7 U.S.C. §1926(b)

Federal Policy To Encourage Rural Development

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PROTECTION FOR FEDERALLY INDEBTED RURAL WATER DISTRICTS

June 2015

By Steven M. Harris[1]

This White Paper is published to inform clients and friends of Doyle Harris Davis and Haughey and should not be construed as providing legal advice on any specific matter.

Introduction – The Purpose Of 7 U.S.C. § 1926(b)

7 U.S.C. § 1926(b) ("1926(b)") provides:

> (b) Curtailment or limitation of service prohibited
>
> 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.

Congress amended the Consolidated Farm and Rural Development Act to allow nonprofit water associations/corporations, water districts[2], etc., to borrow federal

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[2] The term "water district" in this paper is intended to refer to water districts, water associations, water authorities, not-for-profit water corporations and other entities legally authorized to provide water service in any of the 50 states. Any entity which has borrowed money from the USDA, or borrowed money guaranteed by the USDA qualifies for 1926(b) protection provided it has made water service available or can do so within a reasonable period of time.

funds or borrow funds from a private bank guaranteed or insured by the United States Department of Agriculture (USDA) for ‘the conservation, development, use, and control of water primarily serving rural residents.[3]

By enacting 1926(b), Congress intended 1) to protect rural water districts from competition, 2) **to encourage rural water development** and 3) to provide greater security for and thereby increase the likelihood of repayment of USDA loans or loans guaranteed by the USDA.[4] 1926(b) has been broadly construed to protect rural water districts from competition with other water service providers, including municipalities and privately owned for-profit utilities.[5]

1926(b) is a congressional mandate that local governments, such as municipalities, and private or regulated industry, not encroach upon or compete with the services provided by federally indebted water districts regardless of whether that encroachment or competition is in the form of competing franchises, new or additional permit requirements, or similar means.[6] Courts have refused to read any loophole into the provisions of 1926(b).

The statute's legislative history confirms that the U.S. Congress intended a broad reading for 1926(b). The Senate report states that:

> This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very

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[3] *Ross County Water Co., Inc. v. City of Chillicothe*, 666 F.3d 391, 399 (6th Cir. 2011).

[4]*Bell Arthur Water Corp. v. Greenville Utils. Comm'n,*, 173 F.3d 517, 523 (4th Cir.1999). “Under Section 1926(a), “such loans” include loans the government makes or insures, *see id.* § 1926(a)(1), and loans the government guarantees, *see id.* § 1926(a)(24). Therefore, under § 1926(b), the federal guarantee of Douglas–4's private loan may be considered one “such loan” for purposes of meeting the requirements of § 1926(b). *Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 976 (10th Cir. 2011).

[5]*Adams County Reg. Water Dist. v. Village of Manchester, Ohio,* 226 F.3d 513, 518 (6th Cir.2000). Congress intended by enacting § 1926(b) to protect from competition the territory served by a rural water district (see *Lexington–South Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 235 (6th Cir.1996). *Jennings Water, Inc. v. City of North Vernon,* 895 F.2d 311, 315 (7th Cir.1989) (detailing the legislative history of § 1926(b)). See also *Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n,* 291 F.3d 1262, 1264 (10th Cir. 2002) – a case involving a privately owned for-profit water utility that encroached into water district territory.

[6]*Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1214 (10th Cir.1988). See also *City of Madison v. Bear Creek Water Ass'n,* 816 F.2d 1057, 1059 (5th Cir.1987)).

> effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. **By including service to other rural residents, the *cost per user is decreased* and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water.** [Section 1926(b)] has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin.News 2243, 2309; *see also id.* at 2305.[7]

One objective of 1926(b) is to create an economy of scale for water districts, thereby driving down the per user cost of water.[8] To achieve this objective, 1926(b) strictly forbids water sales in competition with a federally indebted water district.

Burden of Proof (Three Elements)

To prove entitlement to 1926(b)'s protection from competition, a water district must show 1) it has the legal authority to provide water service (under the law as it existed at the time the water district obtained qualifying indebtedness), 2) it has continuing indebtedness on loans obtained from the USDA (or guaranteed by the USDA)[9] and 3) that it has provided or at least made water service available (or can do so within a reasonable period of time).[10]

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[7] *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 315 (7th Cir. 1989). See also *Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas,* 243 F.3d 1263, 1269 (10th Cir. 2001).

[8] "…maintaining the necessary **economies of scale** to allow rural utility associations to remain viable and to **keeping the per-user cost low** for the service financed by the loan. *Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo.* 605 F.3d 511, 520 (8th Cir. 2010).

[9] "To obtain protection, a water district must first show it has a qualifying, continued indebtedness to the federal government, as the water district is protected only "during the term of such loan." 7 U.S.C. § 1926(b). Under Section 1926(a), "such loans" include loans the government makes or insures, *see id.* § 1926(a)(1), and loans the government guarantees, *see id.* § 1926(a)(24). Therefore, under § 1926(b), the federal guarantee of Douglas–4's **private loan may be considered one "such loan" for purposes of meeting the requirements of § 1926(b)**.

(a) Legal Authority To Provide Water Service

A water district's legal authority to provide water service is governed by state law. However once state law has established this legal right, the state law right cannot be further impaired or restricted while the water district is federally indebted. Altering the state law right to provide water service, after 1926(b) protection has attached, would interfere with the federal policies inherent in 1926(b). Once a state has authorized its agencies or entities to borrow money from the USDA, the state (and its political subdivisions) agreed to comply with 1926(b)'s proscriptions.[11]

(b) Federal Debt

Once a water district has borrowed money from the USDA or obtained a loan guaranteed by the USDA, 1926(b) protection attaches, provided the water district can show that it has made water service (or other services) available.

(c) Made Service Available

A water district must prove that it has made water service available or can do so within a reasonable amount of time to the customers taken/served by a competing municipality or other utility. What constitutes a reasonable amount of time is determined on a case by case basis. In at least one case, the encroaching municipality conceded that providing water service within three (3) years of a request for service, was reasonable.

Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan., 659 F.3d 969, 976 (10th Cir. 2011).

[10] *Rural Water Sewer and Solid Waste Management, Dist. No. 1, Logan County, Oklahoma v. City of Guthrie,* 654 F.3d 1058, 1062, (10th Cir. 2011).

[11] "The Oklahoma legislature formed the water districts so that the state, through the water districts, could avail itself of the loans made available through § 1926, i.e. "to borrow money from the federal government to accomplish the purposes for which they are established." *Sequoyah,* 191 F.3d at 1194. Given § 1926's text and the judicial decisions referenced above uniformly announcing and applying a rule of liberal construction to effectuate the statute's purposes, the State of Oklahoma and its subdivisions were on sufficient notice that through their *choice* to borrow money from the federal government, they agreed to abide by § 1926(b)'s proscriptions, including those against shrinking the protected rural water association's service area." *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694, 717 (10th Cir. 2004).

The scope of 1926(b) protection is directed to the "service provided or made available." If a water district provides, in addition to domestic potable water service, sewer, electric, raw water, fracking water, industrial water, re-processed wastewater, solid waste disposal, etc., these services would also fall within the protected service provided or made available.

(i) The Financed Service

At least one Federal Circuit Court has held that there must be a nexus between the federal loan and the service provided, namely only the "financed service" is protected by 1926(b).[12] However, once any part of a particular service (or services) has been financed, all aspects of the system associated with such service, is fully protected by 1926(b) during the period of indebtedness, even if portions of the system were not constructed using loan proceeds or pre-existed the loan.[13]

Doubts As To Whether A Water District Is Entitled To 1926(b) Protection Are Resolved In Favor Of The Water District

Doubts about whether a water district is entitled to protection from competition under 1926(b) should be resolved in favor of the water district seeking protection for its territory.[14]

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[12]"In short, divorcing the type of service underlying a rural district's qualifying federal loan from the type of service that § 1926(b) protects would stretch the statute too far. Because we interpret "the service provided or made available" to be limited to the financed service, sewer service here, we affirm the grant of summary judgment to the City with respect to water customers within the District's boundaries. *Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo.,* 605 F.3d 511, 521 (8th Cir. 2010).

[13] In *Bell Arthur Water Corp. v. Greenville Utilities Com'n,* 173 F.3d 517, 525 (4th Cir. 1999) the Circuit Court concluded that 1926(b) protection exists, even if the area in dispute is unrelated to the federal loan. "Bell Arthur's ability to repay its federal loan and to provide low per user cost to its customers does not rest solely on the economic well-being and territorial integrity of the service areas financed by the 1993 loan. To the contrary, both of these goals depend on economies of scale and maximization of Bell Arthur's entire customer base, and can only be accomplished by treating the protection as *applicable to the entire service area rather than merely the increments improved by the loan*." *Bell Arthur Water Corp. v. Greenville Utilities Com'n*, 173 F.3d 517, 524 (C.A.4 (N.C.),1999).

[14]*Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.,* 659 F.3d 969, 976 (10th Cir. 2011). "In *Sioux Center,* we noted that "any '[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the [USDA]-indebted party seeking protection for its territory.' " *Id.* at 1038 (quoting *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1197 (10th Cir.1999))."

1926(b) Prohibits The Condemnation Of Water District Territory/Facilities

1926(b) prohibits a municipality from condemning (by eminent domain) a water district's facilities, despite condemnation not being explicitly listed in the statute's prohibition. 1926(b) precludes a municipality's encroachment by means of expanding its water sales to consumers located within the water district's territory thus limiting the ability of municipalities to sell water when such sales result in competition with a water district.[15]

1926(b) Controls Over And Invalidates Conflicting State And Local Law

To the extent that a local or state action encroaches upon the services provided by a protected water district, the local or state act is invalid.[16] There is thus preemption

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Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo., 605 F.3d 511, 515 (8th Cir. 2010).

[15] "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))." – "The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. **Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts.** See *Public Utility District No. 1 of Franklin County v. Big Bend Electrical Cooperative, Inc.,* 618 F.2d 601 (9th Cir.1980) (similarly rejecting utility's attempt to condemn property owned by cooperative financed by the Rural Electrical Administration)." *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1059-1060 (5th Cir. 1987). See also: "Accordingly, the court concluded that section 1926(b) precluded the municipality from condemning the association's facilities, despite condemnation not being explicitly listed in the statute's prohibition. *Id.* The court in *Moore Bayou,* also rejecting a municipality's encroachment on a rural association's service by means of eminent domain, similarly construed section 1926(b) as broad and absolute." *Jennings Water, Inc. v. City of North Vernon,* Ind., 895 F.2d 311, 315 (7th Cir. 1989).

[16] *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*

of any local or state law that purports to take away from an indebted rural water district any territory for which the association is entitled to invoke the protection of § 1926(b).[17] While indebted, the territory of a water district cannot altered.[18]

A Water District's Fire Flow Capability Is Irrelevant To 1926(b) Protection

Federal courts have consistently held that a water district's ability to provide "fire flow" or "fire protection" is not relevant and not to be considered when determining whether the water district has made water service available in accord with 1926(b).[19]

However, if the water district actually provides fire flow or fire protection, then the ability of the water district to provide fire flow may be factored into the analysis. In most instances water districts do not provide fire flow/fire protection. The better practice is for the water district to disclaim any duty to provide fire flow and instead, advise customers that excess flow or capacity may be available at the request of a customer (usually at an additional cost). The customer is then solely responsible for determining if the excess flow is adequate for the purposes of the customer.

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 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)).

[17] *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 715-716 (10th Cir. 2004)

[18] "In addition to these principles defining the protection which section 1926(b) affords rural water districts from competition, state law cannot change the service area to which the protection applies after that federal protection has attached. Rural Water Sewer and Solid Waste Management, Dist. No. 1, Logan County, Oklahoma v. City of Guthrie 253 P.3d 38, 43 (Okla.,2010). See also *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004)

[19] "We further conclude that **whether Logan–1 can provide fire protection** to the customers in dispute **is irrelevant** to the question of whether Logan–1 has made water service available to them for purposes of 7 U.S.C. § 1926(b)." *Rural Water Sewer and Solid Waste Management, Dist. No. 1, Logan County, Oklahoma v. City of Guthrie*, 654 F.3d 1058, 1067 (10th Cir. 2011).

Equitable Defenses

The equitable defenses of waiver, laches, and estoppel are generally not available as a defense in a suit to enforce 1926(b).[20] These defenses are at odds with the public policy effectuated in 1926(b).[21]

Enforcement Actions – 42 U.S.C. § 1983

1926(b) has no enforcement mechanism, therefore the federal courts have concluded that it is enforceable pursuant to 42 U.S.C. § 1983.[22]

Statute of Limitations

Because 1926(b) is enforceable pursuant to 42 U.S.C. § 1983, the applicable statute of limitations for the recovery of damages, is established by the state law limitations on personal injury cases.[23] For example, in Oklahoma damages would be limited to two years prior to suit (and during suit). In Missouri, damages would be limited to five years prior to suit (and during suit).

