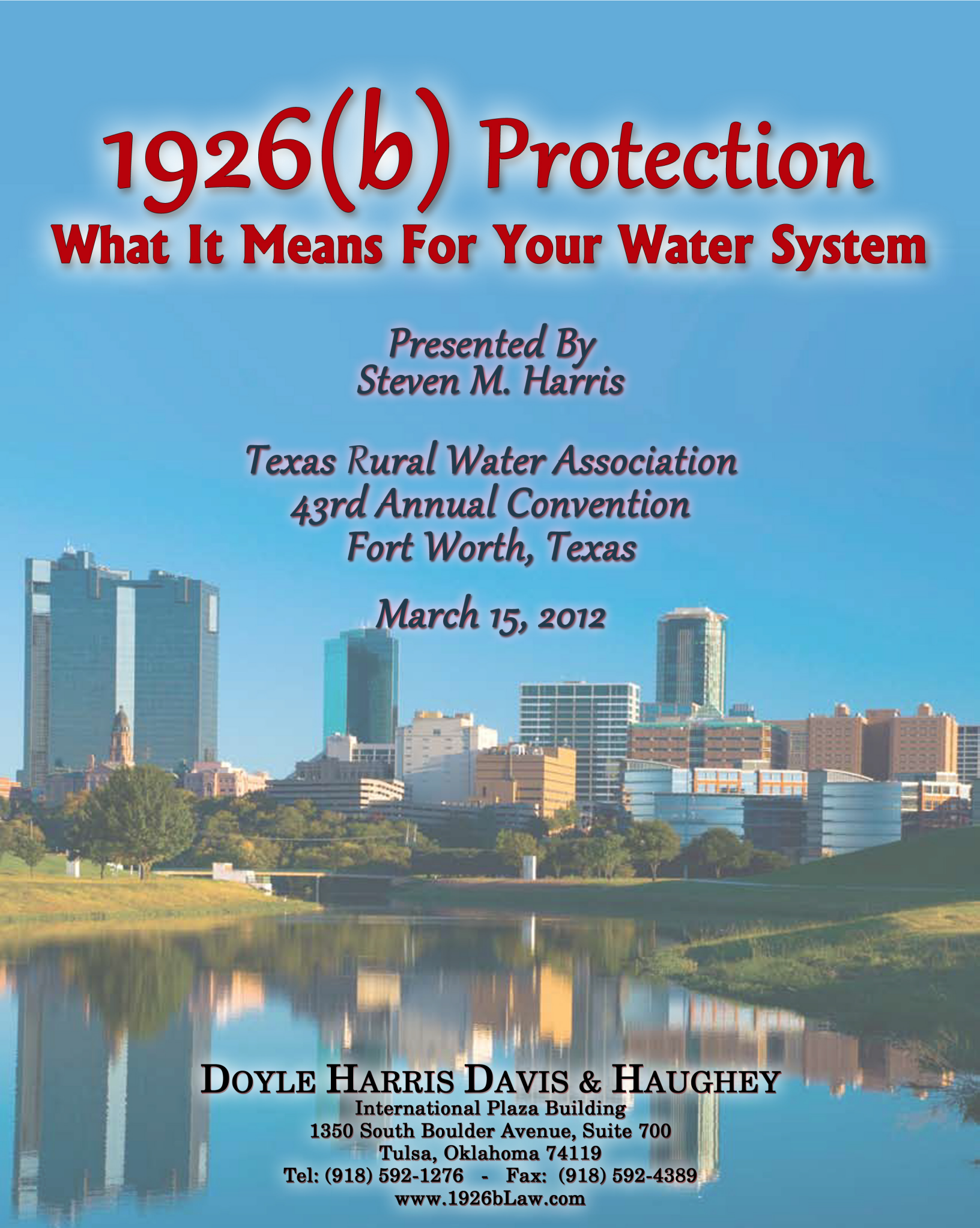
1926(b) Protection

What It Means For Your Water System

Presented By
Steven M. Harris

Texas Rural Water Association
43rd Annual Convention
Fort Worth, Texas

March 15, 2012



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7 U.S.C. § 1926(b) In The 5th Circuit (Texas)

"All of the courts that have reviewed § 1926(b) acknowledge that is provisions should be given a liberal interpretation that protects water associations indebted to the [Farmers Home Administration] from municipal encroachment."

***Bluefield Water Ass'n, Inc. v. City of Starkville, Miss.* 577 F.3d 250, 252 (5th Cir.2009)**

At least one circuit court has refused to apply principles of equity to block application of the statute, arguing that the very strong public interest promoted by § 1926(b) is more important than individual equitable concerns. *See Jennings Water, Inc. v. City of North Vernon,* 895 F.2d 311, 316-17 (7th Cir.1989) (equitable estoppel). We agree. We have previously refused "[t]o read a loophole into this absolute prohibition" provided by § 1926(b), *Bear Creek,* 816 F.2d at 1059, and we will not begin now.

***Post Oak Special Utility Dist. v. City of Coolidge, TX* 1996 WL 556992 (5th Cir.1996)**

To secure the protections of § 1926(b) the Utility must establish that (1) it has a continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the Utility "made service available."

Under Texas law, the Certificate gives the Utility the exclusive right to serve the area within its CCN and obligates it "to serve every consumer within its certified area and ... render continuous and adequate service within the area or areas." We hold that the Utility's state law duty to provide service is the legal equivalent to the Utility's "making service available" under § 1926(b). When confronted with a similar issue, other courts have reached the same result, holding that when state law obligates a utility to provide water service, that utility has, for the purposes of § 1926(b), "made service available."

The service area of a federally indebted water association is sacrosanct.

***North Alamo Water Supply Corp. v. City of San Juan, Tex.* 90 F.3d 910 (5th Cir.1996)**

The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b). See *Moore Bayou Water Association, Inc. v. Town of Jonestown,* 628 F.Supp. 1367 (N.D.Miss.1986) (holding municipal condemnation of water association's facilities and certificate violative of § 1926(b)).

***City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.* 816 F.2d 1057 (5th Cir.1987)**

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7 U.S.C. § 1926(b). This provision **prevents local governments from expanding into a rural water association's area and stealing its customers**; the legislative history states that the statutory provision was intended to protect "the territory served by such an association facility against [other] competitive facilities" such as local governments, as otherwise rural water service might be threatened by "the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." S.Rep. No. 87-566, at 67 (1962), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309.

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The Purpose of 7 U.S.C. § 1926(b)

("*prevents local governments from expanding into a rural water association's area and stealing its customers*")

1. **Encourage Rural Development**
2. **Spread Fixed Costs Over Large Group Of Users (Create An Economy Of Scale)**
3. **Prevent Rural Water Costs From Becoming Prohibitively Expensive To Any Particular User**
4. **Provide fresh and clean water to rural households**
5. **Protect the federal government as insurer of the loan**

> 7 U.S.C. § 1926(b). This provision ***prevents local governments from expanding into a rural water association's area and stealing its customers***; the legislative history states that the statutory provision was **intended to protect "the territory served by such an association facility against [other] competitive facilities**" such as local governments, as otherwise rural water service might be threatened by "the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." S.Rep. No. 87-566, at 67 (1962), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309.
>
> **The concept of economies of scale is an integral part of § 306(b)'s rationale; by protecting a rural water association's customer base, the provision allows such associations to spread their fixed costs over a large group of users. In so doing, the statute aims to prevent rural water costs from becoming prohibitively expensive to any particular user, to develop a system providing fresh and clean water to rural households, and to protect the federal government as insurer of the loan.** *Id.* ("By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water."); *see also Lexington-S. Elkhorn Water Dist. v. City of Wilmore,* 93 F.3d 230, 233 (6th Cir.1996) (stating that the Act "safeguard[s] the financial viability of rural associations and Farmers Home Administration loans" and "encourage[s] rural water development by expanding the number of potential users"). We have stated that this "provision 'should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment.' " *Lexington-S. Elkhorn,* 93 F.3d at 235 (citation omitted).
>
> Le-Ax Water Dist. v. City of Athens, Ohio 346 F.3d 701, *705 (C.A.6 (Ohio),2003)

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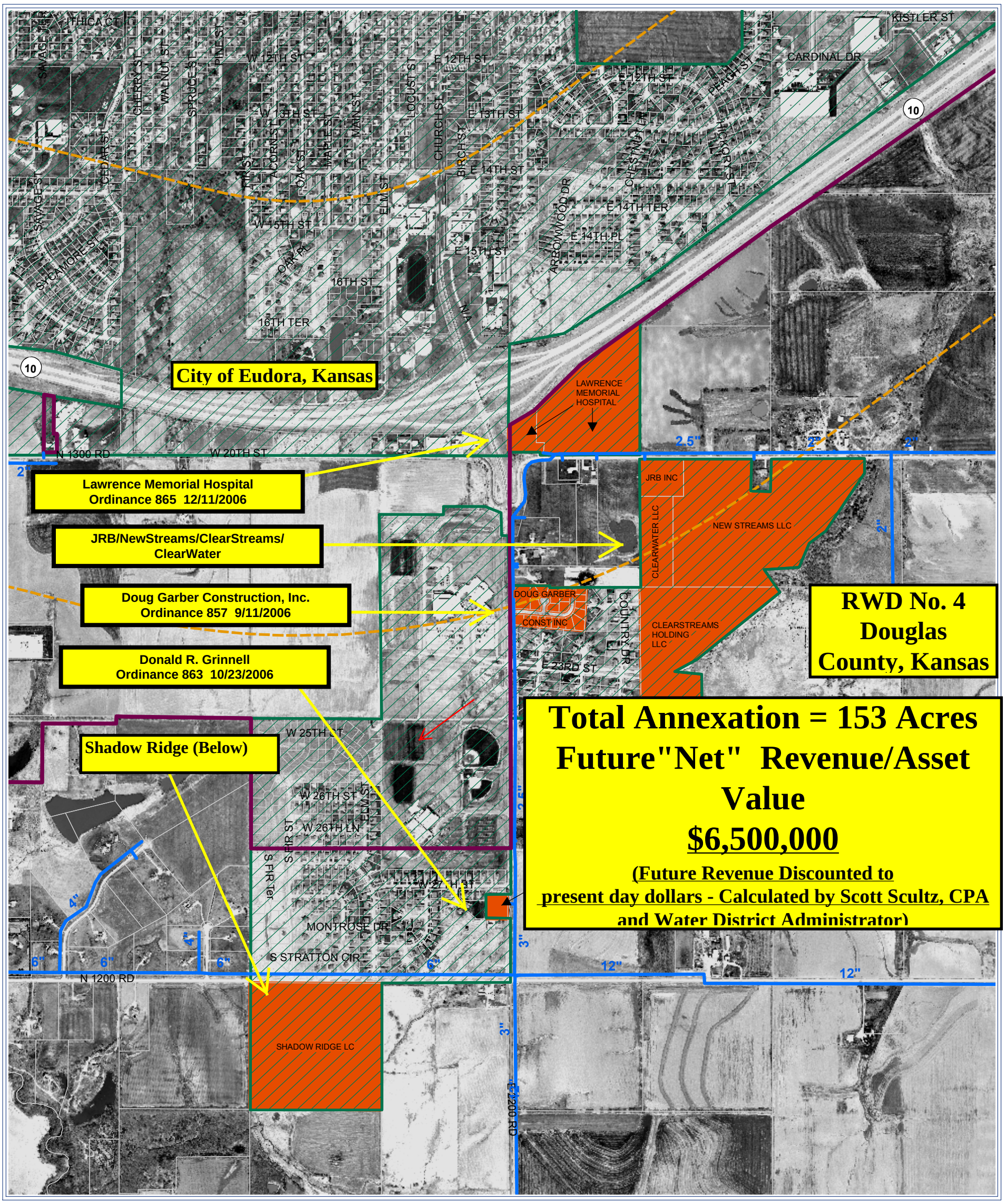

Map Key

- Douglas Co. RWD 4 Waterlines
- Douglas Co. RWD 4 Boundary
- K-10 Corridor Boundary
- City of Eudora Incorp. Area (2006)
- City of Eudora Annexed Areas

Notes:
***Data Source: Douglas County, Kansas**

Aerial Imagery: Douglas County LIDAR color imagery (2006) converted to grayscale.

