

7 U.S.C. § 1926(b) – Dramatic Developments in 2003

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Title 7, United States Code, §1926(b) is a United States statute which grants federally indebted rural water districts/associations the “absolute” right to be the exclusive seller of water within their “service area”. To qualify for this federal protection, the water district must satisfy two (2) primary requirements: (1) show indebtedness to the federal government or to some entity which purchased the district’s federal loan, (2) demonstrate that water service has been “made available” by the district.

Municipalities have continued their invasion of water district territory during 2003 and pursued ever increasingly novel (and sometimes illegal) methods to attempt to defeat §1926(b) rights. However, the most common tactic employed by neighboring cities and towns is to simply run lines into water district territory, connect developments and individual customers in knowing violation of federal law and “dare” the water district to file suit. Districts who file suit to protect their revenue source and right to serve, are faced with many obstacles including: (1) significant legal expense to protect the territory, and (2) political pressure to force district boards to surrender valuable revenue sources (current and future water customers).

Pittsburg County (Oklahoma) Rural Water District #7 v. City of McAlester

In October 2003 the U.S. Court of Appeals for the 10th Circuit repeated what many other Courts have said before - “the service area of a federally indebted water association is sacrosanct”. §1926(b) is a congressional mandate that local governments not encroach upon the services provided by federally indebted water associations – regardless of the form that encroachment may take. The 10th Circuit held: “to the extent that a local or state action encroached upon the services provided by a protected water association, the local law or state act is invalid.”

Local and state action or passage of laws and regulations take creative if not sinister form when the object is to take away existing and potential customers from a water district. Cities regularly thrust out their boundaries through annexation to overlap water district territory. In the process, encroachment by the city may appear in the form of (1) passage of onerous regulations such as fire flow requirements which the water district is not likely to have the ability to comply with, (2) assessing residents a higher rate for sewer service if the resident is a water district customer, (3) slowing building permits or warning that sewer service will not be provided if the developer connects to a water district, (4) using deannexation or detachment laws to remove territory from a water district, (5) condemnation proceedings (6) actively promoting dissolution of a water district. These and similar forms of interference designed to frustrate if not completely block service by a water district are “invalid” and may – and likely will - subject the municipality to

liability for damages and attorney fees. Injunctive relief and forfeiture are also available remedies.

In the Pitt-7 case the city of McAlester sought deannexation of water district territory as a means to defeat the water district's right to be the exclusive water provider for the territory in dispute. Though the County Commissioners of Pittsburg County predictably granted the deannexation request, the 10th Circuit nullified the deannexation. In doing so, the Court firmly and plainly stated: "There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of §1926(b)." Going further, the 10th Circuit repeated its earlier pronouncement of the law in Sequoyah County (Oklahoma) Rural Water District #7 v. Town of Muldrow, 10th Circuit 1999: "...doubts about whether a water association is entitled to protection from competition under §1926(b) should be resolved in favor of the F[M]HA- indebted party seeking protection for its territory".

Despite the Federal Court system's consistent admonition to "get out and stay out" of water district territory, the lure of water revenue remains irresistible. Cities continue to seek ever more surreptitious and clandestine methods to invade and appropriate for themselves, the "sacrosanct" service area of rural water.

Examples of "New Strategies"

Cities regularly lose in Court. A quick reading of the various U.S. Circuit Courts of Appeal decisions handed down over the past 10 years is ample evidence of that. As a result cities have adopted new strategies to carry the fight outside the Courtroom (at least in part). The Pitt-7 decision has foreclosed on a great number of those strategies.

In the case of Public Water Supply District No. 10 of Cass County, Missouri v. City of Peculiar (U.S. Court of Appeals for the 8th Circuit) the district sued claiming the city was soliciting voters to bring about a dissolution of the water district. The appellate court held the water district was premature in its suit since the controversy was not ripe for adjudication. However, in saying so the Court issued the following observation: "This is not to say that the City cannot, or will not, play a part in the dissolution that violates §1926(b)." Factors the Court mentioned regarding whether the City's participation in a dissolution would possibly violate §1926(b) were (1) whether the City joined as a plaintiff in the petition for dissolution, (2) whether the city would pay the District's debt as required for a dissolution under Missouri law, and (3) what role the City has played in organizing the citizen petition drive.

What the city may have overlooked here, is that each individual member of a water association is a beneficiary of §1926(b) rights. It was after all, intended to benefit "rural residents" and to protect the "public" interest. Title 42 United States Code §1983 arms an individual member or members of a water association with a private right of action when a federal statute has been violated. Whether or not a "water association" continues to exist as a legal entity – rural residents negatively impacted by an "end-run"

orchestrated by a municipality to defeat §1926(b) and the benefits it was intended to confer on rural residents – may still sue the municipality for damages. In the case of *Wayne v. Village of Sebring* (6th Circuit, 1994), individual land owners sued for violation of §1926(b).

In the *City of Melissa, Texas et al, v. North Collin Water Supply Corp.* (E.D. Texas 2003) the city sued the water service association seeking to block USDA's loan and grant for an upgrade and improvement of its water supply system. The objective here was simple. If the municipality can stop the loan to the water association, then the water association can not become federally indebted. If not indebted – then no §1926(b) rights attach.

The district court concisely stated the real issue in the case: “Once the loan/grant is funded and [the water association] goes forward with the contemplated improvements, a federal law will be triggered which will generally protect [the water association] service area from encroachment by any competitors for up to 40 years.” This is indeed an interesting tactic, namely blocking §1926(b) from ever going into effect by frustrating funding of the loan with a suit that may take years to resolve. It would seem likely that water competitors would accelerate encroachment into the unprotected territory of the water district during the pendency of the suit.

City of Melissa may have overlooked the law established in the Pitt-7 and Sequoyah decisions. In Pitt-7 the city of McAlester argued that when a municipality has been serving water to customers as of the beginning of the period of indebtedness applicable to the water association – that no §1926(b) protection applies to those “existing” water customers of the city. This argument was rejected by the 10th Circuit. The 10th Circuit, first in its Sequoyah decision in 1999 and again in its Pitt-7 decision in 2003 re-confirmed that regardless of whether a municipality had provided service to properties “prior” to the FmHA loan to the water district, this was no bar to claims arising out of a city's service during the period of indebtedness. To nail the point home, the Court stated: “...all §1926(b) claims based on service by McAlester to customers...were not otherwise barred by the fact that McAlester was serving those customers prior to the 1994 loan.”

Conclusion

§1926(b) is both a right and an obligation. The obligation is to provide water service to residents within the federally indebted association's service area if such service can be legally and feasibly performed. To qualify for §1926(b) protection water associations must make “service available” – which means having the ability to provide service within a reasonable period of time after a request for water has been made at a cost to the customer that is not “confiscatory”. There are complexities to measurement of the time element mentioned here, what constitutes “making service available”, as well as what is meant by “confiscatory” charges. (Confiscatory does not mean that the connection fees and water rates charged by the water district are more expensive than that charged by a neighboring city. It is an objective standard based on many factors.) It is critical that

water districts understand the law, and implement the requirements of §1926(b), in order to benefit from its protection.

Aside from satisfying the stark legal requirements of §1926(b) – water associations must be diligent in their efforts to ward off municipal efforts to undermine their valuable legal rights when experiencing the “fight outside the courtroom”. This is best accomplished through (1) informing rural residents of the federal statute, (2) explaining why it is important for the long term economic success of the district and (3) seeking their active participation in the business of the district.