There is generally no statute of limitations associated with equitable relief, such as injunctive relief and forfeiture of infrastructure built by a municipality in violation

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[20] *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989) ("In *Scott Paper,* the Supreme Court ruled that, in suits between private parties, traditional equitable estoppel may not always be available when the plaintiff's cause of action is based on a federal statute.") See also: "As discussed *supra,* the primary beneficiaries of section 1926(b)'s ban on association service curtailment are not the associations themselves, but rather, the FmHA and the individual rural consumers who would not have inexpensive and reliable water service without FmHA-supported rural *318 water associations. *See generally Bear Creek,* 816 F.2d at 1060. Accordingly, Jennings' section 1926(b) action for injunctive relief cannot be barred by equitable estoppel. *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 317 -318 (7th Cir. 1989)

[21] "Section 1926(b) prohibits any curtailment or limitation by a municipality on the service provided by a rural water association indebted to the Farmers Home Administration. **The effectuation of this public policy embodied in the statute** cannot be thwarted by the principle of equitable estoppel." *Jennings Water, Inc. v. City of North Vernon, Ind.* 895 F.2d 311, 318 (7th Cir. 1989)

[22] *Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas,* 243 F.3d 1263 (10th Cir. 2001).

[23] "Section 1983 contains no statute of limitations. *Wilson v. Garcia,* 471 U.S. 261, 280, 105 S.Ct. 1938, 1949, 85 L.Ed.2d 254 (1985). When such a void in federal statutory law occurs, federal courts have repeatedly "borrowed" the state laws governing an analogous cause of action." *Rural Water System No. 1 v. City of Sioux Center, Iowa,* 967 F.Supp. 1483, 1507 (N.D.Iowa,1997).

of 1926(b). In most instances the competing entity is guilty of a continuing violation of 1926(b). Therefore pursuing violations of 1926(b) that pre-date the filing of suit by a substantial number of years, is feasible.[24]

Attorney Fees

When enforcing 1926(b) rights pursuant to 42 U.S.C. § 1983, the water district is entitled to an attorney fee award if it prevails.[25] If the water district is not the prevailing party, the successful defendant is however, "not" entitled to an award of attorney fees, unless the action brought by the water district was frivolous or brought in bad faith.[26]

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[24]"A "continuing violation" is an exception to the bar posed by a statute of limitations to claims based on actions that occurred before the statute of limitations period. *Varner v. National Super Markets, Inc.,* 94 F.3d 1209, 1214 (8th Cir.1996) (stating this principle in a Title VII "hostile environment" case), *cert. denied,* —— U.S. ——, 117 S.Ct. 946, 136 L.Ed.2d 835 (1997); *Ashley v. Boyle's Famous Corned Beef Co.,* 66 F.3d 164, 167 (8th Cir.1995) (*en banc*) (Title VII case). Although the "continuing violation" theory is most often encountered in discrimination cases, it is also applicable to § 1983 claims for continuing violations of a federal law or the Constitution. *See, e.g., Kuhnle Bros., Inc. v. County of Geauga,* 103 F.3d 516, 520 (6th Cir.1997). When a "continuing violation" is shown, the limitations period runs from the "last occurrence" of wrongful conduct. *Varner,* 94 F.3d at 1214; *Gipson v. KAS Snacktime Co.,* 83 F.3d 225, 229 (8th Cir.1996). Furthermore, the entire course of conduct creating the continuing violation is actionable. *Varner,* 94 F.3d at 1214." *Rural Water System No. 1 v. City of Sioux Center, Iowa*, 967 F.Supp. 1483, 1508 (N.D.Iowa,1997).

[25]"Section 1988(b) allows for an award of attorney fees in an action to enforce 42 U.S.C. § 1983. The district court concluded that actions for violations of § 1926(b) are properly brought under § 1983. Although Post Rock's complaint did not mention § 1983, Post Rock may recover attorney fees under § 1988 if its complaint contained allegations sufficient to support a § 1983 action. *See Haley v. Pataki,* 106 F.3d 478, 481 (2d Cir.1997); *Thorstenn v. Barnard,* 883 F.2d 217, 218 (3d Cir.1989).' *Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas,* 243 F.3d 1263, 1273 (10TH Cir. 2001)

[26]"A party who prevails in a § 1983 action is entitled to an award of reasonable attorneys' fees under 42 U.S.C. § 1988(b), but the standard for awarding attorneys' fees to a prevailing defendant is more stringent than that for awarding fees to a prevailing plaintiff. *See Planned Parenthood of Cent. N.J. v. Att'y Gen. of N.J.,* 297 F.3d 253, 265 n. 5 (3d Cir.2002); *see also Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). A prevailing defendant may be awarded attorneys' fees under 1988(b) only " 'upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation. *Ullman v. Superior Court of Pa.* 2015 WL 873172, 1 (3rd Cir. 2015).

Forfeiture Of Infrastructure (Constructive Trust)

Aside from the remedies of damages (lost net revenue due to encroaching water sales by a competitor) and injunction (to preclude further violations of 1926(b)), a water district is entitled to pursue the remedy of forcing a conveyance to the water district (forfeiture) of the competing party's infrastructure (i.e. pipes, valves, etc.) built in furtherance of violating 1926(b).[27]

Prejudgment Interest

Enforcement actions under 1926(b) may span several years and the amount of lost net revenue can be substantial. Prior to judgment being entered, the water district is entitled to request the court to also award prejudgment interest. The amount of prejudgment interest is left to the discretion of the court. In certain types of cases (but not necessarily a 1926(b) case), a district court has awarded as much as 15 percent per year, or as little as a small fraction of one percent, of prejudgment interest.

Water Districts Are Not Permitted To Abuse Their 1926(b) Protection

Rural water districts protected by § 1926 are subject to price restraints under the threat of losing their § 1926 protection. Water districts are not free at their whim to price monopolistically. Even if a rural water district has adequate facilities within or adjacent to the area to provide service within a reasonable time after a request for service is made, the cost of those services may be so excessive that the water district has *not made service available* under 1926(b). If a municipality (or other competitor) can show that the water district's rates or assessments were unreasonable, excessive, and confiscatory then the water district has not made services available under 1926(b) and therefore is not entitled to § 1926 protection.[28]

The factors to consider in determining whether a water district's cost of service is unreasonable are: (1) whether the challenged practice allows the water district to yield more than a fair profit; (2) whether the practice establishes a rate that is disproportionate to the services rendered; (3) whether other, <u>similarly situated</u>

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[27] "We conclude that in <u>ordering the transfer of the infrastructures to the Utility</u>, the district court did not abuse its discretion." *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 918 (5th Cir. 1996).

[28] *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 719 (10th Cir. 2004).

water districts do not follow the practice; (4) whether the practice establishes an arbitrary classification between various users.[29] The comparison here is between "similarly situated water districts", not between the water district and a neighboring competing municipality.

Divisions Among The Circuits

The United States Federal Courts of Appeal are generally in unison regarding their interpretation of 1926(b), however there are differences.[30]

The 10th Circuit has held that if a municipality provides water service in competition with a water district while the water district is not indebted, the water district can re-claim those customers, after it becomes indebted or re-indebted, provided the water district demonstrates it had made service available to the customers at issue, while not federally indebted. The 8th Circuit disagrees and does not follow this rule.

The 5th Circuit holds that if a water district has the legal duty to provide water service, then this alone satisfies the "made service available" test. This is called the "bright line" rule. However other Circuit Courts that have considered the issue

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[29] *Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas,* 243 F.3d 1263, 1271 (10th Cir. 2001).

[30] "We note that the Fifth Circuit has held that an association may demonstrate that it is "making service available" to an area when it has a statutory duty under state law to provide service to the area. *See North Alamo,* 90 F.3d at 915–16. Other circuits have found that "making service available" requires showing a duty imposed by state law to serve an area *coupled with* a nearby facility to provide the service. *See Lexington—South Elkhorn,* 93 F.3d at 235–37 (noting that proximity of water lines to the disputed area is a key factor in the making service available determination because Kentucky law requires obtaining a state-issued certificate and then making reasonable extensions of water lines to serve customer requests); *Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2,* 861 F.2d 1211, 1213–14 (10th Cir.1988) (concluding that state law duty to provide service upon customer request, in conjunction with a nearby water line, constituted making service available). *Bell Arthur Water Corp. v. Greenville Utilities Com'n,* 173 F.3d 517, 526 (4th Cir. 1999). But see: "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 (6th Cir. 2003).

have concluded that a water district must show more, namely the physical ability to provide water service. This is called the "pipes in the ground" rule.

All Circuits agree that 1926(b) must be given a liberal interpretation to further the legislative purpose behind the statute.

Conclusion

Revenue from potable water service (including sales of raw water and re-processed waste water) is a highly sought after source of money. As a result, municipalities and other water service providers (public and private) are prone to "stealing" water customers from federally indebted water districts. 1926(b) was designed to prevent this.

> "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."

Le-Ax Water Dist. v. City of Athens, Ohio, 346 F.3d 701, 705 (6th Cir. 2003).

ENFORCING 7 U.S.C. § 1926(b)

June 2015

By Steven M. Harris[1]

This White Paper is published to inform clients and friends of Doyle Harris Davis and Haughey and should not be construed as providing legal advice on any specific matter.

Introduction

7 U.S.C. § 1926(b) ("1926(b)") grants a qualifying water district[2] the exclusive right to provide water service[3] within its federally recognized service area.[4] Enforcing 1926(b) rights against an encroaching competitor, most often a municipality, has political, practical and legal considerations.

The Political Factor

Water districts are typically comprised of voting members. Municipalities often attempt to persuade the membership of a water district or its board of directors to surrender water district territory to the municipality with minimal or no compensation. Political pressure is often exerted through the media (local newspapers, radio stations and television) to communicate the argument that if the water district proceeds to enforce its 1926(b) rights, the community will suffer

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[2]The term "water district" is intended to refer to water districts, water authorities, water associations, non-profit water service corporations and other entities which qualify for 1926(b) protection.

[3]The primary activity addressed in this paper is water service. However this article applies to any service made available by a qualifying entity. 1926(b) protection is not limited to precluding a municipality from competing with a federally indebted district, and will protect against encroachment from privately owned utility/service providers.

[4]What constitutes the federally recognized service area, can become a complex issue. It generally means the area where the water district has the legal right to provide water service (as the law existed as of the date the district first obtained a qualifying 1926(b) loan) and has made water service available or can do so within a reasonable period of time.

great injury such as the loss of jobs, diminished development, failure of fire protection, and a waste of valuable resources. Although this "Parade of Horribles"[5] has been rejected by the Courts, it can have an impact on concerned citizens and influence voting on the district's board of directors.

Past history has shown that municipalities have undertaken steps to promote candidates for water district board positions, who share the municipality's view on permitting the municipality to take water district territory and customers.

In at least one instance, the municipality considered the tactic of politically dissolving the neighboring water district, eliminating it entirely.[6]

(i) Unfair/Unlawful Tactics

Municipalities have utilized more sinister methods.

In two separate instances, municipalities threatened to terminate the water supply to the district, if the district refused to release territory and customers to the municipality. In both instances, the water district derived its source of water for re-sale to the membership, from the municipality.

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[5]"Similarly, McAlester advances the policy argument that if we decline to recognize the right of a local government to deannex portions of a rural water association protected by § 1926, no regulatory bar will remain to constrain § 1926–protected rural water districts from charging excessively high prices. Although the prospect of such a scenario *would* give us reason to pause, we do not find McAlester's **<u>parade of horribles</u>** an accurate depiction of the regulatory framework in place before, or after, our decision today. *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 719 (10th Cir. 2004) See also: ¶ 24 Guthrie and OML as *amici curiae,* jointly interpret section 1926(b) as a complete infringement of a municipality's sovereignty. They advance the position that section **1926(b) "cripples"** "both the State and an affected municipality **[rendering them]**... **powerless to protect their citizens' needs** for adequate public safety, access to essential services, promotion of economic development and other benefits of government." ***Amici curiae*** **contend further that 1926(b) prohibits municipalities from providing water, often at rates lower than a district, to its own taxpayers <u>and leaves taxpayers without fire protection</u>** because the volume of water required for fire fighting is made available only so long as it is paid for through water rates. They add "it is not fiscally feasible to extend water lines solely for fire purpose." **<u>We are not persuaded.</u>** *Rural Water Sewer and Solid Waste Management, Dist. No. 1, Logan County, Oklahoma v. City of Guthrie*, 253 P.3d 38, 48-49 (Okla.,2010)

[6]*Public Water Supply Dist. No. 10 of Cass County, Mo. v. City of Peculiar, Mo.,* 345 F.3d 570, 574 (8th Cir. 2003)

In the case of *Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.* 659 F.3d 969 (10th Cir. 2011) the municipality threatened a local real estate developer with deannexation of his housing development, depriving him of other city services, if the developer chose the federally indebted water district as the water service provider for the development.