N

0 0.25 0.5

Miles

1 inch equals 1,000 feet

Created: Jan. 12, 2008
Jason Downs, Downs Geomatix, L.L.C.

City of Eudora Annexed Areas
INCLUDING
City of Eudora Current Service Area
AND
2006 Aerial Imagery

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The Rural Water District/Association Must Be Federally Indebted

Being *federally indebted* means:

1. **Indebted to USDA/Rural Development on a loan made by that Agency**
2. **Indebted to any entity that acquired the loan originally made by USDA/Rural Development (for example, CapMark, GECC)**
0. **Indebted to any private lender on a loan guaranteed by the federal government/USDA/Rural Development**

In 1961, Congress amended 7 U.S.C. § 1926(a) to authorize the United States Farmer's Home Administration (FMHA) **to make loans to nonprofit water service associations** for "the conservation, development, use, and control of water." [FN1] Congress enacted 7 U.S.C. § 1926(b), in turn, to govern the terms of federal loans made to those associations. Section 1926(b) provides that, **for an association indebted by a loan to the federal government** under the statute, "[t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, 701 (C.A.10 (Okla.),2004)

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Making Service Available

The Water District Must Have Adequate Facilities Within Or Adjacent To The Area To Provide Service To The Area Within A Reasonable Time After A Request For Service Is Made (At A Cost That Is Not Unreasonable, Excessive and Confiscatory).

Be Closer (Time To Connect)

Have More Water Capacity (Domestic Water – Fire Protection Not Required)

Cost Should Be Consistent With Other Districts (Cannot Be Unreasonable Or Excessive)

To determine whether service was made available, many courts begin with a "pipes in the ground" or "physical ability" approach that examines whether the water association has the physical means presently to serve the area. This inquiry asks whether the association can demonstrate " 'that it has adequate facilities within or adjacent to the area to provide service to the area **within a reasonable time after a request for service is made**.' " *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1203 (10th Cir.1999) (citation omitted). **The Tenth Circuit has adopted this approach but has also required that the water association have the right under state law to serve the area in question**. *Id.* at 1202 n. 8. **The Eighth Circuit applies this same test, requiring that a water association show both that it has the physical means to serve the area and that it has a legal right to do so.** *Rural Water System # 1 v. City of Sioux Center,* 202 F.3d 1035, 1037 (8th Cir.), *cert. denied,* 531 U.S. 820, 121 S.Ct. 61, 148 L.Ed.2d 28 (2000).

Neither of those circuits requires that a water association have a legal *duty* to serve in order to receive protection under § 1926. That is, however, the approach of the Fourth Circuit, which apparently requires *both* a state-law duty to serve and a physical ability to serve. *Bell Arthur Water Corp. v. Greenville Utils. Comm'n,* 173 F.3d 517, 525-26 (4th Cir.1999).[FN1] The Fifth Circuit has adopted a far looser approach, apparently holding that service is made available through *either* a state-law duty to serve *or* a physical ability to serve. *N. Alamo Water Supply Corp. v. City of San Juan,* 90 F.3d 910, 916 (5th Cir.), *cert. denied,* 519 U.S. 1029, 117 S.Ct. 586, 136 L.Ed.2d 515 (1996).

FN1. The Fourth Circuit in *Bell Arthur* reports that we also have adopted this approach. *See Bell Arthur Water Corp. v. Greenville Utils. Comm'n,* 173 F.3d 517, 526 (4th Cir.1999). As we explain below, however, the *Bell Arthur* court was apparently misreading our decision in *Lexington-S. Elkhorn.* We have only required (like the Tenth Circuit) a state-law *right* (not duty) to serve the area to invoke § 1926.

Le-Ax Water Dist. v. City of Athens, Ohio 346 F.3d 701, *706 (C.A.6 (Ohio),2003)

However, rural water associations protected by § 1926 are subject to price restraints under the threat of losing their § 1926 protection. They are not free at their whim to price monopolistically. As we have stated, "even [if] a rural water district has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made, the cost of those services may be so excessive that it has not made those services available under § 1926(b)." Id. at 1271 (majority) (internal citations and quotation marks omitted) (emphasis supplied). "[I]f the city can show that [the rural water district's] rates or assessments were unreasonable, excessive, and confiscatory," we stated, "then the water district has not made services available under § 1926(b)," and therefore is not entitled to § 1926 protection. Id. Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, *719

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Providing Adequate Service Is Mandatory Under Federal Law

Federal Regulations Specifically Require The Provision Of Adequate Service To Customers "Within The Service Area Who Can Feasibly And Legally Be Served".

Plaintiff argues, and we agree, that the federal regulations governing the FmHA loan program impose a duty to provide service on loan recipients. In fact, it is clear that **by accepting loans from the FmHA, Plaintiff agreed to abide by the governing federal regulations, which specifically require the provision of adequate service to customers "within the service area who can feasibly and legally be served.**" 7 C.F.R. § 1942.17(n)(2)(vii); *see Wayne v. Village of Sebring,* 36 F.3d 517, 528 (6th Cir.1994) (stating that 7 C.F.R. § 1942.17(n)(2)(vii) **requires applicants for FmHA funds to "agree, as a condition of receiving funds, that a person within the service area who can feasibly and legally receive water service has a direct and private right of action against the fund recipient if the recipient fails to make adequate service available")**.

Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow 191 F.3d 1192, 1203 (C.A.10 (Okla.),1999)

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Burden of Proof

<u>All Doubts</u> As To Whether A Federally Indebted Rural Water District/Association Is Entitled To 1926(B) Protection Are <u>Resolved In Favor Of The Water District/Association</u>.

We have noted that *715 **"[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the F[M]HA-indebted party seeking protection for its territory**." *Sequoyah,* 191 F.3d at 1197. *See also North Alamo Water Supply Corp. v. City of San Juan, Tex.,* 90 F.3d 910, 915 (5th Cir.1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect F[M]HA-indebted rural water associations from municipal encroachments.").

Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, *715 (C.A.10 (Okla.),2004)

Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory. *See North Alamo Water Supply Corp. v. City of San Juan, Tex.,* 90 F.3d 910, 913 (5th Cir.1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachments."); *see also Jennings Water, Inc. v. City of North Vernon, Ind.,* 895 F.2d 311, 315 (7th Cir.1989) (listing five federal courts which have concluded that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment).

Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow 191 F.3d 1192, *1197 (C.A.10 (Okla.),1999)

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Detachment / De-annexation

Any Local Or State Law That Purports To Take Away From An Indebted Rural Water Association Any Territory For Which The Association Is Entitled To Invoke The Protection Of § 1926(B) – Is Forbidden And Invalidated.

To the extent that a local or state action encroaches upon the services provided by a protected water association, the local or state act is invalid. *See Title Ins. Co. of Minn. v. I.R.S.,* 963 F.2d 297, 300 (10th Cir.1992) (noting that "under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, federal law preempts and invalidates state law which interferes with or is contrary to federal law."); *Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers,* 27 F.3d 1499, 1504 n. 4 (10th Cir.1994) (" '[F]or the purposes of the Supremacy *716 Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.' ") (quoting *Hillsborough County v. Automated Med. Lab., Inc.,* 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)). **There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).**

To the extent McAlester invested in infrastructure on the assumption that § 1926 was no bar to sales in the deannexed portion, **that assumption was not reasonable**.

Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, 715 - 719 (C.A.10 (Okla.),2004)

This seems to be exactly what happened here. **Having a "private" plaintiff bring a state detachment suit does not negate or trump a district's Section 1926 defense.**

Robertson Properties, Inc. v. Detachment of Territory from Public Water Supply Dist. No. 8 of Clay County 153 S.W.3d 320, 326 (Mo.App. W.D.,2005)

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There Is No Requirement That A Federally Indebted Rural Water District/Association Provide Fire Protection In Order To Qualify For 1926(b) Protection

For remand purposes, we point out that the United States District Court for the Northern District of Ohio recently held that, because **§ 1926(b) was not enacted to supply fire protection, a water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b)**. *See City of Sioux Ctr.,* 29 F.Supp.2d at 992-94; *cf. Rural Water Dist. # 3 v. Owasso Utils. Auth.,* 530 F.Supp. 818, 823 (N.D.Okla.1979) (stating that § 1926(b) "was not enacted for the purpose[ ] of fire protection-it was enacted to provide means of securing a 'safe and adequate supply of running household water.' " (citation omitted)). Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow 191 F.3d 1192, *1204 (C.A.10 (Okla.),1999)

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i. Fire protection. The City notes that "[m]uch of the evidence in this case centers on the question of whether Rural Water can provide water for fire protection," Defendant's Post-Trial Brief, p. 10, but nowhere*993 has the City cited any authority whatsoever for the proposition that a rural water association must provide adequate fire protection to obtain the protections of § 1926(b), or even identified any binding obligation on RWS # 1 to provide fire protection as the result of federal, state, or local statutes or regulations. To put it quite bluntly, "fire protection" is a red herring.

Indeed, the only court to consider the question directly-in a decision not cited or distinguished by the City in pre- or post-trial briefing-has rejected the contention that provision of fire protection is a requirement for § 1926(b) protection of service area. In *Rural Water Dist. # 3 v. Owasso Utilities Auth.,* 530 F.Supp. 818 (N.D.Okla.1979), the court also noted that, as here, "much time was expended and testimony elicited as to the adequacy of the Water District system for the purposes of fire protection." *Owasso,* 530 F.Supp. at 823. The court in *Owasso* dismissed the question even more bluntly than this court has:

The Court finds that § 1926(b) of the Agricultural Credit Act, Title 7 U.S.C. § 1921 *et seq.,* was not enacted for the purposes of fire protection-it was enacted to provide means of securing a "safe and adequate supply of running household water." There is no evidence in the record that the Water District is not effectuating the purpose of the Statute with the implementation of its water system....

... There is nothing in the Act itself to preclude the Owasso Utilities Authority from maintaining a water line for the purposes of fire protection only. Section 1926(b) does not encompass such a purpose.

Owasso, 530 F.Supp. at 823; *see also North Shelby Water Co. v. Shelbyville Muni. Water and Sewer Comm.,* 803 F.Supp. 15, 23 (E.D. Ky.1992) ("The

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STRATEGIES FOR PROTECTING THE TERRITORY OF FEDERALLY INDEBTED RURAL WATER DISTRICTS/ASSOCIATIONS

1. **Develop Political Support From Your Membership**

   a. Educate the membership on the purposes of 1926(b) ("economy of scale")

   b. Publish a monthly newsletter – to keep the membership informed

   c. Encourage direct participation in monthly meetings

2. **Expand the System and Improve Service ("Making Service Available")**

   a. Expand the legal territory of your district/association to the maximum

   b. Acquire maximum water rights and sources of supply

   c. Improve volume and pressure to anticipate new developments

   d. Devise long term engineering plans for future services

   e. Extend lines into anticipated growth areas

   f. Maintain Electronic Data on your system (WaterCad, etc.) so you can document your ability to provide service to prospective customers

3. **Establish Fair and Equitable Rate Structure – Based on Local and State Criteria**

   a. Publish a uniform rate schedule modeled after surrounding cities and other rural water districts/associations. Rates must not be "confiscatory".

