⁶⁸

VII. PUBLIC TRUSTS AND THE INTERLOCAL COOPERATION ACT

In Oklahoma, a public trust can cooperate with other public agencies or it can be a vehicle of cooperation by public agencies. The

160. *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980).

161. *Id.* at 906.

162. *Id.* at 906-07.

163. 11 Op. Att'y Gen. 237 (Okla. 1979).

164. 618 P.2d at 914. However, Justice Doolin, concurring specially, expressed his opinion that the position of the attorney general was correct. *Id.* at 914-15.

165. *General Motors Corp. v. Oklahoma County Bd. of Equalization*, ___ P.2d ___, 54 OKLA. B.J. 1351 (Okla. May 17, 1983).

166. *Id.* at ___, 54 OKLA. B.J. at 1352.

167. *Id.* at ___, 54 OKLA. B.J. at 1353.

168. *Id.* at ___, 54 OKLA. B.J. at 1352.

Oklahoma legislature has adopted the Interlocal Cooperation Act.¹⁶⁹ The purpose of the Act is to allow local governmental units "to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage."¹⁷⁰ The Act provides, in part:

Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment¹⁷¹

The phrase "public agency of this state" is defined by the Act as any political subdivision of the state or any agency of the state government.¹⁷² It seems clear that a public trust is a public agency within the meaning of the Interlocal Cooperation Act.¹⁷³ Therefore, a public trust may be a party to an agreement pursuant to the Interlocal Cooperation Act.

There are two methods of exercising the powers permitted by the Interlocal Cooperation Act. The first is the formal agreement method.¹⁷⁴ This method requires (1) an agreement for joint or cooperative action;¹⁷⁵ (2) approval of such agreement "by ordinance, resolution or otherwise pursuant to [the] law of the governing bodies of the participating public agencies";¹⁷⁶ (3) submission of the agreement to

169. OKLA. STAT. tit. 74, §§ 1001-08 (1981).

170. *Id.* § 1001.

171. *Id.* § 1004(a).

172. *Id.* § 1003(a). The phrase "public agency" of any other state is defined by the Act as any political subdivision of another state. *Id.* The ability to use this Act to cooperate with political subdivisions of another state depends mostly upon whether the laws of the other state grant statutory authorization for its political subdivisions to participate in interlocal ventures. This presents no problem with respect to some states. Arkansas, for example, has adopted an Interlocal Cooperation Act which is virtually identical to that of Oklahoma. See ARK. STAT. ANN. §§ 14-901 to -908 (1979). Texas, however, is narrower with respect to its interlocal cooperation law, which only permits "any city in this state which borders on a state line and which is separated from a city in the adjoining state only by the state line, to cooperate with such adjoining city in another state in furnishing governmental services and facilities" TEX. REV. CIV. STAT. ANN. art. 969e (Vernon Supp. 1982). It authorizes interlocal cooperation in extremely limited circumstances.

173. The Oklahoma attorney general has rendered an opinion that a public trust is a "public agency" within the meaning of the Interlocal Cooperation Act. 4 Op. Att'y Gen. 400 (Okla. 1971). Cf. Merrill, *Our Unrealized Resource—Inter-Municipal Cooperation*, 23 OKLA. L. REV. 349, 354-55 (1970) (discussing term "public agency").

174. OKLA. STAT. tit. 74, §§ 1004-07 (1981).

175. *Id.* § 1004(b).

176. *Id.*

the Oklahoma attorney general for a determination that it is in proper form and lawful;¹⁷⁷ and (4) filing with the county clerk and the Secretary of State.¹⁷⁸ If the agreement deals "in whole or in part with the provision of services or facilities with regard to which an officer or agency of the state government has constitutional or statutory powers of control,"¹⁷⁹ there is an additional requirement that such officer or agency approve the agreement as to all matters within his or its jurisdiction.¹⁸⁰ The requirements as to the contents of the agreement are set out in the Act. The agreement must specify, among other things, the purpose or purposes of the agreement and the precise organization, composition and nature of any separate legal or administrative entity created by the agreement, "provided such entity may be legally created."¹⁸¹ It is clear that the Act would permit the utilization of a public trust as the vehicle of cooperation between parties to a formal agreement.¹⁸²

The second authorized method of interlocal cooperation entails simple contracts for governmental services.¹⁸³ Thus, one or more public agencies may contract with one or more other agencies to provide governmental services or undertakings which "any of the public agencies entering into the contract is authorized by law to perform."¹⁸⁴ The required formalities are that the contract be authorized by the governing body of each party and that the contract "set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties."¹⁸⁵ In conclusion, under the Oklahoma Interlocal Cooperation Act it is probably sufficient if any one of the contracting parties has the power to perform the function or service which is the subject matter of the contract. It is not necessary that all of the contracting entities be so empowered.¹⁸⁶

177. *Id.* § 1004(f).

178. *Id.* § 1005.

179. *Id.* § 1006.

180. *Id.*

181. *Id.* § 1004(c).

182. Application of Southern Okla. Dev. Trust, 470 P.2d 572, 574 (Okla. 1970). Merrill, *supra* note 173, at 367-68.

183. OKLA. STAT. tit. 74, § 1008 (1981).

184. *Id.*

185. *Id.*

186. Merrill, *supra* note 173, at 357-360; Merrill, *Interlocal Cooperation Acts: A Brief Survey*, 41 OKLA. B.J. 1399, 1400 (1970).

VIII. CONCLUSION

Because a public trust is a public agency, its operation involves considerations, such as the open meeting requirement, that might not apply to a nonprofit corporation or other private entity. In addition, the permissible uses of a public trust are, to a large degree, circumscribed by the authorized purposes and functions of its beneficiary. Nevertheless, if employed in the proper manner, the public trust can be a useful vehicle for rendering services to the public or for developing industry.