In *Kay Elec. Co-op. v. City of Newkirk, Okla.,* 647 F.3d 1039 (10th Cir. 2011) the municipality threatened to withhold sewer service to a customer, if the customer chose a competitive utility service from the neighboring co-op. Although the *City of Newkirk* case did not involve water service, it illustrates the extent to which a municipality will go, to maintain a hold on utility service.

These strong-arm tactics are not uncommon.

To counteract misinformation (and other tactics) used by municipalities, it is important for the water district to educate its membership on the purpose of 1926(b) which was designed to encourage rural development and drive down the per user cost of water. Water district membership must understand the magnitude of the money and value of infrastructure the water district will lose if existing and future customers are lost to a competitor rather than retained by the water district.

1926(b) has been successful in encouraging rural development. Encroachment left unabated, will discourage rural development, deprive the water district members of their economy of scale, and ultimately drive up the per user cost of water because over time there will be fewer members to share in the ever increasing fixed cost of water.

The district should actively publicize the facts and legal issues, in newsletters to its members, on the district's website, through direct e-mail and even "letters to the editor" to correct erroneous news articles. District members should be encouraged to attend board meetings and ask questions. This process requires continual diligence before and during litigation.

The Practical Factor

Enforcing 1926(b) in federal court[7] is expensive. Suits can persist for years, draining water district resources. Careful planning and budgeting is essential before suit is filed. An analysis of the amount in controversy should be performed

[7] 1926(b) is enforceable in both federal and state courts. Federal court is the preferred forum.

to weigh the *future* lost net revenue that will result from continuing encroachment against the cost of litigation. Calculating the past lost net revenue resulting from encroachment is important, but the number is likely to be a small fraction of the future harm that will occur if the encroachment is not restrained. Even though a water district is likely to receive an attorney fee award from the district court if it prevails in the litigation, that payment will be years away.

The value of district territory is a mathematical calculation of the net revenue associated with existing and future water customers. Value is relatively easy to compute. Past history will show the amount of net revenue a water district receives on a per customer basis. Added to this is the infrastructure the district receives, paid for by developers.

If the net revenue associated with each water customer has a present day discounted cash value of $7,000 (calculated on the basis of annual net revenue times 40 years discounted to present value), and the water district is likely to lose 1,000 customers in the area being encroached upon or likely to be encroached on in the future, the amount in controversy in this example, is $7,000,000. (This number is independent of the value of infrastructure the district will receive from developers.) Past experience has shown that water districts can expect each customer to be valued between $3,000 and $11,000 depending on the rate per 1,000 gallons (including connection, membership and impact fees, etc.) charged by the district. This range was derived from prior analysis performed by retained expert witnesses in multiple federal suits filed to enforce 1926(b).

Ultimately the district must consider whether the amount in controversy is sufficiently large to warrant the expense of pursing a law suit.

The Legal Factor

The elements to prove a violation of 1926(b) are simple in theory but complex in application. The district must prove it (1) has the legal right to provide water service, (2) has qualifying debt and (3) has made water service available to the water customers at issue. The following is an outline of issues and things to prepare for, prior to and during a federal law suit.

(i) Lawful Formation, Boundaries, And Legal Right To Serve

Study of the water district's formation documents is essential to confirm proper procedures were followed even if the formation dates backwards in time 50 years

or more. The encroacher (defendant) is likely to challenge virtually every fact and legal issue associated with 1926(b) enforcement, including whether the water district was validly formed.[8]

In some jurisdictions, the legal right to serve is dependent on a "certificate of convenience and necessity" or similar permit to provide water service. These certificates should be obtained and studied with care, to insure there is no flaw in the district's legal right to provide water service.

The district should engage a surveyor or engineer to map the precise boundaries of the district using legal descriptions found in formation documents, annexations etc. Surprisingly, maps relied on for decades by the district for system planning, have many times proven inaccurate upon closer examination. Therefore the district should not assume that its historical maps are reliable and re-confirm the boundaries. Maps, including satellite images of the boundaries with the water delivery system drawn in, will be useful in explaining to the encroacher, the court and jury, the district's legal service area and its ability to provide water service.

This mapping must also be time sensitive, namely illustrating the boundaries and water delivery system as it existed relative to each customer in dispute, *as of the date each customer first requested water service from either the water district or the encroacher*. The 1926(b) "made service available" analysis is always performed as of the date "each" customer first requested service, not from any other date. Organized developments/subdivisions are generally analyzed based on the request for service or the availability of service, by the developer rather than requests submitted by each lot owner within the development/subdivision. Therefore, developments/subdivisions are normally grouped for purposes of the made service available analysis.

(ii) Hydraulic Analysis – Engineering Study

A computerized hydraulic analysis must be prepared, regarding each water customer in dispute, calculated as of the date each customer requested water service. Computer software programs such as WaterCad or Bentley are capable of analyzing a water delivery system based on the attributes of the system at any

[8]"In addition to appealing the district court's legal conclusions, jury instructions, and admissions of evidence, **Eudora challenges the sufficiency of the evidence at each step of the § 1926(b) analysis.** *Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.,* 659 F.3d 969, 975 (10th Cir. 2011).

given point in time. The engineer can add electronically, the infrastructure (tower, line extension, pump station, etc.) that would have been necessary to provide water service (such as line extensions, pump stations, standpipes etc.) to the computer model, in order to illustrate how the district could have provided water service within a reasonable period of time had the customer requested service from the district.

The district's engineers must also calculate the cost associated with any needed system improvements necessary to provide water service. Computing the cost of service is an essential part of the made service available analysis. Although the district does not have the affirmative duty to prove that the cost of service would not be unreasonable, it must be prepared to respond to the municipality's claim that the district's cost of service is unreasonable.

The hydraulic analysis is useful in eliminating any customer in dispute, which the district is or was not capable of serving.

(iii) Rate Analysis (price per 1,000, connection fees, impact fees etc.)

Municipalities always contend in defending against a 1926(b) enforcement action, that the water district's cost of service is "unreasonable, excessive and confiscatory". This "defense" to 1926(b) was first discussed in *Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas,* 243 F.3d 1263 (10th Cir. 2001). The analysis is a comparison of the enforcing district's rate structure, with similarly situated water districts. The district should gather historical information (evidence in admissible form) from a multitude of other water districts within the region (i.e. 100 mile radius) to determine whether the enforcing district's rates at the relevant time period are (were) consistent with similarly situated districts, under similar circumstances.

The "time" when a request for service was first made, relative to each customer in dispute, can be obtained in advance of suit, from the encroaching municipality, through open records or "sunshine law" requests for documentation. The billing database maintained by municipalities is a valuable source of information regarding when water service began, as well as consumption information from which a lost net revenue (damage) analysis can be made.

(iv) Loan Documentation

The district must obtain copies of all its historical USDA/FmHA loan documentation (note, mortgage, etc.), even for loans which may have been paid off, and including USDA/FmHA loans which may been assigned to another entity. This also applies for loans obtained from a private bank guaranteed by the USDA. This documentation will be important evidence in the case. The loan history file should also be studied to re-confirm that the district properly followed the procedural steps in obtaining the loan(s). If flaws in the documentation are detected, the district can usually cure any flaws or obtain re-affirmation/ratification of the loans. Though rare, a challenge could be made regarding the legal authority of the district to enter into the loan or guaranteed loan. See for example, *Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.*, 720 F.3d 1269 (10th Cir. 2013)

Loans re-purchased by the district and cancelled/released, or refinanced through a non-USDA lender do not qualify for 1926(b) protection. Loans originally obtained from FmHA/USDA and assigned to or purchased by a third party, and for which the district continues to pay the third party, do qualify for 1926(b) protection.

If the district was formerly indebted to the USDA (or indebted on a USDA guaranteed loan or assigned USDA loan), and became re-indebted to the USDA (directly or via a guaranteed loan), determining the "gap" in indebtedness is important. In the 10th Circuit[9] re-claiming customers who were first served by an encroacher during the gap is possible, if the district became re-indebted to the USDA and can show that it had made water service available during the gap period.

(v) Damage Calculation (Lost Net Revenue – Continuing Harm)

Calculating lost net revenue associated with each water customer taken by an encroacher is an ongoing process which should be started prior to filing suit, if possible. Obtaining consumption data or billing records showing the exact water volume sold on a monthly basis from the encroacher is essential to the case. The calculation is not premised on the profit the encroacher gained by selling water in competition with the water district, but rather what "net revenue" the district would have received had it been the water service provider rather than the encroacher.

[9] Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah

Selecting an accountant, who is committed to testify in a trial setting, is important. The first discussion with the accountant should be whether the accountant is willing to testify before a jury. If the accountant is hesitant to commit to testifying, then the district should consider using an accountant that the district is confident will serve as a testifying witness in the case. This is equally true for the engineer selected by the district.

(vi) Convert District Records To PDF Electronic Format

Virtually every document and pleading used in federal court is required to be in PDF format for filing purposes. Federal rules require substantial voluntary document disclosure at the initial stages of the case (Federal Rule of Civil Procedure 26). Providing additional documentation from the district to the opponent (defendant), is extensive and ongoing during the litigation.

Past cases show that a municipality will make extensive, if not abusive, requests for the production and inspection of documents. Disputes over what must be produced in federal litigation is an expensive and *avoidable* process. Experience has taught us that it is far less expensive to produce documents than fight over what must be produced. Since virtually all water districts must make the entirety of their records available for inspection under open records/sunshine law (freedom of information) requests, it makes sense to produce everything requested (with the exception of attorney client privileged documents and information associated with executive sessions).

It is recommended that all paper records potentially related to the claims should be electronically scanned and saved in PDF format. This will reduce the expense of later replicating the documents and producing them to opposing counsel. Labeling and indexing the PDF documents should be in compliance with local rules for the district court in which suit is filed. Even within a particular district, each individual district judge may have his or her own unique requirements for document labeling and the format for a document/exhibit list to be submitted to the court and opposing counsel. Learning precisely what the requirements are, and applying them from the beginning, will avoid having to re-label/re-index documents.

(vii) The Witness List

(1) Non-retained experts (Rule 26)[10]

Certain witnesses likely to be used by the district in the case, will be its office staff and field personnel, to testify regarding a number of issues, the most important one being the physical ability of the district to provide water service at key points in time. These individuals are indeed "expert witnesses" because they will be providing "opinion testimony" and are (or can be) qualified as an expert because of their knowledge, skill, experience, training, or education, as provided for in Federal Rule of Evidence 702.

A "non-retained" expert is anyone that was not specially retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee do not regularly involve giving expert testimony.

The district is required to disclose the name, and if known the address and telephone number of all its witnesses including listing individuals who may have discoverable evidence about the case which the district may use to support claims or resist defenses – together with disclosing the subject matter of the information anticipated to be used. The more that is disclosed, the better. The failure to disclose could later be a basis for the opponent to argue that the evidence cannot be used by the district in the case.

(2) Special Disclosures For Non-Retained Experts

Relative to non-retained experts, the district **must disclose in writing** (i) the subject matter on which the witness is expected to present evidence under Federal Rules of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify. Although a non-retained expert need not present an "expert report" (as specified in Federal Rule of Civil Procedure 26(a)(2)(B)) the district must nevertheless, make a disclosure of the anticipated subject matter and summary of facts and opinions that its non-retained experts are likely to testify about. It is recommended that this disclosure be "exhaustive". This will avoid a claim by the opponent that Rule 26 was not complied with and therefore the witness should be excluded from testifying.

[10] All references to Rule 26, are to Rule 26 of the Federal Rules of Civil Procedure

(3) Experts – The Expert Report

The outside independent engineer and accountant certainly fall within this category. As noted above, the district should determine before retaining the expert, that he/she is willing to testify at trial. The accountant or engineer may be reluctant to testify in a jury trial. The district should avoid retaining any expert that is not inclined to testifying at trial.