4. **Review Your Formation Records – Insure You Remain a Qualified Non-Profit or Quasi Governmental Entity – or State Agency**

   a. Obtain complete written documentation of formation

   b. Obtain legal descriptions of service area where you provide service

   c. Obtain complete documentation of Government Loan records

5. **Remain Indebted to the Federal Government – and Obtain New Loans**

   a. Without Federal Indebtedness – You Have No 1926(b) Protection

6. **Don't Sit On Your Legal Rights – Challenge Encroachment Early**

   a. Consult legal counsel to send appropriate warnings to Encroachers.

   b. Engage Encroachers <u>early</u> to attempt to resolve disputes

   c. File suit in <u>Federal Court</u> when all other remedies and options are exhausted

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The typical information/documents needed from the Water District to establish entitlement to 7 U.S.C. § 1926(b) protection are as follows:

- **Creation Documents:**
  - **Petition to Incorporate and Organize**
  - **Notice**
  - **Publication**
  - **Order Incorporating and Organizing**

- **Indebtedness on USDA Loan(s)**
  - **Note**
  - **Mortgage**
  - **Security Agreement**
  - **Bond Documents**
  - **Transcript of Proceedings**

- **Made Service Available issue**
  - **Identify Disputed Customers**
  - **Identify when each Disputed Customer requested service from City**
  - **Identify potable water needs of customers**
  - **Identify District's facilities as of the date each Disputed Customer requested water service**
  - **Engineer Report concerning how District could have provided potable water service to each Disputed Customer and at what cost**
  - **What does the District charge the customer to connect to its system**
    - **Membership fee**
    - **Connection/meter fee**
    - **Impact fee**
    - **Cost of facilities**
    - **Etc.**
  - **What do other similarly situated water providers charge a customer to connect:**
    - Membership fee
    - Connect/meter fee
    - Impact fee
    - Cost of facilities
    - Etc.
  - **Has the District ever released a customer to another water provider because it was to expensive to connect the customer to the District's system**
  - **What is the practice of the similarly situated water providers in relation to releasing a customer when the cost to serve is high**
  - **What is the range of charges to connect a customer the District has charged**
  - **What is the range of charges similarly situated water providers have charged customers**

The typical information needed from the City/competitor is as follows:

1. **Identification of all water customers served by the City within the service area of the Water District, including name, address and legal description**
2. **Identification of the date each Disputed Customer requested water service**
3. **Identification of the estimated potable water requirements of each Disputed Customer**
4. **Identification of the facilities on each property which requires potable water service**
5. **Identification of the volume of water delivered to each disputed customer on a monthly basis**
6. **Identification of all charges the City required each Disputed Customer to pay to obtain water service**
7. **Identification of the application process by which each Disputed Customer obtained water service**
8. **Identification of the City's water distribution system as of the date the first Disputed Customer requested water service and all extensions and improvements made since that date, as well as the date such extension or improvement was made.**
9. **Identification of the City's policies regarding who pays for line extensions or facility improvements needed to serve a water customer.**

It is important in these cases to have a good expert engineering report to address the "made service available" issue, i.e., to disclose that at the time each Disputed Customer requested water service, the District had facilities in sufficient proximity from which service could have been provided within a reasonable time, as well as address the cost factor outlined by the *Ellsworth* Case. It is also very helpful if the expert engineer provides a map depicting the District's boundaries and system as they existed at the time each Disputed Customer requested service and disclosing what improvements or extensions would be needed to serve that customer. You will also need an expert for damage calculations. The damage calculations should be made in such a manner that the damages for service to each Disputed Customer can be identified separately. Residential subdivision, apartment complex and similar developments will be considered one Disputed Customer for purposes of the "made service available" evaluation.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AQUA WATER SUPPLY CORPORATION, Plaintiff,	§	
vs.	§	CIVIL ACTION NO. 11-885
CITY OF ELGIN, A TEXAS MUNICIPALITY, AUSTIN COMMUNITY COLLEGE DISTRICT PUBLIC FACILITY CORPORATION, A TEXAS PUBLIC FACILITY CORPORATION; BRYAN W. SHAW, BUDDY GARCIA and CARLOS RUBINSTEIN, in their official capacity as Commissioners of the TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, AN AGENCY OF THE STATE OF TEXAS; and THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, AN AGENCY OF THE STATE OF TEXAS, Defendants.	§	**JURY TRIAL DEMANDED**

PLAINTIFF'S ORIGINAL COMPLAINT AND APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Plaintiff Aqua Water Supply Corporation ("Aqua") and for its claims and causes of action against the Defendants states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1331, as this case is based on a federal question claim brought under 7 U.S.C. § 1926(b), 42 U.S.C. § 1983, and U.S. Const. art. VI, cl. 2, otherwise known as the Supremacy Clause. This Court also has jurisdiction over Aqua's claims for declaratory judgment under the Federal Declaratory

Judgment Act, 28 U.S.C. §§ 2201 and 2002, and Rule 57 of the Federal Rules of Civil Procedure.

2. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(1) and (2) because at least one Defendant resides in this judicial district, and a substantial part of the events giving rise to Aqua's claims occurred, and continues to occur, in this judicial district.

FACTUAL ALLEGATIONS

3. Aqua Water Supply Corporation ("Aqua") is a rural, non-profit water supply corporation, created in 1968 pursuant to Article 1434(a) of the Texas Revised Civil Statutes, and operating under Chapter 67 of the Texas Water Code. Aqua's principal office and place of business is located in Bastrop County, Texas. Aqua is an "association" within the meaning of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. § 1926, *et seq*.

4. Defendant Austin Community College District Public Facility Corporation is a Texas Public Facility Corporation ("ACC"), and may be served with process by serving its Registered Agent with the Texas Secretary of State, Stephen B. Kinslow, at 5930 Middle Fiskville Road, Texas 78752.

5. Defendants Bryan W. Shaw, Buddy Garcia, and Carlos Rubinstein, in their official capacity as Commissioners of the Texas Commission on Environmental Quality ("TCEQ"), a state agency, are charged with the primary responsibility for implementing state laws relating to the use and conservation of natural resources, and environmental protection. Tex. Water Code Ann. § 5.012. These defendants are referred to herein

individually and collectively as the "TCEQ Commissioners," are named defendants in their official capacity as commissioners of the TCEQ, and may be served with process by serving each at 12100 Park 35 Circle, Austin, Texas 78753.

6. Defendant City of Elgin ("Elgin") is a Texas municipal corporation organized and existing under the laws of Texas and located in Bastrop County and Travis County, Texas. This Defendant may be served with process by serving Interim City Manager Greg Vick at 310 North Main Street, Elgin, Texas 78621. Elgin is a home rule municipality, which owns and operates a municipal water supply system and provides water service to customers/residents, some of which are situated within Aqua's Certificated Area ("Aqua's Territory" or "Aqua's CCN").

7. Defendant the Texas Commission on Environmental Quality ("TCEQ") is an agency of the State of Texas, and may be served through its Executive Director, Mark R. Vickery, at 12100 Park 35 Circle, Austin, Texas 78753.

8. Aqua is duly empowered to and has borrowed money from the United States of America acting through the United States Department of Agriculture (USDA), originally on June 12, 1989, and again on September 26, 2002. Aqua remains indebted on said loans. As a condition of said loans, Aqua has pledged to the USDA its system infrastructure, land, and legal right to provide service, including all rights held by Aqua under Aqua's CCN. Aqua has the right to be the exclusive water service provider within Aqua's Territory pursuant to 7 U.S.C. § 1926(b).

9. Aqua enjoys the protection of 7 U.S.C. § 1926(b), by reason of its indebtedness to the Federal Government. [Congress enacted 7 U.S.C. § 1926(b) as part

of a federal statutory program to extend and guarantee loans and grants to certain associations providing soil conservation practices, water service, or management, etc.]

The statute states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

10. 7 U.S.C. § 1926(b) prohibits municipalities or similar entities from exercising their powers to sell water, and from placing conditions or restrictions on the service provided or made available by the indebted association or competing with a federally indebted association, when the exercise of such powers would result in curtailment or limitation of the service provided or made available by a federally indebted association. *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996). *See also Pittsburg County Rural Water Dist. No. 7 v. City of McAlester* 358 F.3d 694 (10th Cir. 2004).

11. On November 1, 1979, Aqua was issued CCN Number 10294 by the Public Utility Commission of Texas, establishing Aqua's "service area," which is herein referenced as "Aqua's Territory," "Aqua's CCN," or "Aqua's Certificated Area."

12. Elgin is and has been selling water within "Aqua's Territory" (Aqua's federally protected service area) to approximately 2,000 potential customers of Aqua (herein "Existing Customers"), to which Aqua "made service available" as required in order to obtain and qualify for 7 U.S.C. § 1926(b) protection. In *North Alamo Water Supply Corp. v. City of San Juan*, the Fifth Circuit held that a Texas Water Supply Corporation (such as Aqua) meets the "made service available" requirement because of its legal obligation to provide service under state law. *North Alamo*, 910 F.3d at 916. However, Aqua meets the "made service available" requirement even under the more strict application of the statute under the "Pipes in the Ground Test" adopted by the Tenth Circuit, as well as other courts. *See, e.g., Sequoyah County RWD No. 7 v. Town of Muldrow*, 191 F.3d 1192 (10th Cir. 1999), and *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035 (8th Cir. 2000).

13. Aqua has brought this action seeking to enforce its rights as the exclusive water service provider within Aqua's Territory granted it by virtue of 7 U.S.C. § 1926(b).

14. The courts that have addressed 7 U.S.C. § 1926(b) have made it clear that the statute should be applied broadly to protect associations indebted to the Federal Government (in this case, USDA/Rural Development) from competition from expanding municipal systems, whatever form the competition may take:

> "The clear message of the three federal cases applying 7 U.S.C. § 1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 425 (S.D. Ind. 1988), affirmed at 895 F.2d 311 (7th Cir. 1989).

> "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory."

Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1197 (10th Cir. 1999).

> Finally, **any "[d]oubts** about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory."

Rural Water System #1 v. City of Sioux Center, 202 F.3d 1035, 1038 (8th Cir. 2000) (emphasis added).

THE ACC PROPERTY

15. Aqua's CCN covers much of Bastrop County, Texas, including a 98-acre tract of land on U.S. Highway 290 west of the City of Elgin, Texas (herein the "ACC Property"). On December 10, 2010, ACC purchased this tract for future use as a college campus. As part of its development of the tract, ACC (or an affiliated entity identified as "Austin Community College"), acting through its engineer and agent, sent a written request to Aqua seeking a water service feasibility study. Aqua has a 12-inch waterline in close proximity to the ACC Property, and at the time the request for the feasibility study was requested could have provided and currently has the ability to provide water service to meet the needs of the ACC Property within a reasonable period of time. Aqua

caused its engineers to prepare the feasibility study and provided complete details of the study to ACC's retained engineering firm and agent.

16. On July 12, 2011, ACC, by and through its agent and engineering representative, inquired with Aqua about procedures available to forego receiving water service from Aqua and to obtain water service from Elgin. Aqua responded later that same day, advising ACC's agent and engineering representative that the ACC Property was within Aqua's certificated service area; that Aqua was ready, willing, and able to provide water service; and that Aqua was not willing to release the ACC Property from its certificated service area.

17. On September 1, 2011, ACC submitted a written request to the TCEQ and/or the TCEQ Commissioners for an expedited release of its 98-acre tract of land from Aqua's Territory/CCN #10294, pursuant to Texas Water Code § 13.254(a-5).

18. Under the law as it existed both before and after September 1, 2011, the TCEQ and/or TCEQ Commissioners should reject ACC's application in accord with *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 914 (5th Cir.1996), because Aqua had borrowed money from the federal government to finance its infrastructure, including the lines that are in close proximity to the ACC Property, because Aqua has made service available to the ACC Property pursuant to 7 U.S.C. § 1926(b), and because Aqua has pledged its revenues and other assets (including its rights under its CCN) as security for the federal loan.

19. Effective September 1, 2011, the Texas Legislature changed the Texas Water Code, specifically empowering the TCEQ and/or TCEQ Commissioners not to

consider whether water supply corporations like Aqua were "a borrower under a federal loan program" in deciding whether to allow a landowner to obtain "decertification" of its property. *See* Tex. Water Code Ann. § 13.254(a-1 and a-6). Indeed, this state legislation dictates that under some circumstances, the TCEQ and/or the TCEQ Commissioners **may not** base its/their decision "on the fact that a certificate holder is a borrower under a federal loan program." *Id.* at 13.254(a-6). Simply stated, this is a clear mandate by the Texas Legislature that directs a Texas agency and its commissioners to violate federal law.

20. As alleged above, Elgin has offered, operated, and sold, and continues to offer, operate, and sell, water services in competition with Aqua within Aqua's federally protected service area. This competition, upon information and belief, extends to the ACC Property.

COUNT ONE

VIOLATION OF 42 U.S.C. § 1983 – EXISTING CUSTOMERS

21. Aqua incorporates by reference all factual allegations above.

22. In order to state a cause of action under 42 U.S.C. § 1983, Aqua must allege only that some person has deprived it of a federal right, and that such person acted under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980).

23. Aqua has a federal right under 7 U.S.C. § 1926(b) to be protected from any curtailment or limitation of its rights to sell water within Aqua's Territory.

24. Elgin's actions of selling water to certain "Existing Customers" situated within Aqua's Territory have deprived Aqua of the above-described federal right.

25. Elgin's actions of selling water to these "Existing Customers" are and have been conducted under color of state law, by virtue of its purported authority to sell water in the State of Texas.

26. Aqua has suffered damages as a result of the wrongful acts of Elgin selling water to the "Existing Customers," and by Elgin's acts of offering to sell water to residents or entities situated within Aqua's Territory in an amount not yet determined, but in any event greater than $75,000.

COUNT TWO

DECLARATORY JUDGMENT – 7 U.S.C. § 1926(b) – EXISTING CUSTOMERS

27. Aqua incorporates by reference all allegations above.

28. This claim is brought pursuant to and in accordance with 28 U.S.C. §§ 2201 and 2202, seeking a declaration of the rights and other legal relations of the parties.

29. There exists an actual case or controversy between Aqua and Elgin regarding Elgin's right to sell water within Aqua's Territory to the "Existing Customers," and regarding the compensation (damages) Aqua should receive for such sales.

30. Aqua seeks to have the Court declare the rights and other legal relations of the parties as to the right of Elgin to sell water within Aqua's Territory to the "Existing Customers."

31. Furthermore, Aqua seeks to have the Court declare reasonable damages that Elgin must pay Aqua for its past and future sales of water within Aqua's Territory to the

"Existing Customers," until transition can be completed that eliminates Elgin's encroachment(s).

COUNT THREE

INJUNCTION – EXISTING CUSTOMERS

32. Aqua incorporates by reference all allegations above.

33. Aqua does not have a proper and adequate remedy at law, and injunctive relief is a proper remedy for violations of 42 U.S.C. § 1983 and 7 U.S.C. § 1926(b).

COUNT FOUR

CONSTRUCTIVE TRUST – EXISTING CUSTOMERS

34. Aqua incorporates by reference all allegations above.

35. Any and all water lines and facilities owned by Elgin to serve the "Existing Customers" within Aqua's Territory should be declared to be held in constructive trust for the use and benefit of Aqua.

COUNT FIVE

VIOLATION OF 42 U.S.C. § 1983 – ACC PROPERTY – ELGIN

36. Aqua incorporates by reference all allegations above.

37. In order to state a cause of action under 42 U.S.C. § 1983, Aqua must allege only that some person has deprived it of a federal right, and that such person acted under color of state or territorial law. *Gomez v. Toledo*, 446 US 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980).

38. Aqua has a federal right under 7 U.S.C. § 1926(b) to be protected from any competition with or curtailment or limitation of its rights to sell water within "Aqua's Territory."

39. Elgin's actions relating to the ACC Property constitute improper and prohibited competition with Aqua.

40. Elgin's actions are and have been conducted under color of state law, by virtue of its alleged statutory right to sell water within the State of Texas.

41. Aqua has suffered or is in immediate jeopardy of suffering damages as a result of the wrongful acts of Elgin in relation to the ACC Property, in an amount not yet determined, but in any event greater than $75,000.

COUNT SIX

DECLARATORY RELIEF – 7 U.S.C. § 1926(b) – ACC PROPERTY - ELGIN

42. Aqua incorporates by reference all allegations above.

43. This claim is brought pursuant to and in accordance with 28 U.S.C. §§ 2201 and 2002, seeking a declaration of the rights and other legal relations of the parties under 7 U.S.C. § 1926(b) in relation to the ACC Property.

44. There exists an actual case or controversy between Aqua and Elgin, regarding (1) Elgin's right to provide water service to the ACC Property within Aqua's Territory; (2) what compensation, in the form of damages, Aqua should receive for any such past and continuing sales; and (3) the TCEQ Commissioners' authority to decertify a portion of Aqua's CCN.

45. Federal law [7 U.S.C. § 1926(b)] prohibits decertification of any portion of Aqua's CCN if the decertification would function to limit or curtail the water service provided or made available by Aqua within said CCN, or if the decertification would impair the collateral pledged to secure the federal loans referenced above or deprive the federal government of its collateral.

46. The state law, Texas Water Code § 13.254(a-6) (effective September 1, 2011), states that "the [TCEQ and/or TCEQ Commissioners] may not deny a petition [for decertification/removal of an area from a water supply corporation's territory] received under subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program."

47. Texas Water Code § 13.254(a-6), as amended and effective September 1, 2011, unconstitutionally attempts to preempt federal law, in violation of the Supremacy Clause of the Constitution of the United States. Any action by the TCEQ and/or TCEQ Commissioners in furtherance of § 13.254(a-5 and a-6) and the request for decertification submitted to the TCEQ and/or the TCEQ Commissioners by ACC or its affiliated entity (if not the same entity as ACC) directly frustrates an important federal statutory scheme designed to promote rural development, as codified in 7 U.S.C. § 1926. This Texas statute, and any action taken under it, must therefore be declared preempted, void, and unconstitutional, because said statute and action are in direct conflict with the purposes and objectives of 7 U.S.C. § 1926, as described by every Federal Circuit Court that has considered such matters, and to the extent said statute purports to authorize the TCEQ or the TCEQ Commissioners to decertify or revoke any portion of Aqua's CCN.

48. In order to qualify for protection under 7 U.S.C. § 1926(b), an indebted association must have "made service available"—that is, it must have the legal right to serve and the physical ability to serve the disputed customer. [Note that the Fifth Circuit has held that the physical ability to serve element is met in Texas, because of the association's legal obligation to provide service. *North Alamo Water Supply Corp. v. City of San Juan*, 910 F.3d 910 (5th Cir. 1996).] The "legal right" prong of the "made service available" requirement is determined by state law at the time the association first became indebted, and any state law which would purportedly take away that right after such date is preempted by federal law:

> "...state law that defines the service area of an association prior to or at the time it becomes indebted is state law that stands outside the window of §1926(b) preemption and also is state law that can reasonably coexist with the federal law.
>
> * * *
>
> Second, the court is not saying that state law can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally providing service under state law. The state law used to justify the encroachment would clearly conflict with or stand as an obstacle to, the non-encroachment provisions of §1926(b), and consequently would be preempted by superior federal law in the form of §1926(b). *See, e.g., Kinley Corp.*, 999 F.2d at 358 n. 3; *Hankins,* 964 F.2d at 861. Therefore, there is express and conflict preemption of any state law that purports to take away from an indebted association any territory in which the association has both a legal and physical ability to provide service at the time the association is first entitled to invoke the protection of §1926(b)".

Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1529 (N.D. Iowa, 1997) (emphasis added). See also *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004).

> "To the extent that a local or state action encroaches upon the services provided by a protected water association, the local or state act is invalid. . . . There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).

Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 694, 715 (10th Cir. 2004).

> "We addressed this issue in *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694 (10th Cir.2004), which concerned the deannexation of a portion of the existing service territory of a qualified association. We held that "where the federal § 1926 protections *have attached,* § 1926 preempts local or state law that can be used to justify ... encroachment upon [a] disputed area in which an indebted association is legally providing service under state law." *Id.* at 715 (emphasis added) (internal quotation marks and brackets omitted). In other words, a state or local government may not act "to *take away* from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b)." *Id.* at 716 (emphasis added)."

Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass'n 420 F.3d 1082, 1090 (10th Cir. 2005).

49. "Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, federal law preempts and invalidates state law which interferes with or is contrary to federal law." *Title Ins. Co. of Minn. v. I.R.S.*, 963 F.2d 297, 300 (10th Cir. 1992).

50. The application of the preemption doctrine can be applied in one of two ways, either to preclude decertification or merely to preclude the effect decertification would have on the association's legal right to serve:

- Detachment/Deannexation has no effect on § 1926(b) rights. *Pittsburg County Rural Water District No. 7 v. City of McAlester,* 358 F.3d 694 (10th Cir. 2004).

- Detachment/Deannexation is itself preempted. *Robertson Properties, Inc. v. Public Water Supply District No. 8*, 153 S.W.3d 320 (W.D. Mo. 2005).

51. Furthermore, to the extent decertification itself is not preempted, void and unconstitutional, such decertification cannot and does not affect Aqua's 7 U.S.C. § 1926(b) rights. *See Pittsburg County RWD #7*, 358 F.3d at 705-710.

COUNT SEVEN

INJUNCTIVE RELIEF – 7 U.S.C. § 1926(b) – ACC PROPERTY – ELGIN

52. Aqua incorporates by reference all allegations above.

53. Aqua does not have a proper and adequate remedy at law, and injunctive relief is a proper remedy for violation of 42 U.S.C. § 1983, as well as for violations of 7 U.S.C. § 1926(b).

COUNT EIGHT

VIOLATION OF 42 U.S.C. § 1983 – ACC PROPERTY – ACC, TCEQ AND TCEQ COMMISSIONERS

54. Aqua incorporates by reference all allegations above.

55. In order to state a cause of action under 42 U.S.C. § 1983, Plaintiff/Aqua must allege only that some person has deprived it of a federal right and that such person acted under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980).

56. Aqua has a federal right under 7 U.S.C. § 1926(b) to be protected from any curtailment or limitation of its rights to sell water within Aqua's Territory.

57. The actions of ACC and the TCEQ and TCEQ Commissioners constitute an attempt to deprive Aqua of the above-described federal right.

58. The actions of the Defendants (ACC, TCEQ and the TCEQ Commissioners) are conducted under color of state law, by virtue of their alleged statutory right to decertify/remove areas from Aqua's Territory after the date Aqua became indebted to the USDA.

59. Aqua has suffered or is in immediate jeopardy of suffering damages as a result of the wrongful acts of the Defendants (ACC, TCEQ, and TCEQ Commissioners) in relation to the ACC Property, in an amount not yet determined, but in any event greater than $75,000.

COUNT NINE

DECLARATORY JUDGMENT – 7 U.S.C. § 1926(b) – ACC PROPERTY – ACC, TCEQ AND TCEQ COMMISSIONERS

60. Aqua incorporates by reference all allegations above.

61. This claim is brought pursuant to and in accordance with 28 U.S.C. §§ 2201 and 2002, seeking a declaration of the rights and other legal relations of the parties under 7 U.S.C. § 1926(b).

62. There exists an actual case or controversy between Aqua and Defendants ACC, TCEQ, and TCEQ Commissioners concerning the TCEQ's and/or TCEQ Commissioners' authority to decertify a portion of Aqua's CCN, i.e., to remove the ACC Property from Aqua's Territory to allow ACC to obtain water service from another entity (presumably Elgin), and/or whether such decertification, if itself not prohibited, will

negatively affect Aqua's rights under 7 U.S.C. § 1926(b) to be the exclusive potable water provider to the ACC Property.

63. Federal law [7 U.S.C. § 1926(b)] prohibits decertification of any portion of Aqua's CCN if the decertification would function to limit or curtail the water service provided or made available by Aqua or allow competition with Aqua within Aqua's CCN, or function to impair the collateral pledged to secure the federal loans referenced above, or deprive the federal government of its collateral.[1] Decertification of Aqua's Territory is prohibited. Any decertification order (if later issued) cannot take away any of Aqua's Territory for which Aqua is entitled to invoke the protection of § 1926(b), nor will such order (if issued) affect Aqua's 7 U.S.C. § 1926(b) rights to be the exclusive potable water provider to such areas.