Whether the expert has prior experience testifying in a jury trial setting, is not essential (in my opinion). There are both positives and negatives to retaining a "professional expert witness" (one who derives a significant amount of his/her income from testifying). Although a professional expert witness may have a smoother presentation and handle cross-examination better, the non-professional expert witness may be someone the jury can better relate to.

Using the district's auditor should be considered with care. The auditor, although generally the ideal person to testify regarding lost net revenue and anticipated future lost net revenue (because of his/her familiarity with the district), must confirm that he/she will not have an issue regarding continuing to serve as the auditor, once the auditor functions as an expert witness.

Any witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, must provide an "expert report" as specified by Rule 26.[11] This report must be a very comprehensive presentation of literally everything the expert will testify about, and all supporting documentation.

(4) Fact Witnesses

The list of fact witnesses should be developed early and updated frequently. The description of the facts to be testified about as to each fact witness must be extensive/exhaustive to avoid objections raised later that proper disclosure was not made.

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[11] The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fact witnesses will cover a multitude of issues, including original formation of the district, identification of district records, historical practices regarding water service and rates charged, the details of the district's qualifying indebtedness, the identity of the customers in dispute, the ability of the district to provide water service to the customers in dispute, etc.

The disclosure should include "lay opinions" on key issues such as how the district has and can make water service available to the customers/areas in dispute and how it has done so in the past to other customers under similar circumstances.

Fact witnesses customarily consist of present and past board members, office staff, field personnel, the district manager, etc. Literally everyone that has knowledge regarding the construction and operation of the water delivery system, and the financial aspects of the district, should be listed.

(viii) Consumption Data (Open Records Act Requested Data)

Federal Rule of Civil Procedure 26 requires the district to disclose its damage calculation early in the case. The calculation should be updated frequently up through the date of trial.[12]

Consumption data for water customers in dispute served by an encroaching municipality are easily obtained using open records/freedom of information/sunshine laws (and document/data requests during litigation). To make the lost net revenue (damage) calculation as precise as possible, this data should be obtained as soon as possible, preferably before suit is filed. Collecting this data will continue through the life of the suit.

(ix) Document List – Exhibit List

1926(b) cases are document intensive. Preparing the list (description) of documents (exhibit list) anticipated to be used at trial is a time consuming process that must be started early and maintained/expanded diligently throughout the case.

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[12]Rule 26 provides in pertinent part: (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered

(x) Graphical Exhibits and Summaries (maps, charts, illustrations)

Satellite photographic displays of the customers in dispute and areas at issue are helpful to the jury in understanding the case. Damage calculations should be summarized into an easily understood form. This will aid the jury in responding to questions on verdict forms, and calculating damages on a “customer by customer” basis.

(xi) Where To File Suit

Federal court (in our opinion) is the preferred forum to pursue 1926(b) claims. Although state courts have jurisdiction over 1926(b) claims, the federal courts have considered far more cases and have well developed case authority interpreting the scope of protection under 1926(b). Because federal statutes are involved here (1926(b) and 42 U.S.C. § 1983), federal courts always have jurisdiction to hear a 1926(b) case.

(xii) Claims

Claims presented in a federal suit usually consist of (1) violation of 42 U.S.C. § 1983 (because the district was deprived of its 1926(b) rights), (2) declaratory judgment claim to determine a 1926(b) violation has occurred and the damages suffered due to past competitive water sales, (3) injunction – to prevent future violations, and (4) constructive trust or forfeiture of infrastructure used in furtherance of a 1926(b) violation. Claims may also include, depending on the facts of the case, a state or federal antitrust violation particularly if the municipality is guilty of tying other utility services to water service.

(xiii) Jury or Non-Jury Trial

Our past experience has shown that juries consider rural water districts in a favorable light. The inherent unfairness of a municipality taking what does not belong to it, namely water customers and revenue, strikes a resonant tone with the jury. There is no reason to trade 8 judges of the facts (federal cases are generally tried to an 8 person jury) for one district judge. Because of the wide geographic areas from which federal courts draw jurors, there is a greater likelihood that you will have individuals on the jury that have rural life experience.

(xiv) Attorney Fees

A prevailing plaintiff in a 1926(b) case (which includes a claim for violating 42 U.S.C. § 1983) is presumptively entitled to an attorney fee award. The amount of the fee award is left to the discretion of the district court. However, if the plaintiff does not prevail, the presumption is that the prevailing municipality is not entitled to an attorney fee award, unless the court determines the case was frivolous or brought in bad faith.

(xv) Prejudgment Interest

If the litigation persists for a number of years, and the lost net revenue is significant, prejudgment interest awarded to the district can be substantial. Prejudgment interest must be requested before judgment is awarded (and it is best to request this in the federal complaint and again by motion following trial and before judgment is formally entered). The amount of prejudgment interest is left to the discretion of the district court.

(xvi) Settlement Negotiations – Settlement Contract

Settlement should be pursued frequently, both before suit is filed, and if suit is required, then periodically thereafter. Most federal courts require the parties to participate in at least one mediation session, often moderated by a federal magistrate judge or professional mediator. One mediation session is rarely sufficient to conclude a settlement.

Most settlement contracts will control water sales between water district and municipality for forty (40) years or longer. As result, careful drafting is critical. A small mistake in the settlement in year one, could grow to monumental proportions in year 30 or 40. It is advisable to have the district court retain jurisdiction over the parties and the contract in the event there is a breach of the settlement. Utilization of a "consent decree" is also recommended.

Conclusion

Enforcing 1926(b) rights can be accomplished quickly and amicably at minimal expense, but more often it involves years of litigation and considerable expense. To be successful, the district must plan carefully and be prepared to devote considerable time and resources to better insure success.

To be successful, the district must plan carefully and be prepared devote considerable time and resources to better insure success.

Effective: October 29, 2007

Code of Federal Regulations Currentness

Title 7. Agriculture

Subtitle B. Regulations of the Department of Agriculture

Chapter XVII. Rural Utilities Service, Department of Agriculture (Refs & Annos)

Part 1782. Servicing of Water and Waste Programs (Refs & Annos)

➡ § 1782.14 Protection of service areas--7 U.S.C. 1926(b).

(a) 7 U.S.C. 1926(b) was enacted to protect the service area of Agency borrowers with outstanding loans, or those loans sold in the sale of assets authorized by the "Joint Resolution Making Continuing Appropriations for the Fiscal Year 1987, Pub.L. 99–591, 100 Stat. 3341 (1986)," from loss of users due to actions or activities of other entities in the service area of the Agency financed system. Without this protection, other entities could extend service to users within the service area, and thereby undermine the purpose of the congressionally mandated water and waste loan and grant programs and jeopardize the borrower's ability to repay its Agency debt.

(b) Responsibility for initiating action in response to those actions prohibited by 7 U.S.C. 1926(b) rests with the borrower.

SOURCE: 59 FR 66440, Dec. 27, 1994; 72 FR 55013, Sept. 28, 2007, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 1981; 16 U.S.C. 1005.

7 C. F. R. § 1782.14, 7 CFR § 1782.14

Current through March 13, 2014; 79 FR 14185

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FILED
IN OPEN COURT
OCT 25 2013
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RURAL WATER DISTRICT NO. 5
WAGONER COUNTY, OKLAHOMA,

Plaintiff,

v.

CITY OF COWETA; COWETA
PUBLIC WORKS AUTHORITY,

Defendants.

Case No. 08-CV-252-JED-FHM

Total Jury Award: $614,798.00

VERDICT FORM

We the jury, impaneled and sworn in the above entitled case, upon our oaths, do make the following answers to the questions propounded by the Court:

SECTION ONE

1.1. Has Wagoner-5 made potable water service available to the Koweta Health Clinic? To answer this question, see the Jury Instruction concerning the "made service available" issue (Instruction No. 13).

X Yes ______ No

Proceed to the remaining questions in this section only if you answered "Yes" to this question. If you answer "No" to this question, do not answer any more questions in this section, and proceed to the next section.

1.2 Did Coweta establish that the cost to the Koweta Health Clinic to obtain potable water service from Wagoner-5 was "unreasonable, excessive and confiscatory?" To answer this question, see the Jury Instruction concerning the "cost of service" (Instruction No. 15).

_____ Yes X No

Proceed to the remaining questions in this section only if you answered "No" to this question. If you answer "Yes" to this question, do not answer any more questions in this section, and proceed to the next section.

1.3. Insert below the amount of damages that Wagoner-5 has incurred due to Coweta providing potable water service to the Koweta Health Clinic. If you find there have been no damages, you should enter a nominal damage amount of $1.00. To answer this question, see the Jury Instruction concerning"General Measure of Damages" (Instruction No. 16).

$ 19,834 .

SECTION TWO

2.1. Has Wagoner-5 provided or made service available to the Cedar Creek Village Property? To answer this question, see the Jury Instruction concerning the "made service available" issue (Instruction No. 13).

X Yes ______ No

Proceed to the remaining questions in this section only if you answered "Yes" to this question. If you answer "No" to this question, do not answer any more questions in this section and proceed to the next section.

2.2. Did Coweta establish that the cost to Cedar Creek Village to obtain potable water service from Wagoner-5 was "unreasonable, excessive and confiscatory?" To answer this question, see the Jury Instruction concerning the"cost of service" (Instruction No. 15).

______ Yes X No

Proceed to the remaining questions in this section only if you answered "No" to this question. If you answer "Yes" to this question, do not answer any more questions in this section and proceed to the next section.

2.3. Insert below the amount of damages Wagoner-5 has incurred due to Coweta providing potable water service to the Cedar Creek Village Property. If you find there have been no damages, you should enter a nominal damage amount of $1.00. To answer this question, see the Jury Instruction concerning "General Measure of Damages" (Instruction No. 16).

$ 34,478 .

SECTION THREE

3.1. Has Wagoner-5 provided or made potable water service available to the Celebration At The Woods Property? To answer this question, see the Jury Instruction concerning the "made service available" issue (Instruction No. 13).

X Yes ______ No

Proceed to the remaining questions in this section only if you answered "Yes" to this question. If you answer "No" to this question, do not answer any more questions in this section proceed to the next section.

3.2 Did Coweta establish that the cost to Celebration at the Woods to obtain potable water service from Wagoner-5 was "unreasonable, excessive and confiscatory?" To answer this question, see the Jury Instruction concerning the "cost of service" (Instruction No. 15).

______ Yes X No

Proceed to the remaining questions in this section only if you answered "No" to this question. If you answer "Yes" to this question, do not answer any more questions in this section, and proceed to the next section.

3.3. Insert below the amount of damages Wagoner-5 has incurred due to Coweta providing potable water service to the Celebration At The Woods Property. If you find there have been no damages, you should enter a nominal damage amount of $1.00. To answer this question, see the Jury Instruction concerning "General Measure of Damages" (Instruction No. 16).

$ 27,379 .

SECTION FOUR

4.1. Has Wagoner-5 provided or made potable water service available to the Timber Ridge Crossing Property? To answer this question, see the Jury Instruction concerning the "made service available" issue (Instruction No. 13).

X Yes ______No

Proceed to the remaining questions in this section only if you answered "Yes" to this question. If you answer "No" to this question, do not answer any more questions in this section and proceed to the next section.

4.2. Did Coweta establish that the cost to Timber Ridge Crossing to obtain potable water service from Wagoner-5 was "unreasonable, excessive and confiscatory?" To answer this question, see the Jury Instruction concerning the "cost of service"(Instruction No. 15).

______Yes X No

Proceed to the remaining questions in this section only if you answered "No" to this question. If you answer "Yes" to this question, do not answer any more questions in this section, and proceed to the next section.

4.3. Insert below the amount of damages Wagoner-5 has incurred due to Coweta providing water service to the Timber Ridge Crossing Property. If you find there have been no damages, you should enter a nominal damage amount of $1.00. To answer this question, see the Jury Instruction concerning "General Measure of Damages" (Instruction No. 16).

$ 533,107 .

DATED this 25th day of October, 2013.

____
Signature of Jury Foreman

____
Print name of Jury Foreman

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RURAL WATER, SEWER, AND SOLID WASTE MANAGEMENT DISTRICT NO. 1, LOGAN COUNTY, OKLAHOMA, AN AGENCY AND LEGALLY CONSTITUTED AUTHORITY OF THE STATE OF OKLAHOMA,

Plaintiff,

vs.

CITY OF GUTHRIE, AN OKLAHOMA MUNICIPALITY AND THE GUTHRIE PUBLIC WORKS AUTHORITY, A PUBLIC TRUST,

Defendants.