64. Texas Water Code § 13.254(a-6) (effective September 1, 2011), states that the TCEQ and/or TCEQ Commissioners may not deny a petition received under subsection (a-5) [a request for decertification/removal of an area from a water supply corporation's territory] based on the "fact that a certificate holder is a borrower under a federal loan program."

65. Texas Water Code § 13.254(a-5 and a-6), as amended effective September

[1] "We addressed this issue in *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694 (10th Cir.2004), which concerned the deannexation of a portion of the existing service territory of a qualified association. We held that "where the federal § 1926 protections *have attached,* § 1926 preempts local or state law that can be used to justify ... encroachment upon [a] disputed area in which an indebted association is legally providing service under state law." *Id.* at 715 (emphasis added) (internal quotation marks and brackets omitted). **In other words, a state or local government may not act "to *take away* from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b)." *Id.* at 716 (emphasis added).**" *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass'n* 420 F.3d 1082, 1090 (10th Cir. 2005) (emphasis added).

1, 2011, unconstitutionally attempts to preempt federal law, in violation of the Supremacy Clause of the Constitution of the United States. Any action by the TCEQ and/or the TCEQ Commissioners in furtherance of § 13.254(a-6) and the request for decertification submitted to the TCEQ and/or TCEQ Commissioners pursuant to § 13.254 (a-5) by ACC or its affiliated entity (if not the same entity as ACC) would be an attempt to directly frustrate an important federal statutory scheme designed to promote rural development, as codified in 7 U.S.C. § 1926. Said state statute, and any action taken pursuant to said statute, must therefore be declared preempted, void, and unconstitutional, because said statute and action are in direct conflict with the purposes and objectives of 7 U.S.C. § 1926 as described by every Federal Circuit Court that has considered such matters. To the extent said Texas statute purports to authorize the TCEQ or the TCEQ Commissioners to decertify or revoke any portion of Aqua's CCN, such authority is preempted and thus void. See Allegations 47-49 and 61 above.

COUNT TEN

INJUNCTIVE RELIEF – ACC PROPERTY – ACC, TCEQ AND TCEQ COMMISSIONERS

66. Aqua incorporates by reference all allegations above.

67. Aqua does not have a proper and adequate remedy at law and injunctive relief is a proper remedy for violation of 42 U.S.C. § 1983, as well as for violations of 7 U.S.C. § 1926(b).

JURY DEMAND

Plaintiff Demands A Jury Trial As To All Issues Triable By Jury.

PRAYER

WHEREFORE, Aqua requests this Court to grant the relief set forth in this Complaint, specifically:

1. A declaration that Elgin's acts of selling water within Aqua's Territory are violations of 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983;

2. A monetary judgment for all damages sustained as a result of Elgin's violations of federal law and wrongful actions;

3. Injunctive relief against Elgin, restraining it from selling water within Aqua's Territory and to Aqua's existing or potential customers;

4. An order compelling the orderly transition of water customers and infrastructure from Elgin to Aqua;

5. A judgment for transfer and/or forfeiture of lines and other water facilities dedicated, conveyed, or constructed by Elgin to serve within Aqua's Territory;

6. A judgment for the return of any and all funds which the Court deems were obtained in contravention of federal law, and through which Elgin has been unjustly enriched;

7. A monetary judgment for all attorneys' fees and costs incurred in this action;

8. A declaration that Texas Water Code § 13.254 is preempted by federal law and shall not be permitted to curtail, encroach, or limit Aqua's exclusive right to provide water service within its federally protected territory, and a permanent injunction against the TCEQ and TCEQ Commissioners from the present and any future attempts to enforce

Texas Water Code § 13.254 against Aqua to decertify or remove any Aqua Territory while Aqua remains indebted to the federal government; or alternatively, a declaration that any order decertifying or removing any area from Aqua's Territory has no effect on Aqua's 7 U.S.C. § 1926(b) rights to such area; and

9. Such further and other relief to which Plaintiff is entitled.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AQUA WATER SUPPLY CORPORATION, Plaintiff,	§	
vs.	§	CIVIL ACTION NO. 11-CV-885
CITY OF ELGIN, A TEXAS MUNICIPALITY, AUSTIN COMMUNITY COLLEGE DISTRICT PUBLIC FACILITY CORPORATION, A TEXAS PUBLIC FACILITY CORPORATION; BRYAN W. SHAW, BUDDY GARCIA and CARLOS RUBINSTEIN, in their official capacity As Commissioners of the TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, AN AGENCY OF THE STATE OF TEXAS, Defendants.	§	**JURY TRIAL DEMANDED** **Oral Argument Requested**

PLAINTIFF AQUA WATER SUPPLY CORPORATION'S RESPONSE AND OBJECTION TO DEFENDANTS SHAW, GARCIA, AND RUBINSTEIN AND TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1, 6 AND 7) (DOC. 15)

COMES NOW Plaintiff Aqua Water Supply Corporation (Aqua) and for its response and objection to Defendants Shaw, Garcia, and Rubinstein (Commissioners) and Texas Commission on Environmental Quality's (TCEQ) Motion to Dismiss respectfully presents the following:

Response to Part I - Nature of the Controversy

TCEQ/Commissioners have misstated and oversimplified the nature of the controversy in their Motion. Aqua seeks a declaration of rights[1] and injunctive relief[2] from state regulation[3] on

[1] See Doc. 1 (Complaint), pp. 16-18, ¶¶ 60-65.

[2] See Doc. 1 (Complaint), Counts 8, 9 and 10, pages 15-18. See also ¶ 8, page 19-20.

the ground that such regulation is pre-empted by a federal statute (7 U.S.C. § 1926(b), hereafter "§ 1926(b)"), which, by virtue of the U.S. Constitution's Supremacy Clause , presents a federal question that the federal courts have jurisdiction to resolve under 28 U.S.C. § 1331.[4] After this suit was filed, the Commissioners/TCEQ proceeded to decertify a portion of Aqua's Certificate of Convenience and Necessity ("CCN" or "Territory"). See Doc. 15-1. Aqua specifically seeks a prospective "declaration that any order decertifying or removing any area from Aqua's Territory has no effect on Aqua's 7 U.S.C. § 1926(b) rights."[5]

Aqua has alleged that (1) it is an association within the meaning of § 1926(b), (2) it has continuing indebtedness to the federal government, (3) the Defendant City of Elgin has encroached on Aqua's Territory, and (4) Texas state law[6] stands as an obstacle to and is preempted by § 1926(b).[7] Doc. 1 at ¶¶ 3, 9, 10, 12, 19, 20, 45, 47. For purposes of the Motion to Dismiss, the Court must accept as true all of the allegations of the Complaint, including the facts set out by the Plaintiff.[8] Therefore, Aqua is entitled to be the exclusive water service provider within its federally recognized service area, free from competition or encroachment from Elgin, or any other entity.

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[3] Texas Water Code § 13.254(a-5).

[4] *Planned Parenthood of Houston and Southeast Tex. v. Sanchez,* 403 F.3d 324, 331 (5th Cir.2005).

[5] See Doc. 1 (Complaint), ¶ 8, page 20.

[6] Texas Water Code § 13.254(a-6).

[7] "To secure the protections of § 1926(b) the Utility must establish that (1) it has a continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the Utility "made service available." *North Alamo Water Supply Corp. v. City of San Juan, Tex.* 90 F.3d 910, 915 (5th Cir.1996).

[8] "This court reviews the grant of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction *de novo. Saraw P'ship v. United States,* 67 F.3d 567, 569 (5th Cir.1995). The party asserting jurisdiction bears the burden of proof on a 12(b)(1) motion to dismiss. *Randall D. Wolcott, M.D., P.A. v. Sebelius,* 635 F.3d 757, 762 (5th Cir.2011). The court takes as true all of the allegations of the complaint and the facts set out by the plaintiff. *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.,* 627 F.3d 547, 553 (5th Cir.2010). *Life Partners, Inc. v. U.S.* 650 F.3d 1026, 1029 (5th Cir.2011).

The TCEQ/Commissioners' decertification order[9] (entered after suit was filed) purports to take away from Aqua a portion of Aqua's Territory for which Aqua is entitled to the protection of § 1926(b). Such action by the TCEQ/Commissioners is preempted and forbidden by federal law. A state or local government may not act to *take away* from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).[10]

Response to Part II - Jurisdiction over State Defendants

This Court has jurisdiction over the TCEQ and the Commissioners. Aqua has sued the TCEQ and its Commissioners in their official capacity. In *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court carved out an exception to Eleventh Amendment immunity and held that enforcement of an unconstitutional law is not an official act, because a state cannot confer authority on its officers to violate the Constitution or federal law. *See American Bank & Trust Co. of Opelousas v. Dent,* 982 F.2d 917, 920-21 (5th Cir.1993). To meet the *Ex Parte Young* exception, a plaintiff's suit alleging a violation of federal law must be brought against individual persons in their official capacities as agents of the state, and the relief sought must be declaratory or injunctive in nature and prospective in effect. *See Saltz v. Tennessee Dep't of Employment Sec.,* 976 F.2d 966, 968 (5th Cir.1992), and *Aguilar v. Texas Dept. of Criminal Justice* 160 F.3d 1052, 1054 (5th Cir.1998). Aqua's federal complaint is in strict compliance with the *Ex Parte Young* exception.

TCEQ/Commissioners erroneously argue that § 1926(b) does not authorize any action against the state, its agencies, or officials. No separate authorization for action is necessary

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[9] Doc.15-1.

[10] *Pittsburg County Rural Water Dist. 7. v. City of McAlester*, 358 F.3d 694, 715 (10th Cir.2004), and *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Ass'n*, 420 F.3d 1082, 1090 (10th Cir.2005). See also *North Alamo Water Supply Corp. v. City of San Juan, Tex.* 90 F.3d 910, 915 (5th Cir.1996), noting, "[T]he service area of a federally indebted water association is sacrosanct."

relative to the preemption claims against the TCEQ/Commissioners. Aqua has an implied right of action to seek injunctive relief from a state statute preempted by federal Spending Clause legislation. *Planned Parenthood of Houston and Southeast Tex. v. Sanchez* 403 F.3d 324, 331-335 (5th Cir.2005).[11] Section 1926(b) is Spending Clause legislation.[12] Texas granted Aqua the power to obtain money from federal agencies (*e.g.*, U.S.D.A.). Tex. Water Code § 67.010 (b). In granting this power, the state bound itself and all its subdivisions to the conditions it had accepted.[13] Therefore, the TCEQ/Commissioners have also waived Eleventh Amendment Immunity. *Miller v. Texas Tech University Health Sciences Center,* 421 F.3d 342, 348 (5th Cir.2005).

Plaintiff's claim against the TCEQ/Commissioners in their official capacity for prospective relief (an injunction against a state statute that is preempted by federal law) is not barred by sovereign immunity. The Eleventh Amendment does not protect state officials from claims for prospective relief when it is alleged that the state officials acted in violation of federal law. *Warnock v. Pecos County, Tex.* 88 F.3d 341, 343 (5th Cir.1996).

The TCEQ/Commissioners contend that the Aqua suit seeks to "...compel the TCEQ and its Commissioners to exercise their statutory authority in a specified manner." (TCEQ Brief at 4.) The Aqua complaint seeks no such remedy. The requested relief applicable to the

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[11] "...[w]e hold that Appellees have an implied right of action to seek injunctive relief from a state statute purportedly preempted by federal Spending Clause legislation." *Planned Parenthood of Houston and Southeast Tex. v. Sanchez,* 403 F.3d 324, 335 (5th Cir.2005).

[12] "Section 1926(b) of Title 7 of the United States Code is most appropriately viewed as a congressional enactment resting upon Congress' powers under the spending clause of the United States Constitution. *See City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1061 (5th Cir.1987)." *Glenpool Utility Services Authority v. Creek County Rural Water Dist. No. 2,* 861 F.2d 1211, 1215 (10th Cir.1988). See also *North Alamo Water Supply Corp. v. City of San Juan, Tex.* 90 F.3d 910, 916 (5th Cir.1996), *citing to City of Madison.*

[13] "Oklahoma thus authorized District No. 2 to borrow from the federal government and to enter into any required agreements in connection with those loans. In so borrowing, Oklahoma—through its authorized entity District No. 2—bound itself and all of its subdivisions, including the City of Glenpool, to the conditions it had accepted." *Glenpool Utility Services Authority v. Creek County Rural Water Dist. No. 2,* 861 F.2d 1211, 1216 (10th Cir.1988).

TCEQ/Commissioners is for (1) a declaration that Texas Water Code § 13.254 is preempted by federal law, (2) a permanent injunction against the TCEQ/Commissioners, precluding future attempts to enforce that statute, and (3) a declaration that any order involuntarily decertifying/removing an area from Aqua's Territory has no force or effect. Doc. 1 at ¶¶ 45-51, 54-67; *see also* Doc. 1 at p.19-20, ¶ 8 (prayer).

Contrary to TCEQ/Commissioner's argument that Aqua is seeking injunctive relief that would "...require an affirmative action by the sovereign" (TCEQ Brief at 4), Aqua prays for an injunction that is prospective, and which would preclude the TCEQ/Commissioners from taking any affirmative action to enforce the unconstitutional Water Code provision. Doc. 1, pp. 19-20, ¶8. Nullifying any past decertification by the TCEQ (*i.e.*, Doc. 15-1) or reinstating Aqua's Territory is also prospective in nature. *Warnock v. Pecos County, Tex.* 88 F.3d 341, 343 (5th Cir.1996), noting, "[P]laintiff's claim for prospective relief (reinstatement), however, is not barred by sovereign immunity."

TCEQ/Commissioners' contention that Aqua has failed to allege a deprivation of a constitutional right overlooks the allegations of the complaint that refer to Aqua's rights under the Supremacy Clause, and the Commissioners' efforts to enforce an unconstitutional state statute against Aqua that is preempted by federal law. See Doc. 1 at ¶¶ 49-51. The exception to Eleventh Amendment immunity embodied in *Ex Parte Young* is applicable here. Aqua seeks to enjoin a state official from enforcing an unconstitutional statute. Stated differently, Aqua's complaint includes specific allegations of unconstitutional conduct by state officials. *See, e.g., Mohler v. State of Miss.* 782 F.2d 1291, 1294 (5th Cir.1986). Independent of this, Aqua is also enforcing its federal right under § 1926(b) through 42 U.S.C. § 1983.[14]

[14] "It follows that Post Rock can sue the City under § 1983 for violations of § 1926." *Rural Water Dist. No. 1, Ellsworth County, Kansas, v. City of Wilson, Kansas,* 243 F.3d 1263, 1274 (10th Cir.2001).

TCEQ/Commissioners' arguments about a "constitutionally protected property interest" miss the mark. (TCEQ Brief at 5.) Aqua's constitutional rights under the Supremacy Clause, and Aqua's suit to enjoin enforcement of an unconstitutional Texas statute, do not depend on whether Aqua's CCN is a "property interest." TCEQ/Commissioners' argument is a straw man. *Creedmoor-Maha Water Supply Corporation v. Texas Commission on Environmental Quality*, 307 S.W. 3d 505, 525, cited by the TCEQ/Commissioners, confirms that under state law, Aqua has a legal right to provide water service. State government cannot take away that right once Aqua's § 1926(b) right attaches.[15] Aqua's § 1926(b) federal right[16] attached when Aqua became indebted to the federal government in 1989 and 2002. Doc. 1 at p. 3, ¶ 8. Aqua's federal right to be the exclusive water service provider within its federally-recognized service area under § 1926(b) is a right that exists alongside its right under the Supremacy Clause of the U.S. Constitution to prevent enforcement by the Commissioners of an unconstitutional and preempted state statute.

Response to Part III - Necessary Parties

The Commissioner defendants are charged with the primary responsibility for implementing state laws relating to the use of, *inter alia*, water. Tex. Water Code Ann. § 5.012. The TCEQ/Commissioners' Exhibit 1 (Doc. 15-1) (signature illegible) was signed in a representative capacity (*i.e.*, "for the Commission"). See Doc. 15-1, page 3. TCEQ/Commissioners apparently contend that when an employee of the TCEQ signs an order as a ministerial function "for the Commission," the employee must also be named as a defendant.

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[15] *See Pittsburg County Rural Water Dist. 7. City of McAlester*, 358 F.3d 694, 715 (10th Cir.2004), and *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Ass'n*, 420 F.3d 1082, 1090 (10th Cir.2005).

[16] "All of these factors support the conclusion that § 1926(b) gives rise to a federal right." *Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas,* 243 F.3d 1263, 1275 (10th Cir.2001) (emphasis added).

No authority is cited supporting this argument beyond a bald reference to Fed.R.Civ.P. 19. Suit against the TCEQ/Commissioners will afford complete relief among the parties, as contemplated by Fed.R.Civ.P. 12(b)(7) and 19. Joinder of an individual assigned the ministerial task of signing orders "for the Commission" is unnecessary.

Response to Part IV - Defendants' Fed.R.Civ.P. Rule 12(b)(6) Argument

a. Prospective v. Retrospective Relief

The TCEQ/Commissioners offer a "Catch-22" argument in support of their motion. They contend that because the decertification order was entered after suit was filed, the only remaining remedy is an "...order reversing the decision of the TCEQ." After posing this further straw man, these defendants then argue that such a remedy is for "retrospective relief," against which the TCEQ/Commissioners have 11th Amendment immunity. Therefore, under the TCEQ/Commissioners' theory of the case, Aqua could never achieve *any* relief against continued unlawful action by the TCEQ or the Commissioners if orders are entered faster than the Court can stop them.

Contrary to TCEQ/Commissioners' assertion, Aqua is not seeking to reverse any order of the TCEQ (no such relief is prayed for in the complaint). *See* Doc. 1 at pp. 19-20. Contemplating that decertification by the TCEQ would occur during the pendency of suit, Aqua has sought a declaratory judgment remedy to have the order of decertification rendered a nullity, insofar as Aqua's § 1926(b) rights are concerned. Doc. 1 at p. 19-20, ¶ 8.

Quern v. Jordan, 440 U.S. 332, 337 (1979), cited by the Defendants, helpfully illustrates the distinction between retrospective and prospective relief in the context of 11th Amendment immunity. The Defendants attempt to create an artificial and singular "retrospective" remedy (to gain the benefit of 11th Amendment immunity), when in fact Aqua's prayer remains prospective

only (because it seeks to prospectively nullify the effect of any order previously granted). Defendants' citation to *Cox v. City of Dallas*, 256 F.3d 281, 308 (5th Cir.2001), does nothing more than reiterate the discussion in *Quern* that 11th Amendment immunity is a bar to retrospective relief, but not prospective relief.[17]

b. Adequate Remedy at Law

The Defendants argue that Aqua will receive compensation under the Texas Water Code for the loss of its territory. (TCEQ Brief at 7.) However, the Texas Water Code is preempted by § 1926(b), which forbids state and local government from involuntarily taking away portions of Aqua's Territory—with or without compensation.[18] There is no compensation mechanism within § 1926(b) that would permit or sanction the loss of Aqua's Territory or provide compensation for that loss.

The fact that Aqua has previously and under different circumstances agreed to decertification is both irrelevant to the case at hand and permissible under federal regulations.[19] A taking of Aqua's Territory and payment of financial compensation cannot be forced upon Aqua; however, Aqua can consent to a decertification, if this consent-based event complies with federal regulations. The TCEQ/Commissioners present no evidence or argument suggesting that Aqua has consented to any taking of its Territory at issue here, nor that it has agreed to accept

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[17] "The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other. *Quern v. Jordan,* 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979)." *Cox v. City of Dallas*, 256 F.3d 281, 308 (5th Cir.2001).

[18] *Pittsburg County Rural Water Dist. 7. City of McAlester*, 358 F.3d 694, 715 (10th Cir.2004), and *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Ass'n*, 420 F.3d 1082, 1090 (10th Cir.2005). *See also North Alamo Water Supply Corp. v. City of San Juan, Tex.* 90 F.3d 910, 915 (5th Cir.1996), noting, "[T]he service area of a federally indebted water association is sacrosanct."

[19] "...it does not prevent the municipality from purchasing facilities from the district, if done pursuant to FmHA regulations." *Glenpool Utility Services Authority v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1216 (10th Cir.1988).

any compensation for such taking. If the TCEQ/Commissioners' Doc. 15-2 is offered to support an estoppel argument, this defense does not deprive the Court of jurisdiction, nor is it relevant to 11th Amendment immunity. Further, estoppel is not a permissible defense to an action brought pursuant to § 1926(b).[20]

The TCEQ/Commissioners argue that, because there is no allegation that Aqua is likely to suffer a future taking that will violate federal law, Aqua is not entitled to prospective injunctive relief for the taking at issue here, which violated federal law. TCEQ/Commissioners cite no authority to support this novel argument. Aqua is entitled to prospective injunctive relief under 5th Circuit precedent.[21]

CONCLUSION/PRAYER

For the reasons stated above, Aqua respectfully prays that the TCEQ/Commissioners' Motion to Dismiss be denied.

Notice Pursuant To Local Rule CV-12

Aqua has determined that discovery is not necessary to respond to the Motion to Dismiss. However, if the Court considers the motion as a Motion for Summary Judgment, Aqua moves

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[20] "At least one circuit court has refused to apply principles of equity to block application of the statute, arguing that the very strong public interest promoted by § 1926(b) is more important than individual equitable concerns. *See Jennings Water, Inc. v. City of North Vernon,* 895 F.2d 311, 316-17 (7th Cir.1989) (equitable estoppel). We agree. We have previously refused "[t]o read a loophole into this absolute prohibition" provided by § 1926(b), *Bear Creek,* 816 F.2d at 1059, and we will not begin now." *Post Oak Special Utility Dist. v. City of Coolidge, Tex.* 1996 WL 556992, 4 (5th Cir.1996).

[21] *Planned Parenthood of Houston and Southeast Tex. v. Sanchez* 403 F.3d 324, 331-335 (5th Cir.2005). See also, *Warnock v. Pecos County, Tex.* 88 F.3d 341, 343 (5th Cir.1996), noting, "[P]laintiff's claim for prospective relief (reinstatement), however, is not barred by sovereign immunity. The Eleventh Amendment does not protect state officials from claims for prospective relief when it is alleged that the state officials acted in violation of federal law. *Ex parte Young,* 209 U.S. 123, 155-56, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908); *Edelman v. Jordan,* 415 U.S. 651, 664, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974); *Brennan v. Stewart,* 834 F.2d 1248, 1252 (5th Cir.1988)."

the Court to permit 30 days to complete discovery and to submit further evidence in response to the motion.

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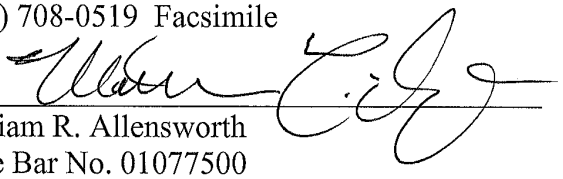
By: 
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ATTORNEYS FOR PLAINTIFF

TCEQ DOCKET NO. _____

J.D. WOLF PROPERTIES, LLC'S	§	**BEFORE THE TEXAS COMMISSION**
PETITION FOR THE EXPEDITED	§	
RELEASE OF PROPERTY	§	
FROM THE RETAIL WATER CCN	§	**ON**
NO. 11590 OF CHISHOLM-TRAIL	§	
SPECIAL UTILITY DISTRICT	§	**ENVIRONMENTAL QUALITY**

PETITION FOR EXPEDITED RELEASE

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

J.D. Wolf Properties, LLC (the "Petitioner"), acting pursuant to Section 13.254(a)(1), Tex. Water Code, and Section 291.113(b), Title 30, Texas Administrative Code, hereby respectfully petitions the Texas Commission on Environmental Quality (the "TCEQ" or the "Commission"), for the expedited release of certain real property it owns in Williamson County from within the area covered by Certificate of Convenience and Necessity ("CCN") No. 11590, and would show the following:

1. Petitioner is acting pursuant to the authority granted to it by the Texas Legislature in Section 13.254 *et. seq.*, Texas Water Code, and asserts to the Commission that the real property that is the subject of this petition comprises approximately 121 acres, located on Williams Drive in Williamson County, Texas (the "Property"). The property is identified by Williamson County Appraisal District numbers R039930, R473857, R300099, and R473858. The Property is not in a platted subdivision actually receiving water service. Surveys of the Property along with legal descriptions are attached as Exhibit A.