Case No. CIV-05-786-M

Total Jury Award: $1,274,437.00

VERDICT FORM

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Section One

1. Has plaintiff Logan-1 made potable water service available to the Mission Hills development?

  X Yes ______ No

If you answered "Yes" to question 1, proceed to the remaining questions in this section. If you answered "No" to question 1, do not answer any more questions in this section and proceed to the next section.

2. Have defendants Guthrie established that the cost to the developer or customers within the Mission Hills development to obtain potable water service from plaintiff Logan-1 was "unreasonable, excessive and confiscatory"?

  ______ Yes X No

If you answered "No" to question 2, proceed to the remaining questions in this section. If you answered "Yes" to question 2, do not answer any more questions in this section and proceed to the next section.

3. Did defendants Guthrie limit or curtail plaintiff Logan-1's water service to the Mission Hills development?

X Yes ______ No

If you answered "Yes" to question 3, proceed to the remaining question in this section. If you answered "No" to question 3, do not answer any more questions in this section and proceed to the next section.

4. Insert below the amount of damages plaintiff Logan-1 has incurred due to defendants Guthrie providing potable water service to the Mission Hills development. If you find there has been no damages, you should enter a nominal damage amount of $1.00.

$ 43,000

Section Two

1. Has plaintiff Logan-1 made potable water service available to the Pleasant Hills development?

X Yes ______ No

If you answered "Yes" to question 1, proceed to the remaining questions in this section. If you answered "No" to question 1, do not answer any more questions in this section and proceed to the next section.

2. Have defendants Guthrie established that the cost to the developer or customers within the Pleasant Hills development to obtain potable water service from plaintiff Logan-1 was "unreasonable, excessive and confiscatory"?

______ Yes X No

If you answered "No" to question 2, proceed to the remaining questions in this section. If you answered "Yes" to question 2, do not answer any more questions in this section and proceed to the next section.

3. Did defendants Guthrie limit or curtail plaintiff Logan-1's water service to the Pleasant Hills development?

X Yes ________ No

If you answered "Yes" to question 3, proceed to the remaining question in this section. If you answered "No" to question 3, do not answer any more questions in this section and proceed to the next section.

4. Insert below the amount of damages plaintiff Logan-1 has incurred due to defendants Guthrie providing potable water service to the Pleasant Hills development. If you find there has been no damages, you should enter a nominal damage amount of $1.00.

$ 53,513

Section Three

1. Has plaintiff Logan-1 made potable water service available to Disputed Customer No. 1, Spirit Wing Aviation, 510 Airport Road?

X Yes ________ No

If you answered "Yes" to question 1, proceed to the remaining questions in this section. If you answered "No" to question 1, do not answer any more questions in this section and proceed to the next section.

2. Have defendants Guthrie established that the cost to Disputed Customer No. 1 to obtain potable water service from plaintiff Logan-1 was "unreasonable, excessive and confiscatory"?

________ Yes X No

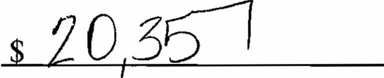
If you answered "No" to question 2, proceed to the remaining questions in this section. If you answered "Yes" to question 2, do not answer any more questions in this section and proceed to the next section.

3. Did defendants Guthrie limit or curtail plaintiff Logan-1's water service to Disputed Customer No. 1?

X Yes ________ No

If you answered "Yes" to question 3, proceed to the remaining question in this section. If you answered "No" to question 3, do not answer any more questions in this section and proceed to the next section.

4. Insert below the amount of damages plaintiff Logan-1 has incurred due to defendants Guthrie providing potable water service to Disputed Customer No. 1. If you find there has been no damages, you should enter a nominal damage amount of $1.00.


$ 20,357

Section Four

1. Has plaintiff Logan-1 made potable water service available to Disputed Customer No. 3, Star Stop, 1620 S. Division St.?

X Yes ________ No

If you answered "Yes" to question 1, proceed to the remaining questions in this section. If you answered "No" to question 1, do not answer any more questions in this section and proceed to the next section.

2. Have defendants Guthrie established that the cost to Disputed Customer No. 3 to obtain potable water service from plaintiff Logan-1 was "unreasonable, excessive and confiscatory"?

________ Yes X No

If you answered "No" to question 2, proceed to the remaining questions in this section. If you answered "Yes" to question 2, do not answer any more questions in this section and proceed to the next section.

3. Did defendants Guthrie limit or curtail plaintiff Logan-1's water service to Disputed Customer No. 3?

X Yes ________ No

If you answered "Yes" to question 3, proceed to the remaining question in this section. If you answered "No" to question 3, do not answer any more questions in this section and proceed to the next section.

4. Insert below the amount of damages plaintiff Logan-1 has incurred due to defendants Guthrie providing potable water service to Disputed Customer No. 388. If you find there has been no damages, you should enter a nominal damage amount of $1.00.

$ 18,000

11-14-2014
Date Signed

Signature of Presiding Juror

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FILED
IN OPEN COURT
OCT 24 2013
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RURAL WATER DISTRICT NO. 5)
WAGONER COUNTY, OKLAHOMA,)
)
Plaintiff,)
) Case No. 08-CV-252-JED-FHM
v.)
)
CITY OF COWETA; COWETA)
PUBLIC WORKS AUTHORITY,)
)
Defendants.)

JURY INSTRUCTIONS

Dated this 24th day of October, 2013

JOHN E. DOWDELL
UNITED STATES DISTRICT JUDGE

JURY INSTRUCTION NO. 2

STATEMENT OF THE CASE

Plaintiff Rural Water District No. 5, Wagoner County brings this action against the defendants, City of Coweta and the Coweta Public Works Authority. In these instructions, I will refer to the plaintiff as "Wagoner-5," and I will refer to the defendants together as "Coweta."

Wagoner-5 alleges that Coweta has violated Wagoner-5's rights under federal law by providing water service to the customers that are disputed in this case. Those disputed customers are: (a) the Koweta Indian Clinic; and (b) three housing subdivisions in Coweta: Timber Ridge Crossing Subdivision; Celebration at the Woods Subdivision; and Cedar Creek Village. Wagoner-5 seeks damages for the past sales of water to those disputed customers.

Coweta alleges that Wagoner-5 has not made and cannot make service available to the disputed customers and therefore that Wagoner-5 is not entitled to federal protection for the disputed customers. In addition, Coweta denies that Wagoner-5 has suffered any damages for the water sales that have occurred.

JURY INSTRUCTION NO. 12

ELEMENTS OF A CLAIM FOR VIOLATION OF TITLE 7 U.S.C. § 1926(b)

Wagoner-5 must prove by a preponderance of the evidence the following in order to recover on its claim that Coweta violated Wagoner-5's rights under 7 U.S.C. § 1926(b):

1. That Wagoner-5 is an "association";

2. That Wagoner-5 is indebted on a loan originally obtained from the Federal Government;

3. That Wagoner-5 has made potable water service available to one or more of the disputed customers; and

4. That Wagoner-5's services were curtailed or limited by Coweta's service to each of those disputed customers.

Elements 1, 2, and 4 have been established as a matter of law in this Court. Thus, you are to consider only whether Wagoner-5 has proven element 3 from the evidence presented to you.

JURY INSTRUCTION NO. 13

MADE SERVICE AVAILABLE

In considering whether Wagoner-5 made water service available to each of the disputed customers, you are instructed that Wagoner-5 made service available to a customer if, at the time that customer requested water service, Wagoner-5 had adequate facilities within or adjacent to the area to provide potable water service to that customer within a reasonable time. Any doubts about whether Wagoner-5 has made service available to a customer should be resolved in favor of Wagoner-5.

If you find that Wagoner-5 has made service available to one or more of the disputed customers, you must proceed to determine whether the cost of such service would be unreasonable, excessive, and confiscatory, as outlined in the following instructions.

If you find that Wagoner-5 has not made service available as to one or more of the disputed customers, you should enter judgment for Coweta as to that disputed customer.

JURY INSTRUCTION NO. 14

PRE-USDA DEBT

Coweta commenced service to some of the disputed customers prior to the date Wagoner-5 became indebted on its current USDA Loan, which is dated June 15, 2007.

If Coweta continued potable water service to such customers after Wagoner-5 became indebted to the USDA on June 15, 2007, such continued service is a violation of 7 U.S.C. § 1926(b) if Wagoner-5 met the "made service available" element of the § 1926(b) claim.

However, Wagoner-5's damages for such customer, if you find any, are limited to any damages incurred subsequent to the date of Wagoner-5's current USDA Loan dated June 15, 2007.

JURY INSTRUCTION NO. 15

COST OF SERVICE

If you determine that Wagoner-5 made service available to one or more of the disputed customers, you must then determine whether the cost of that service would be "unreasonable, excessive and confiscatory." This is a defense raised by Coweta and it is therefore Coweta's burden to establish the defense by a preponderance of the evidence.

The costs charged by Wagoner-5 for water service are not required to be competitive with costs charged by Coweta or any other competitor. However, if you find that Wagoner-5's costs for water service to one or more of the disputed customers are unreasonable, excessive and confiscatory, then Wagoner-5 has not made service available to that customer or customers.

In making this determination, you should consider the following factors:

1. Whether the costs charged by Wagoner-5 for water service allow it to yield more than a fair profit;

2. Whether the costs charged by Wagoner-5 for water service establish a rate that is disproportionate to the services rendered;

3. Whether other, similarly situated water districts do not follow the same cost practices as Wagoner-5; and

4. Whether Wagoner-5's costs for water service establish an arbitrary classification between various users.

No one of these four factors is dispositive of the issue, and you should consider the totality of the circumstances as you view them considering the evidence.

JURY INSTRUCTION NO. 16

GENERAL MEASURE OF DAMAGES

If you decide in favor of Wagoner-5 on its claims for violation of 7 U.S.C. § 1926(b) as to one or more of the disputed customers, you must then determine the amount of any damages to Wagoner-5 as to that customer or customers. This is the amount of money that would put Wagoner-5 in as good a position as it would have been in if there had been no violation of § 1926(b).

If you find in favor of Wagoner-5 on its claim under § 1926(b), but you find that Wagoner-5 failed to prove actual damages, you should return a verdict for Wagoner-5 and enter a nominal damage amount of $1.00.

If you find that Wagoner-5 failed to prove its claim under § 1926(b), then you will not consider the question of damages.

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United States Court of Appeals, Sixth Circuit.
LE-AX WATER DISTRICT, Plaintiff-Appellee,
v.
CITY OF ATHENS, OHIO, Defendant-Appellant.
346 F.3d 701

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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City of Eudora, Kansas

Lawrence Memorial Hospital
Ordinance 865 12/11/2006

JRB/NewStreams/ClearStreams/ClearWater

Doug Garber Construction, Inc.
Ordinance 857 9/11/2006

Donald R. Grinnell
Ordinance 863 10/23/2006

Shadow Ridge (Below)

RWD No. 4
Douglas County, Kansas

Total Annexation = 153 Acres
Future"Net" Revenue/Asset Value
$6,500,000

(Future Revenue Discounted to present day dollars - Calculated by Scott Scultz, CPA and Water District Administrator)

LAWRENCE MEMORIAL HOSPITAL
JRB INC
NEW STREAMS LLC
CLEARWATER LLC
DOUG GARBER CONST INC
CLEARSTREAMS HOLDING LLC
SHADOW RIDGE LC

ITHICA CT
SAVAGE ST
CHERRY ST
WALNUT ST
SPRUCE ST
PINE ST
W 12TH ST
E 12TH ST
W 13TH ST
E 13TH ST
E 14TH ST
E 14TH TER
E 14TH PL
W 15TH ST
E 15TH ST
16TH ST
16TH TER
CEDAR ST
ACORN ST
OAK ST
MAPLE ST
MAIN ST
LOCUST ST
CHURCH ST
BIRCH ST
ELM ST
ARROWWOOD DR
CHESTNUT ST
HICKORY ST
PEACH ST
SYCAMORE ST
OAK PL
KISTLER ST
CARDINAL DR
N 1300 RD
W 20TH ST
COUNTRY DR
E 23RD ST
W 25TH ST
W 26TH ST
W 26TH LN
W 27TH ST
S FIR ST
S FIR Ter
MONTROSE DR
S STRATTON CIR
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E 1200 RD
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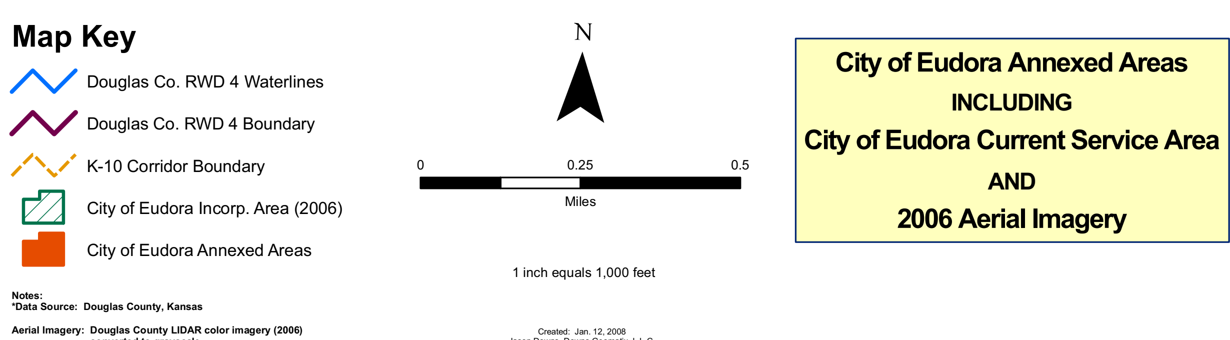
2"
2.5"
3"
4"
6"
12"



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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.**

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United States Court of Appeals,
Tenth Circuit.
KAY ELECTRIC COOPERATIVE, an Oklahoma Rural Electric Cooperative; and Kay County Rural Water District No. 3, an Oklahoma Rural Water District, Plaintiffs–Appellants,
v.
The CITY OF NEWKIRK, OKLAHOMA, a Municipality; and the Newkirk Municipal Authority, a public trust, Defendants–Appellees.
Oklahoma Association of Electric Cooperatives, Amicus–Curiae.