2. Petitioner is developing the Property to provide single family, multi family, age restricted residential, and commercial facilities on the Property. Petitioner requires a level of water service which is beyond the capability of the Chisholm Trail Special Utility District (the "Certificate Holder" or "CTSUD").

3. Certificate Holder has been issued retail water service CCN No. 11590. Certificate Holder does not hold a retail sewer service CCN. A map of the area within CCN No. 11590 is attached as Exhibit B. Exhibit B also shows the location of the Property in relation to the CCN area.

5. Certificate Holder is a rural water system with limited financial resources and inadequate water supplies. Certificate Holder cannot supply fire flow to the property. The specifics of Certificate Holder's deficiencies are well known to TCEQ and were recently noted by TCEQ's Executive Director in a meeting on August 10, 2011. Although located within Certificate Holder's CCN, the entirety of the Property is within the city limits of the City of Georgetown.

6. The City of Georgetown can provide water service to the Property at the level Petitioner requires. See Exhibit C.

7. Petitioner will be receiving retail sewer service for the property from the City of Georgetown.

8. On December 14, 2009, more than 90 days in the past, Petitioner submitted written requests for service to Certificate Holder (the "Requests for Service"). The Requests for Service identified the area for which service is sought, the timeframe in which service is needed for current and projected service demands, and the level and manner of service needed for current and projected service demands in the identified area. Copies of the Requests for Service are attached as Exhibit D. These requests, collectively, contain the information required by Section 13.254(a-1), Water Code, and applicable TCEQ regulations.

9. Certificate Holder's responses to the Request for Service are attached as Exhibit E.

10. Certificate Holder is not capable of providing service to Petitioner on a continuous and adequate basis within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands for the property.

11. The chronology of negotiations between Petitioner and Certificate Holder is attached as Exhibit F.

12. The proposed development of the Property is not speculative. Exhibit G contains a list of supporting documentation submitted to the City of Georgetown for approval and those documents listed illustrate the viability of the proposed development on the Property. Petitioner is in the final stages of obtaining various approvals for the initial phases of development. The development cannot occur without fire flow to the Property.

13. Petitioner hereby identifies the City of Georgetown as the Alternate Provider of retail water service to the Property. Alternate Provider has a large water line across the front of the Property and is capable of providing continuous and adequate service, including fire flow, within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands for the Property. Alternate Provider's capability of providing continuous and adequate service within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area is reflected by Alternate Provider's standard service and rate schedule. Certificate Holder requires an "upfront" payment of $2,501,200.00 to serve the Property, without a guarantee of service level. Such is not required by Alternate Provider. Certificate Holder's cost of hookup and per gallon water cost is significantly higher than Alternate Provider. Alternate Provider will be charging its regular standard fees. *See* Exhibit H.

14. Additional, related correspondence, between Petitioner and Certificate Holder is

attached as Exhibit I.

15. Pursuant to 30 Tex. Admin. Code §291.113(b) and (g) and consistent with the intent of HB 2876 and SB 573, Petitioner requests that, in its Order approving this Petition, the Commission at the same time transfer the CCN for the Property to Alternate Provider.

16. Exhibit J contains the name and contact information of an appraiser who Petitioner proposes to use to appraise the value of the CCN for the Property.

17. Petitioner has served on Certificate Holder, via certified mail, return receipt requested, a copy of this Petition prior to the date of filing with the Commission.

18. Petitioner hereby submits a filing fee in the amount of one hundred dollars ($100) to the Commission.

WHEREFORE, Petitioner prays that the Commission grant this Petition, order the decertification of the Property, transfer the CCN for the Property to Alternate Service Provider, and thereafter, the Commission proceed to set the compensation, if any is required, for the value of the CCN for the Property.

Respectfully submitted,

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APPLICATION NO. 37147-C

PETITION FOR EXPEDITED DECERTIFICATION OF CERTIFICATED SERVICE TERRITORY WITHIN CHISHOLM TRAIL SPECIAL UTILITY DISTRICT	§ § § § § § § §	**BEFORE THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

CHISHOLM TRAIL SPECIAL UTILITY DISTRICT'S RESPONSE TO PETITION FOR EXPEDITED DECERTIFICATION

Chisholm Trail Special Utility District (the "District" or "CTSUD") files this Response to the Petition for Expedited Decertification dated September 27, 2011 (the "Petition") filed by J.D. Wolf Properties, LLC ("Petitioner").

OVERVIEW

Chisholm Trail Special Utility District is the holder of Certificate of Convenience and Necessity No. 11590 (the "CCN"). In its Petition, Petitioner requests that TCEQ decertify certain real property encompassing approximately 121 acres (the "Property") from the certificated water service territory of Chisholm Trail Special Utility District pursuant to Texas Water Code § 13.254(a-1). By correspondence dated September 30, 2011, Mr. Kerry Russell, legal counsel for Petitioner, stated that it is the intent of Petitioner "to have SB 573 and 30 Tex. Admin. Code § 13.254(a)(5)" [sic] apply to the Petition.

This Response demonstrates that the Property is not eligible for expedited decertification under Texas Water Code Sec. 13.254(a-5). As will be discussed more fully below, Petitioner does not own the real property that it seeks to decertificate. Further, the statute does not authorize expedited decertification of lands that receive "service."

Chisholm Trail Special Utility District provides "service" to the Property, as defined at Sec. 13.002(21) of the Texas Water Code. For the foregoing reasons, the Property is not eligible for expedited decertification under Sec. 13.254(a-5), and TCEQ must deny the Petition in its entirety.

PRELIMINARY JURISDICTIONAL MATTERS

Federal Indebtedness

Chisholm Trail Special Utility District is indebted to the United States Department of Agriculture's Rural Development Division ("USDA-RD"). The District previously granted deeds of trust to USDA-RD pursuant to which the federal government took a security interest in the District's system, facilities, properties, and assets, including the District's Certificate of Convenience and Necessity.

The District has expended substantial funds to provide retail water service within its CCN, specifically including the Property. In fact, and as will be addressed in more detail below, the District has constructed a 24-inch water transmission and distribution line directly within and across the Property for the specific purpose of serving the Property and other lands within the District's certificated service territory. USDA-RD's security interest includes the District's water transmission line constructed within the Property, the District's right to serve the Property, and revenues derived from service provided to the District's existing and future customers (including those within the Property). The District's loan covenants specifically prohibit the transfer of any loan collateral, including the District's CCN rights to the Property, without the prior written consent of USDA-RD.

For the foregoing reasons, the District objects to the Petition pursuant to 7 U.S.C.A. §1926(b). The federal statute prohibits the decertification of property and prohibits any local or state governmental entity from in any way limiting or restricting the District from providing water service within the certificated service territory in which USDA-RD has a security interest, including the Property that is the subject of the Petition. Federal law preempts the implementation and enforcement of Texas Water Code Section 13.254(a-5), which provides, in direct contravention of federal law, that TCEQ may not deny a petition for decertification based on the fact that a CCN holder is a borrower under a federal loan program.[1]

In the event that TCEQ does not deny the Petition in its entirety for the reasons more fully set forth below, Chisholm Trail Special Utility District urges TCEQ to cease and desist any further processing of the Petition because of the federal statute. The District specifically reserves all of the federal issues in this matter for federal court, in accordance with *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 412 (1964).

Applicable State Law

Based upon Mr. Russell's September 30, 2011 correspondence, the District understands that it is Petitioner's intent that the Petition be considered by TCEQ under Texas Water Code Sec. 13.254(a-5), and not Sec. 13.254(a-1). TCEQ staff has confirmed

[1] A state or local government may not act "to *take away* from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b). *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 716 (10th Cir.2004). See also *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass'n* 420 F.3d 1082, 1090 (10th Cir. 2005). See also *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996).

that the Petition will be processed and evaluated by TCEQ under Sec. 13.254(a-5).[2] As a result, this Response will address the merits of the Petition under Sec. 13.254(a-5) only. In the event that TCEQ evaluates the Petition under Sec. 13.254(a-1), Petitioner requests to be notified accordingly. Under such circumstances, Petitioner will demonstrate that the Petition also does not meet the requisite criteria for expedited decertification set forth in Sec. 13.254(a-1).

RESPONSE TO PETITION

Response to Factual Allegations

The Petition contains many factual inaccuracies. Although not relevant to consideration of a petition for expedited decertification under Section 13.254(a-5) of the Water Code, the District offers the following responses to Petitioner's factual allegations: [3]

1. Paragraph 1 of the Petition asserts that Petitioner is acting pursuant to the authority set forth in Section 13.254 of the Water Code. As discussed more fully below, the Petition does not meet the requisite statutory criteria under Section 13.254(a-5) because Petitioner does not own the Property that it seeks to decertificate and because the District provides service to the property within the meaning of the Water Code. Therefore, Petitioner is not acting in accordance with the statute.

[2] October 7, 2011 telephone conversation with Karen Blaschke, TCEQ Water Supply Division.
[3] The District specifically reserves its rights to supplement this Response in the event that it is processed under Section 13.254(a-1) of the Water Code.

Paragraph 1 of the Petition further asserts that "surveys" of the Property are included with Exhibit "A" to the Petition. No such survey was included in the copy of the Petition furnished by TCEQ to the District.[4]

The District: (a) is indebted to the United States of America (acting through the Department of Agriculture/Rural Development); (b) has made water service available to the Property; and (c) the Property is situated within the federally recognized territory of the District. 7 U.S.C. § 1926(b) bars (x) the Petitioner from obtaining decertification of the Wolf Tract, (y) the Commission from decertifying any land within the District's CCN pursuant to § 13.254, and (z) any alternative water service provider from selling water in competition with the District.

2. Paragraph 2 of the Petition asserts that Petitioner requires a level of water service beyond the capability of the District. The District denies any such allegation. As more fully discussed below, the District owns and operates a 24-inch water transmission and distribution line that is located *within* the Property and that has ample capacity available for service to the Property. Moreover, Exhibit "D" to the Petition evidences that development plans for the Property are only at a "conceptual stage" and thus theoretical. Petitioner concedes that its needs or demands for water are substantially unknown.
3. Paragraph 3 of the Petition asserts that Exhibit "B" identifies the location of the Property in relation to the District's CCN. It does not identify the District's CCN boundary.
4. There is no Paragraph 4 to the Petition.

[4] Petitioner never furnished a copy of the Petition to the District.

5. Paragraph 5 alleges that the District has limited financial resources and inadequate water supplies. In fact, the District has substantial financial resources and a sufficient surplus water supply to fully satisfy the projected use of the Property for both domestic potable water and fire flow (although the District has no state law nor federal law obligation to provide fire flow).

   The August 10, 2011 meeting with the TCEQ Executive Director referenced by Petitioner related to Petitioner's outdoor watering drought restrictions. As TCEQ is well aware, many public water systems have imposed mandatory drought restrictions during the current extreme drought conditions, and in fact, TCEQ has ordered many public water systems to impose such restrictions. Further, the City of Georgetown (from whom Petitioner seeks alternative service) recently banned all outdoor watering.

6. Contrary to Petitioner's allegation in Paragraph 6 of the Petition, Exhibit "C" to the Petition provides absolutely no support for the proposition that Georgetown can or will provide water service to the Property.

7. The District has insufficient information to admit or deny paragraph 7 of the Petition (asserting that the City of Georgetown will provide sewer service to the Petitioner).

8. The District denies Paragraph 8 of the Petition. Petitioner's Exhibit "D" ("indication of interest") reveals: (a) it is dated November 9, 2009, not December 14, 2009; (b) that Petitioner's development plans are "conceptual" only; (c) that Petitioner's need or demand for water for at least 111 of the 121 acres is "unknown"; and (d) that Petitioner's timeframe for build-out is "unknown".

9. Paragraph 9 of the Petition references the District's response (attached as Exhibit "E" to the Petition) to the original request for service filed by Petitioner. Significantly, the exhibit excludes correspondence of the District clarifying the availability and terms of service (see Exhibit "I" to the Petition).

10. The District denies Petitioner's assertions in Paragraph 10 of the Petition that the District is not capable of providing service to Petitioner on a continuous and adequate basis within the time frame, at the level, and in the manner reasonably needed or requested by current and projected service demands for the property. The District owns and operates a 24-inch water transmission and distribution line within the Property that is capable of providing water service to the Property immediately. The District's responses to the Petitioner's prior request for service (Exhibits "E" and "I" to the Petition) demonstrate that the District agreed to make service available to the Property in accordance with the request. After the Petitioner verbally objected to the payment of impact fees to the District, the District offered to negotiate the terms of service (see Exhibit "I" to the Petition), but Petitioner never responded to the District's offer.

11. Paragraph 11 of the Petition references a "chronology" of negotiations between the District and Petitioner. The chronology entirely fails to account for the communications from the District offering to make service available from the 24-inch transmission/distribution line located within the Property, the District's offer to negotiate the payment of impact fees and other terms of service, and Petitioner's failure to respond to such offer (see Exhibit "I").

12. The District denies Paragraph 12 of the Petition. Petitioner's Exhibit G demonstrates that its development plans were "conceptual" only and that Petitioner could not quantify its water needs or demands. (See response to Paragraph 2 above.)

13. The District denies Paragraph 13 of the Petition. The Petitioner has provided no documentation to reflect that Georgetown is either capable or willing to provide water service to the property. Contrary to Petitioner's assertions, the City's water line is not "across the front of the property." It is located on the opposite side of a major roadway. Service from the City would require boring of the roadway at significant expense. In other words, the District (and not the City) owns and operates a major transmission and distribution line in the Property. Petitioner's statement that the District requires an upfront payment of $2,501,200 is false and directly contradicts the District's February 23, 2011 letter (a copy of which is attached as Exhibit "I" to the Petition) stating that it will negotiate the terms of service. Petitioner never responded to the District's offer.

Moreover, Georgetown is precluded by federal law from providing water service to the Wolf Tract. 7 U.S.C. § 1926(b) prohibits a municipality from providing water service in competition with a federally indebted water district. Any water service provided by Georgetown to the Property would be water service in competition with the District. See *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996); *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004).

14. The District objects to Paragraph 15 of the Petition. The requested transfer would directly violate federal law. See response to Paragraph 1 above.

15. The District objects to Paragraph 16 of the Petition. The allegation suggests that Petitioner is entitled to decertification and that compensation will be paid to the District. The District would be entitled to compensation only in the event that all of the District's federal rights and remedies described above are denied by a federal district court.

16. Contrary to Petitioner's allegation, the District has never received a copy of the Petition from Petitioner (via certified mail or otherwise). The District obtained a copy from TCEQ.

PETITIONER'S PROPERTY IS NOT ELIGIBLE FOR DECERTIFICATION UNDER SECTION 13.254(A-5) OF THE WATER CODE

Petitioner does not own the Real Property that it seeks to Decertificate

Section 13.254(a-5) of the Water Code provides in relevant part that "the owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for expedited release of the area if *the landowner's property* is located in a county with a population of at least one million" or a county adjacent thereto. (emphasis added). The statute explicitly provides that a landowner may petition for expedited decertification only for real property that is owned by the landowner/petitioner.

The Petition identifies the Petitioner as "J.D. Wolf Properties, LLC." Exhibits A and B, and Paragraph No. 1, of the Petition identify the Property that Petitioner seeks to decertificate from Chisholm Trail SUD's water CCN. *J.D. Wolf Properties, LLC is not the*

owner of the 121 acres of real property described in the Petition. Attached as **Exhibit "A"** to this Response is a copy of the Williamson Central Appraisal District ownership records for the individual tax parcels constituting the Property (as identified in the Petition). The records indicate that the Property is owned by "Georgetown Gatlin Creek Ltd." Attached as **Exhibit "B"** is a copy of the deed pursuant to which Georgetown Gatlin Creek Ltd. acquired ownership of the Property.

As conclusively demonstrated by **Exhibits A and B**, Petitioner J.D. Wolf Properties, LLC does not own the Property that it seeks to decertificate from the District's CCN. Section 13.254(a-5) does not authorize a petitioner to decertificate lands it does not own. Nor does the statute grant jurisdiction to TCEQ to approve the decertification of lands not owned by a petitioner. The requisite criteria of ownership set forth in Section 13.254(a-5) has not been met, and the Petition must be denied in its entirety.

Provision of Service

Section 13.254(a-5) authorizes expedited decertification only for property "that is not receiving water or sewer service." Texas Water Code Sec. 13.002(21) defines "service" as follows:

> *Any act performed*, anything furnished or supplied, and *any facilities or lines* committed or used by a retail public utility in the performance of its duties under this chapter. . . .(emphasis added).

Tex. Water Code § 13.002(21). As discussed in more detail below, the District has constructed a 24-inch water transmission and distribution line *within the Property.* The water line has ample capacity available for service to the Property. In fact, the water transmission and distribution line was specifically constructed and modified to serve the

Property and other lands located in proximity thereto within the District's CCN territory. As a result, the District has performed an act, and committed a water transmission/distribution line, in the performance of its duty to provide retail water service to the Property under Chapter 13 of the Water Code. Accordingly, the District provides "service" to the Property within the meaning of Sec. 13.002(21), and the Property is not eligible for decertification under Sec. 13.254(a-5).

Attached as **Exhibit "C"** to this Response are relevant excerpts from the plan sheets for that portion of the 24-inch water transmission/distribution line located within the Property. As is evident from the exhibit, the line is located within the Property.

Attached as **Exhibit "D"** to this Response is an affidavit of Todd Jackson, a licensed professional engineer employed by Halff Associates, Inc., a professional engineering consulting firm that provides professional engineering and consulting services to the District. In his affidavit, Mr. Jackson affirms the following:

i. that the District's 24-inch water transmission/distribution line has been constructed and is in active service;

ii. that the 24-inch water transmission/distribution line is located within the Property that is the subject of the Petition;

iii. that the 24-inch water transmission/distribution line has sufficient capacity to provide retail water service to the Property;

iv. that the District has a sufficient raw water supply to provide retail water service to the Property; and

v. that upon completion of construction of internal distribution facilities by the Developer, the District may provide retail potable water service within the Property.[5]

The exhibits conclusively demonstrate that Chisholm Trail Special Utility District has furnished service to the Property, as defined under Sec. 13.002(21) of the Texas Water Code. Section 13.245(a-5) does not authorize expedited decertification of lands which receive service.

Conclusion

The statutory criteria for expedited decertification set forth in Section 13.254(a-5) has not been met with respect to the Property that Petitioner seeks to decertificate from Chisholm Trail Special Utility District's certificated water service territory. The Petition may not be approved for the following reasons: (i) Petitioner does not own the real property it seeks to decertificate from the District's CCN; and (ii) the District provides "service" to the Property, as defined under Section 13.002(21) of the Texas Water Code.

Decertification is forbidden by federal law. The District does not consent to any adjudication of its federal rights in any state administrative proceeding or in any state court proceeding. The District asserts and maintains its right to have all federal questions and federal rights referenced herein adjudicated within a federal forum (United States District Court).

[5] Under Sec. 13.2502 of the Texas Water Code and the District's Service Rules, it is the responsibility of developers to construct the internal onsite facilities required for nonstandard service.

Since the requisite statutory criteria for decertification under Sec. 13.254(a-5) has not been met, and federal law forbids the requested decertification, Chisholm Trail Special Utility District respectfully requests that the Executive Director deny the Petition in its entirety. If TCEQ does not deny the Petition, then the District requests that TCEQ suspend any further consideration of the Petition until such time as the federal rights and claims referenced herein have been fully resolved in a federal forum.

If TCEQ intends to proceed with processing the Petition notwithstanding the fact that the Property is not eligible for expedited decertification under Section 13.254(a-5) of the Water Code and notwithstanding that decertification under the present facts is forbidden under federal law, then Chisholm Trail Special Utility District requests the opportunity (without prejudice to its right to seek relief from the United States District Court for the Western District of Texas) to present evidence regarding the damages that will be incurred by the District and its customers by decertification of the Property from the District's CCN, as authorized by Section 13.254 of the Water Code.

Respectfully submitted,

By: _____
Anthony S. Corbett

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BIOGRAPHY

Steven M. Harris, a Tulsa, Oklahoma lawyer, received his Juris Doctorate degree from the University of Tulsa in 1975. Mr. Harris' law practice is focused on representing federally indebted Rural Water Districts/Associations/Water Supply Corporations in Federal actions to protect them from encroachment from neighboring municipalities. Mr. Harris has 22 years experience representing over seventy (70) Rural Water Districts in Oklahoma, Arkansas, Missouri, New Mexico, North Dakota, Kansas, Ohio, Colorado and Texas. The success of Mr. Harris and his staff of experienced lawyers has produced judicial decisions at the federal appellate level that have benefitted Rural Water nationally. He has lectured frequently on issues relevant to Rural Water. He has also authored numerous published articles on Rural Water issues.

AREAS OF EXPERTISE:

Enforcement Actions involving 7 U.S.C., sec. 1926(b)
Commercial Contract/Business Torts Litigation
Business Interference Litigation
Patent Litigation (emphasis in software patents)
Copyright Litigation
Insurance Coverage Litigation
General Civil Trial and Appellate Practice

ADMITTED TO PRACTICE:

Oklahoma Supreme Court May 2, 1975
United States Federal Court of Appeals - 10th Circuit May 20, 1975
United States Supreme Court March 17, 1980
United States District Court Northern District of Oklahoma September 19, 1980
United States District Court Western District of Oklahoma October 18, 1989
United States Court of Claims September 24, 1990
United States Federal Court of Appeals - 9th Circuit June 5, 1992
United States Court of Appeals for the Federal Circuit January 17, 2001
United States Federal Court of Appeals - 8th Circuit April 23, 2004
United States District Court Eastern District of Oklahoma September 2004

PRESENTER AT RURAL WATER CONFERENCES/CONVENTIONS

Kansas Rural Water Association Annual Conference, 2007
National Rural Water Association Annual Conference, 2008
Arkansas Rural Water Association Annual Conference, 2008
New Mexico Water Association Annual Conference, 2009
Colorado Rural Water Association Annual Conference, 2009
Oklahoma Rural Water Association Annual Conference, 2009 & 2011
Missouri Rural Water Association Annual Conference, 2011
Texas Rural Water Association Annual Convention, 2012

EDUCATION:

B.A., University of Kansas
J.D., University of Tulsa

COURTS MR. HARRIS HAS BEEN ADMITTED TO PRACTICE PRO HAC VICE

1995 Seventh Judicial District of Idaho
1996 Western District of Texas
1998 Northern District of Texas
1998 Eastern District of Michigan
1998 Bay County Circuit Court, Michigan
1999 Northern District of California
2000 Western District of Washington
2000 Eastern District of Arkansas
2001 Southern District of Texas
2001 Northern District of California
2002 Southern District of California
2002 Northern District of Georgia
2002 District of New Mexico
2002 Eastern District of Louisiana
2003 Central District of California
2003 Western District of Missouri
2004 District of Minnesota
2004 Circuit Court of Clay County, State of Missouri,
2007 Western District of Missouri
2007 District of Kansas
2008 Circuit Court of Laclede County, State of Missouri

ARTICLES ON 7 U.S.C. 1926(B)

- *Protecting Your Service Area From Municipal Competition/Encroachment*, 2002
  Chapter 1 - The Four Elements of 7 U.S.C § 1926(b)
  Chapter 2 - Making Service Available. How Much Is Enough?
- *7 U.S.C. § 1926(b) Dramatic Developments*, 2003
- *Clandestine Arrangements*, 2005

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