No. 10–6214.
July 29, 2011.

Background: Electric cooperative filed action alleging that municipality had engaged in unlawful tying and attempted monopolization in violation of Sherman Act. The United States District Court for the Western District of Oklahoma, Robin J. Cauthron, J., 2010 WL 3222477,dismissed action. Plaintiff appealed.

Holding: The Court of Appeals, Gorsuch, Circuit Judge, held that municipality did not enjoy any federal antitrust "immunity" in provision of electricity services.

Reversed and remanded.

West Headnotes

[1] Antitrust and Trade Regulation 29T 903

29T Antitrust and Trade Regulation
29TXI Antitrust Exemptions and Defenses
29Tk901 State Action
29Tk903 k. Political subdivisions; municipalities. Most Cited Cases

A municipality shares a state's antitrust "immunity" when, but only when, it is implementing anticompetitive policies authorized by the state. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

[2] Antitrust and Trade Regulation 29T 903

29T Antitrust and Trade Regulation
29TXI Antitrust Exemptions and Defenses
29Tk901 State Action
29Tk903 k. Political subdivisions; municipalities. Most Cited Cases

A municipality lacks antitrust "immunity" unless it can bear the burden of showing that its challenged conduct was at least a foreseeable result of state legislation. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

[3] Antitrust and Trade Regulation 29T 903

29T Antitrust and Trade Regulation
29TXI Antitrust Exemptions and Defenses
29Tk901 State Action
29Tk903 k. Political subdivisions; municipalities. Most Cited Cases

A state's grant of a traditional corporate charter to a municipality is not enough to make the municipality's subsequent anticompetitive conduct foreseeable, which would allow a municipality to share a state's antitrust "immunity." Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

[4] Antitrust and Trade Regulation 29T 903

palities. Most Cited Cases

For an anticompetitive result to qualify as a foreseeable consequence of state legislative policy, which would allow a municipality to share a state's antitrust “immunity,” it should be plainer and easier to ascertain in advance than a court's ruling on whether a particular business at a particular time and in a particular place qualifies as a “natural” monopoly. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

***1040** Douglas A. Rice, Derryberry & Naifeh, LLP, Oklahoma City, OK, (Larry Derryberry and Pete G. Serrata III, Derryberry & Naifeh, LLP, Oklahoma City, OK, and Jonathan C. Ihrig and Andrew M. Ihrig, ***1041** Ihrig Law Firm, Blackwell, OK, with him on the briefs) for Plaintiffs–Appellants.

Andrew W. Lester (Carrie L. Williams, Lester, Loving & Davies, P.C., Edmond, OK, with him on the brief), for Defendants–Appellees.

Michael Burrage, Whitten Burrage, Oklahoma City, OK, for Amicus–Curiae.

Before MURPHY, GORSUCH, and SCOTT M. MATHESON, Circuit Judges.

GORSUCH, Circuit Judge.

When a city acts as a market participant it generally has to play by the same rules as everyone else. It can't abuse its monopoly power or conspire to suppress competition. Except sometimes it can. If the city can show that its parent state authorized it to upend normal competition, to install instead a municipal monopoly, the city enjoys immunity from federal antitrust liability. The problem for the City of Newkirk in this case is that the state has done no such thing.

Newkirk and Kay Electric Cooperative both provide electricity to Oklahoma consumers. Traditionally, Newkirk has served customers inside its city limits while Kay, a rural electrical cooperative, has served nearby customers outside the city boundaries. When the announcement came that a new jail would be built just outside Newkirk, Kay naturally offered to provide electricity. But unwilling to let so lucrative an opportunity slip away, Newkirk responded by annexing the area and issuing its own service offer. At the end of the day, Kay's offer was much the better but the jail still elected to buy electricity from Newkirk. Why? Because Newkirk is the only provider of sewage services in the area and it refused to provide any sewage services to the jail—that is, unless the jail also bought the city's electricity. Finding themselves stuck between a rock and a pile of sewage, the operators of the jail reluctantly went with the city's package deal.

As these things go Kay responded by suing Newkirk, alleging that the city had engaged in unlawful tying and attempted monopolization in violation of the Sherman Act. 15 U.S.C. §§ 1, 2. But the district court refused to allow the case to proceed, granting Newkirk's motion to dismiss under Fed.R.Civ.P. 12(b)(6) after it found Newkirk “immune” from liability as a matter of law. It is this ruling Kay challenges on appeal.

The Sherman Act has little to say about municipal immunity, at least directly. It contains only the broadest and barest of proscriptions against anticompetitive activity—declaring unlawful any contract, combination, or conspiracy in restraint of trade and forbidding any monopoly or attempt to monopolize. Over the last 120 years, however, much judicial embroidery has stitched out the scope of permissible and impermissible competitive activity under the Act, handiwork that's often been informed by evolving (if sometimes competing) schools of economic thought. One particular development, however, and the one at issue in this case, has less to do with economic regulation than state sovereignty.

While the Sherman Act clearly forbids anticompetitive conduct by *private* market players, what about

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Mississippi,
Western Division.
ADAMS COUNTY WATER ASSOCIATION, INC., Plaintiff
v.
CITY OF NATCHEZ, MISSISSIPPI, et al., Defendants.

Civil Action No. 5:10CV199–DCB–RHW.
July 16, 2013.

James H. Herring, Herring, Long & Joiner, Canton, MS, for Plaintiff.

John Walter Brown, Jr., Walter Brown Law Office, Edgar Hyde Carby, Carby And Carby, PC, Everett T. Sanders, Sanders Law Firm, PLLC, Natchez, MS, John L. Maxey, II, William Holcomb Hussey, Maxey Wann, PLLC, Jackson, MS, for Defendants.

OPINION AND ORDER

DAVID BRAMLETTE, District Judge.

***1** On May 28, 2013, this Court held a hearing on the pending motions for summary judgment **[docket nos. 110, 136, 143, 153]** at the United States Courthouse in Natchez, Mississippi. Having reviewed the arguments and testimony presented by both sides in light of their respective summary-judgment requests, and having carefully considered relevant statutory and case law as it applies to those requests, the Court will deny all parties' motions in all respects with one exception. However, the Court adds that, for the reasons discussed below, it does not appear that an order or judgment addressing the sewer-effluent issue will be necessary or appropriate in this case. Nevertheless, the Court will hold this issue in abeyance as this case proceeds to trial. After hearing all the evidence related to the Defendants' actual or imminent provision of water services in Adams County Water's certificated areas, the Court will determine the relief, if any, to which Adams County Water is entitled.

ANALYSIS

I. The Defendants' Motion and Justiciability

At the hearing, Adams County Water made it clear that it wants declaratory or injunctive relief indicating that the Defendants may not provide sewer effluent in its certificated areas. In response, the Defendants assert that it would be error to grant Adams County Water its requested relief because this Court does not have jurisdiction over the issue. The Defendants frame the dispute as one of "mootness." *See* Def.s' Br. at 3, docket no. 3. But having given careful consideration to the Defendants' jurisdictional concerns, the dispute is better expressed in terms of standing, which is closely related to the doctrine of mootness. *See U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980) (quoting *Henry P. Monaghan, Constitutional Adjudication: The Who and When,* 82 Yale L.J. 1363, 1384 (1973)); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

"In order for a plaintiff to have sufficient standing under Article III, that plaintiff must show that: he has suffered or will suffer an injury, his injury is traceable to the defendant's conduct, and a favorable federal court decision will likely redress the injury." *Samnorwood Indep. School Dist. v. Texas Educ. Agency,* 533 F.3d 258, 264–65 (5th Cir.2008). Applying the first prong of this test to the facts in the case, Adams County Water has not convinced the Court that (1) it *has suffered harm* as a result of any discussions the Defendants had with Rentech about the provision of sewer effluent in Adams County Water's certificated

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Supreme Court of Oklahoma.
RURAL WATER SEWER AND SOLID WASTE MANAGEMENT, DISTRICT NO. 1, LOGAN COUNTY, OKLAHOMA, an agency and legally constituted authority of the State of Oklahoma, Plaintiff/Counter–Defendant/Appellee,
v.
CITY OF GUTHRIE, an Oklahoma Municipality; the Guthrie Public Works Authority, a public trust, Defendants/Counter–Claimants/Third–Party Plaintiffs/Appellants,
v.
Department of Agriculture, Third–Party Defendant/Appellee,
and
Community Program Loan Trust 1987A, a Massachusetts Business Trust, Third–Party Defendant.

No. 107,468.
June 29, 2010.
Rehearing Denied Jan. 31, 2011.

Background: Rural water, sewer, and solid waste management district filed action against municipality claiming unlawful encroachment on its service area in alleged violation of federal law that protected rural water districts that remained indebted on loans obtained from United States Department of Agriculture (USDA) from competition from other water districts. The United States District Court for the Western District of Oklahoma, David Russell, J., granted judgment for plaintiff. Defendant appealed. The United States Court of Appeals, Tenth Circuit, 344 Fed.Appx. 462, certified questions.

Holding: The Oklahoma Supreme Court, Colbert, J. held that State constitutional ban on legislature's grant of an exclusive franchise did not preclude district from either entering into loan agreements with USDA that provision limiting ability of municipality to curtail water services that district provided.

Questions answered.

Opala, Kauger, JJ., concurred in the result.

West Headnotes

[1] Water Law 405 2112

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

To receive federal statutory protection from competition under Consolidated Farm and Rural Development Act, nonprofit water association that has received federal loan must have: (1) continuing indebtedness under loans obtained from the federal government, and (2) have provided or made available service to disputed area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[2] Water Law 405 2112

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

ti–Curtailment” provision, section 1926(b) specifically provides:

> FN4. Title 82, section 1324.10(A)(4) authorizes a district to:
>
> > [b]orrow money and otherwise contract indebtedness for the purposes set forth in this act, and, without limitation of the generality of the foregoing, to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to issue its notes or obligations therefor, and to secure the payment thereof by mortgage, pledge or deed of trust on all or any property, assets, franchises, rights, privileges, licenses, rights-of-way, easements, revenues, or income of the said district ....

> The service provided or made available through any [indebted rural water] 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).

¶ 7 Section 1926(b)'s protection serves two goals. *See Pittsburg County,* 358 F.3d at 715. First, it provides for:

See also Robertson Properties, Inc. v. In re Detachment of Territory from Pub. Water Supply Dist. No. 8, 153 S.W.3d 320, 326 (Mo.Co.App.2005);

> greater security for the federal loans made under the program ... By ‘protecting the territory served by such an association['s] facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system,’ § 1926 protects the financial interests of *the United States, which is a secured creditor of the water association,* from reduction of the water association's revenue base.

Id. (emphasis added). The second interest served by section 1926(b)'s protection from competition is the “promotion of rural water development ‘by expanding the number of ***43** potential users of such systems, thereby decreasing the per-user cost.’ ” *Id.*

[1] ¶ 8 “[T]o receive the protection against competition provided by § 1926(b) a water association must (1) have a continuing indebtedness ... [under loans obtained from] the [federal government], and (2) have provided or made available service to the disputed area.” *Moongate Water,* 420 F.3d at 1084. Thus, the Tenth Circuit Court has held that a water district's service area protected from competition under section 1926(b) is not necessarily the entire geographic area granted to the district under state law, but is instead the area (1) for which the water district has a right under state law to provide service and (2) has actually done so, or could do so in a reasonable time. *See Sequoyah County,* 191 F.3d at 1201–03.

[2] ¶ 9 In addition to these principles defining the protection which section 1926(b) affords rural water districts from competition, state law cannot change the service area to which the protection applies after that federal protection has attached. *See Pittsburg County,* 358 F.3d at 715. For instance, “where the federal § 1926 protections have attached, § 1926 preempts local or ‘state law [that] can be used to justify a municipality's encroachment upon [a] disputed area in which an

here, the municipality argued that the Oklahoma statute authorizing the water district to borrow from the federal government, coupled with section 1926(b) protection amounts to the granting of an exclusive franchise by the Oklahoma Legislature in contravention of the Oklahoma Constitution. Finding that there was no state legislative grant of an exclusive right to provide service, the Tenth Circuit held that the Oklahoma Legislature "authorized the acceptance of a condition" and that the district's right to exclude the municipalities water service was granted by the federal legislature through section 1926(b). *See Glenpool,* 861 F.2d 1211. Therefore, an indebted district's right to be free from a competitor's unqualified intrusion into its service area is a right granted by Congress, and only "Congress can terminate that right." *Id.* at 1216. Further, Oklahoma's constitutional ban on the Oklahoma Legislature's grant of an exclusive franchise does not apply to indirect, remote, or incidental benefits provided by Congress pursuant to the terms of a federally funded loan program. We agree with the Tenth Circuit's conclusion that article 5, section 51 is neither implicated nor violated as no action by the Oklahoma Legislature has been taken that grants an exclusive right to a water district.

[14][15] ¶ 23 In addition, where federal section 1926(b) protections have attached, section 1926(b) preempts local or state law that can be used to justify a municipality's (or any competitor's) encroachment upon a disputed area in which the indebted association is legally providing service under state law. *Pittsburg County,* 358 F.3d at 715. Therefore, even assuming if section 1926(b) could be construed as violating the Oklahoma Constitution, the United States Supreme Court has long recognized that where a state law or constitution stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Supremacy Clause, those laws are pre-empted and "judges of every state are bound thereby." *Robertson Properties, Inc. v. In re Detachment of Territory from Pub. Water Supply Dist. No. 8,* 153 S.W.3d 320, 326 (Mo.Co.App.2005); *see Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *see also* U.S. Const. Art. VI, Cl. 2. As such, a state court's decision on the effect of a federal statute is not binding on the federal courts. *Rural Water Dist. No. 3 v. Owasso Util's Auth.,* 530 F.Supp. 818, 823 (1979). In furthering the full purpose and objectives of Congress, federal courts have deemed a federally indebted rural water district's service area as "sacrosanct." *See North Alamo Water Supply Corp. v. City of San Juan,* 90 F.3d 910, 915 (5th Cir.1996) (per curiam) (quoting *Bear Creek Water Ass'n Inc.,* 816 F.2d at 1060–61). Therefore, section 1926 shall be liberally constructed to protect the indebted district from an unqualified intrusion. *Glenpool,* 861 F.2d at 1214.

¶ 24 Guthrie and OML as *amici curiae,* jointly interpret section 1926(b) as a complete infringement of a municipality's sovereignty. They advance the position that section 1926(b) "cripples" "both the State and an affected municipality [rendering them]... powerless to protect their citizens' needs for adequate public safety, access to essential services, promotion of economic development and other benefits of government." *Amici curiae* contend further that 1926(b) prohibits municipalities from providing water, often at rates lower than a district, to its own taxpayers and leaves taxpayers without fire protection because the volume of water required for fire fighting is made available only so long as it is paid for through water rates. They add "it is not fiscally feasible to extend ***49** water lines solely for fire purpose." We are not persuaded.

[16] ¶ 25 The overarching theme of section 1926(b) seeks to limit the actions of a municipality when those actions would lead to direct competition with the district's customers while the district remains indebted to the federal government. *Owasso,* 530 F.Supp. at 824. The Act's purpose is two-fold: provide fresh and clean water to rural households, and protect the federal government as insurer of the loans. *Le–Ax,* 346 F.3d at 705. The court in *Owasso* held that section 1926(b)

does not preclude municipalities from providing water outside of their city limits and within the geographic boundaries of a water district. Rather, section 1926(b) protection only becomes an issue when a municipality provides water in a manner that affects the water district's ability to repay its federal loans. 530 F.Supp. at 824 (noting that there is "no conflict between the Oklahoma Statutes empowering municipalities to furnish water outside of their city limits and the Federal Act").

[17] ¶ 26 The congressional enactment, however, does not preclude a municipality from exercising all municipal acts within the district. Despite the anti-curtailment provision, jurisdictions that have addressed the issue have not read such language to prohibit a municipality from erecting and maintaining water lines within the district for fire protection purposes. *See Id.,* 530 F.Supp. at 823 (holding that section 1926(b)'s scope is limited to curtailment of competition with potential customers, not fire services); *Sequoyah County,* 191 F.3d at 1204 n. 10; *Rural Water System # 1 v. City of Sioux Ctr.,* 29 F.Supp.2d 975, 993 (1998); *see also Glenpool,* 861 F.2d at 1216 (finding that a municipality may regulate water lines for fire hydrants within the boundaries of a rural water district). In fact, the right of an indebted association to supply water service within its service area under section 1926(b), coexists with a municipality's right to provide fire protection. A district's capacity to provide fire protection therefore, is not a consideration to invoke section 1926(b) protection. *North Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n,* 803 F.Supp. 15, 23 (E.D.Ky.1992).

¶ 27 Likewise, a municipality's sovereign right is not affected by the anti-curtailment provision. While a municipality cannot seek to engage in direct competition with an indebted water district during the life of the loan, nothing in the Act prevents a municipality from exercising its governmental functions to regulate water services to an overlapping service area within that district. For instance, Guthrie asserts that the anti-curtailment provision unconditionally prohibits a municipality from extending water service. This contention is incorrect.

[18] ¶ 28 A district's right to exclude a competitor's water service is a qualified not an exclusive right, limited in time and in scope so as not to severely impair a municipality from performing its governmental functions. The provision precludes competitive water services only while a district remains indebted to the USDA to the extent that a competitor's services would curtail or limit the indebted district's ability to provide water services and repay its loans. Accordingly, section 1926(b) is a district's "shield" from a competitor's unqualified intrusion. However, an indebted association cannot use such protection to categorically prevent a competitor from ever servicing the district's area. For instance, a district loses its anti-curtailment protection when a district refuses to extend water service to a customer within its service area. In *Sequoyah County,* the court, interpreting title 82, section 1324.2(7), of the Oklahoma Rural Water and Sewer Act, determined that a water district is not required to provide services to every customer within its district. 191 F.3d at 1202 (noting that landowners subscribe to "benefit units" within the district but the district maintains discretion over the existence and cost of such units). In such a case, nothing prevents a municipality from extending water service within that district if the district has made no attempt to provide water to its customer after a request for service is made. *Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n,* 291 F.3d 1262, 1267–68 (10th Cir.2002).

***50** ¶ 29 Similarly, the Tenth Circuit has held that charging unreasonable, excessive, and confiscatory fees to customers is the equivalent of not providing service under the Act even where a district has adequate facilities. *See Pittsburg County,* 358 F.3d at 719 (reasoning that the anti-curtailment provision is aimed at prohibiting "excessively high monopolistic pricing without [providing] legal recourse for consumers and

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Missouri Court of Appeals,
Western District.
ROBERTSON PROPERTIES, INC., Respondent,
v.
In the Matter of the DETACHMENT OF TERRITORY FROM PUBLIC WATER SUPPLY DISTRICT NO. 8 OF CLAY COUNTY, Missouri, Appellant.

No. WD 62968.
Jan. 21, 2005.

Background: Developer whose 55-acre parcel had already been annexed by city brought action against public water supply district to detach parcel from district, and district counterclaimed for a declaration of law and an injunction protecting its supply area. The Circuit Court, Clay County, David W. Russell, J., ruled in favor of developer, denying all relief to district. District appealed.

Holdings: The Court of Appeals, Harold L. Lowenstein, J., held that:
(1) trial court was first to consider federal statute before ruling on state detachment claim;
(2) on remand, court was required to determine if district was indebted to federal government; and
(3) court was also required to determine whether district made service available to homeowners in disputed area.

Reversed and remanded with instructions.

West Headnotes

[1] Water Law 405 ⚷1886

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)2 Local Water Districts
405k1886 k. Nature and existence of district. Most Cited Cases
(Formerly 405k183.5)

Generally, the purpose of public water supply districts is to provide drinking water to areas in which service would be economically difficult to sustain.

[2] Appeal and Error 30 ⚷846(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k846 Trial by Court in General
30k846(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚷1010.1(6)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(6) k. Substantial evidence. Most Cited Cases

Appeal and Error 30 ⚷1012.1(1)

ment. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b); V.A.M.S. § 247.031.

[11] Water Law 405 ⚷2111

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2111 k. Encroachment and curtailment in general. Most Cited Cases
(Formerly 405k202)

Where federal statute barring detachment of property from water districts indebted to federal government is raised as a defense to a state statutory suit for detachment by a landowner whose territory overlaps district and city due to a later municipal annexation, the trial court must first make all necessary findings and conclusions in order to decide whether the federal statute protects the district; if the court concludes the federal act protects the district, the inquiry is at an end and no detachment may be had. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b); V.A.M.S. § 247.031.

[12] Water Law 405 ⚷2111

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2111 k. Encroachment and curtailment in general. Most Cited Cases
(Formerly 405k202)

If federal statute barring detachment of property from water districts indebted to federal government does not apply, the trial court must: (1) consider the evidence, and determine that the overlap area created by municipal annexation is not being served by the district, (2) find that detachment will be in the best interest of the district, and (3) find that inhabitants and landowners of the overlap area will not be adversely affected, or that the detachments will be in the best interest of the inhabitants and landowners in the overlap area, and will not adversely affect the remainder of the district; only after making all of these determinations may the trial court grant the landowners' petition. Agricultural Act of 1961, § 306(a, b), 7 U.S.C.A. § 1926(a, b); V.A.M.S. § 247.031(4).

***322** Jeremiah D. Finnegan, Kansas City, MO, for Appellant.

John W. Roe, Kansas City, MO, for Respondent.

Before ULRICH, P.J., LOWENSTEIN and SMITH, JJ.

OVERVIEW

HAROLD L. LOWENSTEIN, Judge.

This is an appeal from a judgment in an action brought by Robertson Properties (Robertson) under Section 247.031 [FN1] to detach approximately fifty-five acres of land from the defendant Public Water Supply District No. 8 of Clay County, Missouri (District), a non-profit association. This overview is presented since the alignment of the parties and relief sought differs from the cases cited by the parties and the trial court. The typical case involves a public water district filing suit against a defendant municipality that seeks to serve drinking water to consumers in a congruent area. This case is different, in that the area in issue is located within a public water district's domain and has been annexed into a municipality's boundary, and the land is being developed by a plaintiff who wants a city to supply drinking water.

FN1. All statutory references are to RSMo. (2000) unless otherwise stated.

Other portions of the public water district law in Chapter 247 that deal with detachment from a district include Sections 247.160, 247.170, and 247.220.

Section 247.160 covers the procedure where a municipality has annexed part of the district's territory and the district's board *voluntarily* enters into a contract with the municipality to allow the municipality to provide water service and to detach. This section also addresses payment for the use of district property and means by which to insure its bond payments. The circuit court must ultimately approve the district board and municipality's contract in order for detachment to occur.

Section 247.170 applies if the district and city cannot agree on who will supply water to annexed property within the district's territory. In order to detach, a petition may be filed in circuit court by a designated percentage of the registered voters in the district who are also patrons of the district. If the court approves the petition, a special election will be called to vote on the detachment.

Finally, Section 247.220 provides a mechanism by which the inhabitants of an entire district may dissolve the entire district through a popular vote of two-thirds of the voters. Under this section, the detachment must be signed by one-fifth of the voters. The court must also determine dissolution would be in the public interest. *Public Water Supply Dist. No. 10 v. City of Peculiar,* 345 F.3d 570, 572 (8th Cir.2003).

[1] Generally, as will be set out *infra,* the purpose of public water supply districts is to provide drinking water to areas in which service would be economically difficult to sustain. Congress set up a mechanism to help finance these districts in the delivery of potable water. In providing financial aid to the states to fulfill this purpose, the United States government has prescribed measures to ensure repayment of these obligations.

Much of the litigation that has resulted from this federal-state cooperation has involved situations where the public water ***323** supply district, financed in part by federal money, has been formed within a state to serve a remote or unpopulated area. As the area served by the public district grew, communities with a municipal or other water supplier developed and expanded into the district's territory. Consequently, developers, residents, and others who had land in both the district and in the municipality could potentially have two different water suppliers. In instances where the landowner elects to be served by the municipal provider, but the water supply district does not agree to detach the affected area from its territory, Section 247.031 sets out the mechanism for detachment in Missouri.

In this case, the plaintiff Robertson, is a developer of residential real estate. One hundred thirty-four acres of Robertson's land had been annexed by the City of Kearney approximately one year before the filing of this suit. Robertson worked closely with Kearney since beginning the development, and it was assumed that Kearney would supply all the water. Robertson brought suit under the auspices of state law, seeking to detach the fifty-five acres [FN2] from the District. Robertson's evidence in favor of detachment was to the effect that neither Roberston, nor Kearney, knew that this land was located in the District's territory.

FN2. These fifty-five acres will be referred to as the “Overlap Area.”

The District answered Robertson's petition by raising the affirmative defense that 7 U.S.C. § 1926[FN3] protected its territory from competitors. It also counterclaimed for a declaration of law and an injunction protecting its supply area. The trial court ruled in favor of Robertson, denying all relief requested by the District.

FN3. Title 7 U.S.C. Section 1926(a)(1) authorizes the Secretary of Agriculture to:

make or insure loans to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farms tenants, farm laborers, rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes.

Subsection (b) states that:

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) (1994).

The ultimate question now on appeal concerns which entity—Kearney or the District—will supply drinking water to the Overlap Area. However, the answer to this question lies in yet another question: Where a state trial court is presented with a property owner's detachment suit filed under state law, and the public water supply district raises federal law as a defense to the detachment, must the trier of fact first decide the issues prescribed in the federal act, and upon finding the federal act does not apply, then decide if the elements contained in the state detachment action are met? This court finds that it must.

***324** FACTS

In 1999, Robertson purchased a tract of undeveloped land and entered into an agreement with the seller, whereby Kearney would annex one hundred thirty-four acres of the land. Robertson began developing its land in phases, with Kearney supplying water. During development, it was discovered that fifty-five acres of the land annexed by Kearney was already within the District's territory. By the time this discovery was made, however, Kearney had already obtained easements and had extended an eighteen-inch and a fourteen-inch water main to service the Overlap Area (Phase IV). Accordingly, Robertson brought suit to detach the Overlap Area from the District.

In entering judgment for Kearney and granting detachment, the trial court made extensive findings that it would be cheaper, more feasible, and less cumbersome for all phases of Robertson's develop-

This case is different in that the property sought to be detached was annexed with the landowner's permission by Kearney in March 1999, well before the filing of the detachment suit. Kearney planned to provide water to one hundred forty-five houses, until later discovering that fifty-five acres of the project were within the District's territory. Although not the *de jure* plaintiff, Kearney had made prior arrangements with the landowner to provide water service. Therefore, it was not an innocent bystander to Robertson's dispute with the District. Despite *Chance's* language that suggests blanket authority be given to municipal water systems supplying water where "service areas" coincide with federally indebted public water districts, this language should not be taken out of context. Specifically, neither *Chance,* nor its interpretation of federal and state law, should be read to allow automatic circumvention of Section 1926(b)'s protection where the municipality seeks to provide water to property it has annexed from within the distributor's boundaries and over the water district's objections.

COMPARING STATE AND FEDERAL LAW

The error of law here results from the trial court's commingling of the facts and conclusions from its Section 1926 and Section 247.031 analyses, primarily from deciding the state action first. The trial court specifically held that the plaintiff, Robertson, was a private individual, not a municipality. The problem with a "private" plaintiff bringing a Section 247.031 suit is that the Section 1926 defense must first be addressed; application of federal law does not rest on anything other than the provider being a competitor with a district indebted to the United States. Section 1926 is not affected by who brings the underlying suit. In a Section 1926 analysis it makes no difference whether an individual brings the suit for detachment; the end result is the same—a municipal or private water supplier is chosen to provide drinking water.

As stated in the legislative history of, and the many cases interpreting, Section 1926, the primary type of competition Congress envisioned was an expanding municipality that annexes and tries to lure urban customers to buy water from them. *See, e.g., Jennings Water, Inc. v. City of N. Vernon,* 895 F.2d 311, 317 (7th Cir.1989); *Rural Water Dist. No. 3 v. Owasso Util. Auth.,* 530 F.Supp. 818, 824 (N.D.Okla.1979). This seems to be exactly what happened***326** here. Having a "private" plaintiff bring a state detachment suit does not negate or trump a district's Section 1926 defense. Only after first determining that one of Section 1926's prongs is inapplicable may the court consider the applicable state detachment statute.

MUST THE SECTION 1926 DEFENSE BE DECIDED FIRST?

[3][4] A side-by-side examination of the criteria for detachment from a public water district contained in the federal statute reveals a distinct difference from the Missouri statute, Section 247.031, for detachment by a landowner. As stated earlier, public districts—such as the District here—are funded by government loans provided for by federal law. Section 1926, therefore, takes precedence over state detachment law. There is no issue here of invalidating state law, nor could this court entertain such an examination. What is evident, however, is that the trial court must first determine whether the letter of the federal law and the Congress' purposes and objectives are being followed. The Supremacy Clause, U.S. CONST. art. VI, cl. 2. states that the laws of the United States made in pursuance of the Constitution shall be the supreme law and judges of every state are bound thereby. *Ard v. Jensen,* 996 S.W.2d 594, 596 n. 3 (Mo.App.1999); *City of Sunset Hills v. Southwestern Bell Mobile Sys., Inc.,* 14 S.W.3d 54, 57 (Mo.App.1999). When, upon examination, state law conflicts with federal law, the state laws are preempted. *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978).

Inherent in this examination is the proposition that the trial court should interpret federal law without

also considering state law issues. That is not what happened in the instant case. Although state and federal law seem similar, they are not, but nor are they contradictory. Combining federal criteria with state issues, and even matters irrelevant to the federal purpose of supplying drinking water to rural areas, i.e., a District supplying water to fight fires or facilities for sewer collection, simply should not enter into a Section 1926 analysis.[FN4] If the federal statute applies, there is no need to determine whether state law has been met, for the federal law, via a Section 1926 defense, has preempted a detachment under Section 247.031. *See Paul v. Jackson,* 910 S.W.2d 286, 290 (Mo.App.1995).

FN4. "[A] water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b)." *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1204 n. 10 (10th Cir.1999).

[5] Title 7, Section 1926 of the United States Code was enacted as a manifestation of Congress' discretionary powers under the spending clause, U.S. CONST. art. 1, § 8, cl. 1, to provide for the general welfare. *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2,* 861 F.2d 1211, 1215 (10th Cir.1988). Legislation enacted under the spending clause is like a contract in that when states accept federal money they "agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

The legislative history of Section 1926(b) explains that the main purpose of the federal loans made to water district associations is to supply potable water to farmers and ranchers. S. REP. NO. 87–566 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309. The legislative history further states that the words, "other rural residents," were included to indicate the desire to reduce the cost per user in the remaining, more remote areas. *Id.* Congress did not intend,***327** however, to allow expanding municipalities to "skim the cream" by expanding into and annexing land from water associations. *See City of Madison v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1060 (5th Cir.1987).

[6] The purpose of securing the district's territory from competitive suppliers, such as municipalities, is to protect and encourage rural water developments and to insure repayment of the loans to the federal government. *Sequoyah,* 191 F.3d at 1196 (citing S.REP. NO. 87–566 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309). Although the legislation does not specifically state that there cannot be open competition, the history showed the "intent of Congress was to protect rural water districts from 'competitive facilities,' especially those which would be developed as a result of the expansion of neighboring municipalities." *Rural Water Dist. No. 3,* 530 F.Supp. at 824; *see also City of Madison,* 816 F.2d at 1060.

[7] Section 1926(b) sets out a congressional mandate that local governments not be allowed to encroach upon, curtail, or limit the drinking water services provided by an association that is indebted to the federal government. *Pub. Water Supply Dist. No. 10,* 345 F.3d at 571; *City of Madison,* 816 F.2d at 1059. Accordingly, the designated area of a water association entitled to Section 1926(b) protection is sacrosanct; any doubts as to protection should be resolved in favor of the association from municipal encroachment. *Rural Water Sys. No. 1 v. City of Sioux Center,* 202 F.3d 1035, 1038 (8th Cir.2000) (citing *Sequoyah,* 191 F.3d at 1197).

[8][9] In order for Section 1926 to apply, a water district association must establish that (1) it has a continuing indebtedness to the FmHA and (2) has provided or made available service to the disputed area. *See Le–Ax Water Dist. v. City of Athens,* 346 F.3d 701, 705 (6th Cir.2003). However, the trial court in this case failed to make a definitive finding whether the District was indebted to the FmHA.[FN5] Instead, the

trial court merely indicated that the second prong—whether the District had "made service available to the disputed area"—had not been satisfied. Because express findings on both prongs are required to determine the applicability of Section 1926, the judgment is reversed and remanded. On remand, the trial court should, without admitting new evidence, determine whether the District was indebted to the FmHA.

FN5. The court did point to evidence that supported a ruling that the District owed on obligations on its assets and property securing a federal loan as defined under the act.

[10] In addition, the trial court should also revisit its analysis of prong two. Section 1926(b) uses the language "service provided or made available." The statute clearly prohibits a municipal annexation that would "pry" existing customers away from a public water district. Even in instances where service has not yet been provided to an area, an association can still claim Section 1926 protection under this second prong by demonstrating an ability to provide service, in that it has water lines and adequate facilities in or adjacent to the disputed area, within a reasonable time after a request for service has been made. *See, e.g., N. Alamo Water Supply Corp. v. City of San Juan,* 90 F.3d 910, 916 (5th Cir.1996); *Lexington–South Elkhorn Water Dist., v. City of Wilmore,* 93 F.3d 230, 238 (6th Cir.1996). The ability to provide drinking water service can be shown by evidence that there are "pipes in the ground" in or adjacent to the disputed area with which it can serve the disputed customers within a reasonable time after a ***328** request for service is made. *Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass'n,* 291 F.3d 1262, 1267–68 (10th Cir.2002) (citing *Sequoyah,* 191 F.3d at 1203).

It is within this context that a determination must be made whether the District has made service available to future water consumers in Brooke Haven. In making this critical determination, the comparison of what the District offers and what Kearney offers is not the litmus test. Whether it is easier or cheaper for Kearney to provide service is irrelevant.[FN6] The test is simply whether the District has made available service to this area.

FN6. Relative cost is determinative only if the district's price is "grossly excessive." *Rural Water Dist. No. 1 v. City of Wilson,* 243 F.3d 1263, 1271 (10th Cir.2001).

Here, the trial court merely determined that Kearney would be a better provider. It did not address the admitted or uncontested facts that Robertson initially decided to "go with the City," the failure of Robertson/Kearney to determine if there was an encroachment, and Robertson's late request for service, which was made well after Robertson/Kearney had laid mains and connecting pipes into an undeveloped area at the edge of the District's territory. As a result, on remand, the trial court should ultimately determine whether the District was reasonably capable of "providing service" at the request of Robertson.

SUGGESTIONS TO THE TRIAL COURT

[11] Although this court would prefer to afford finality to the underlying question of which entity would be the water supplier, that result cannot be reached under the findings and conclusions of the trial court. This court now holds that where Section 1926(a)-(b) is raised as a defense to a Section 247.031 suit for detachment by a landowner involving overlapping territory due to a later municipal annexation, the trial court must make a determination in the following order. First, the trial court must make all necessary findings and conclusions in order to decide whether the federal statute protects the district, i.e., is the District still indebted to the federal government and has the District "made service available"? If the court concludes the federal act protects the district, the inquiry is at an end and no detachment may be had.

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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, private water suppliers, etc. Mr. Harris has over 25 years experience representing over eighty-five (85) Rural Water Districts in Oklahoma, Alabama, 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, 2012 & 2013
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Colorado Rural Water Association Annual Conference, 2009
Oklahoma Rural Water Association Annual Conference, 2009, 2011, 2012 & 2013
Missouri Rural Water Association Annual Conference, 2011 & 2012
Texas Rural Water Association Annual Convention, 2012 & 2013
Missouri Rural Water Association Annual Conference, 2015
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EDUCATION:

B.A., University of Kansas
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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 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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