

Protecting Rural Water From Encroachment

en·croach

intr.v. **en·croached, en·croach·ing, en·croach·es**

To take another's possessions or rights gradually or stealthily: *encroach on a neighbor's land.*

To advance beyond proper or former limits

By

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INTRODUCTION

What drives an otherwise responsible municipal government to engage in domestic terrorism by threatening to terminate the water supply to local citizens, putting the health, safety, and financial well being of rural residents at risk? What motivates a city to engage in illegal antitrust “tying” conduct - violating state and federal statutes? What explains a local government board’s decision to delay approval *for over two years* of a simple public use application for a water line extension?

Control over who can sell water and where in the United States, means money and power. Competition for water sales revenue, and territorial control is big business. Federally indebted rural water districts¹ enjoy protection from competition under Title 7, United States Code, Section 1926(b)². The U.S. Congress intended §1926(b) to protect “federally” indebted water districts from competition for two reasons: (1) Congress wanted to better insure that the federal debt would be repaid, and (2) Congress desired to promote the development of rural water systems to make water available to rural residents that is both economical and safe. The federal courts have consistently held that the territory of a federally indebted rural water district is “sacrosanct”.

The purpose of this book is to explain §1926(b). It will show what water districts must do to qualify for protection. It will tell you how to enforce statutory rights against encroachers. It will help prepare water districts to defend against its neighbors many of whom will literally do anything (legal, illegal or immoral) to take away rural water’s territory and customers.

¹For ease of reference I have used the term “rural water district” which is intended to refer to all forms of legal entities that are entitled to the protection of Title 7, United States Code, §1926(b) - which includes water districts, water associations, non-profit corporations, quasi-governmental entities selling water etc.

²Throughout these materials 7 U.S.C. §1926(b) will be referred to simply as “§1926(b)”.
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Chapter 1

The Four Elements Of 7 U.S.C. § 1926(b)³

³(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. 7 USCA § 1926(b)

There have been over 40 federal judicial decisions published during the past 20 years interpreting §1926(b). Judicial decisions have varied in certain respects because of the differences in state law governing the legal right or obligation to sell water. However, Federal Appellate Courts have consistently given a liberal interpretation to §1926(b) that broadly protects rural water districts indebted to the federal government (FmHA/RUS)⁴ from competition by municipalities, other water districts and quasi-public utilities/private water companies. §1926(b) also protects water districts from interference which may come in the form of regulations/ordinances from neighboring municipalities, efforts at condemnation, forced de-annexation, or refusal to deal (where a district's water supply is derived from the purchase of water from a competing municipality). Typically these kinds of unlawful activities are intended to shrink a district's service area, or make it more difficult if not impossible to serve new customers.

Congress enacted 7 U.S.C. §1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service or management, waste facilities, or essential community facilities to farmers, ranchers, and other rural residents.⁵

⁴This also includes assignees of FmHA/RUS who directly purchased loans from the government for which a rural water district/association was (and remains) indebted. This does "not" include rural water districts that re-purchased their loans or have paid off the loans purchased by others. Repurchases by a water district will cause §1926(b) protection to be extinguished.

⁵*Sequoyah County Rural Water District No.7 v. Town of Muldrow*, 191 F.3d 1192 (10th Cir. 1999)
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To gain entitlement to the protection against competition and interference provided by §1926(b) a water district must *generally* prove four elements. The burden of proof is different depending on what federal judicial circuit the water district is situated in, since there are differences between the federal circuits on what must be proven and the degree of proof. In 1999 the 10th Circuit⁶ announced a significant new rule regarding the burden of proof and the weighing of evidence in §1926(b) cases. In *Sequoyah County Rural Water District No. 7 v. Town of Muldrow*, the 10th Circuit Court of Appeals declared: “Doubts about whether a water association is entitled to protection from competition under §1926(b) ***should be resolved in favor of*** the FmHA-indebted party seeking protection for its territory.” The 10th Circuit re-emphasized this burden in its decision by stating: “...evidentiary uncertainties should be resolved in favor of plaintiff, the party seeking to protect its territory...”. This language is tantamount to a presumption of entitlement to protection in favor of the water district. In other words, the encroacher (usually a municipality) is required to prove that there is “no doubt” that the water district has failed to prove its case and is not entitled to protection. If there is any doubt about whether the water district is entitled to §1926(b) protection, that question should be resolved against the encroacher and in favor of the water district. In the context of litigation, water districts enjoy a tremendous advantage.

The four elements of §1926(b) are:

1. The water district must be a qualifying entity as contemplated by and described in §1926(b); and
2. The water district must have the legal right to sell water; and

⁶The 10th Circuit comprises the States of Oklahoma, New Mexico, Kansas, Colorado, Utah, and Wyoming.

3. The water district must have a continuing indebtedness to the FmHA (now called Rural Development or Rural Utilities Service); and
4. The water district must have provided or made service available to the area in dispute.

Because each of these four elements has been vigorously litigated in the Courts, I will deal with each separately.

Is the District a Qualifying Entity Contemplated by §1926(b) ?

This issue is rarely challenged in federal court since there is little controversy as to the legal status of a water district. Nevertheless, in *Moongate Water Co. v. Butterfield Park Mutual Domestic Water Association* (federally indebted non-profit corporation), Moongate claimed Butterfield did not qualify for §1926(b) protection because Butterfield was not a “true non-profit” and therefore could not satisfy requirement #1. The District Court dispensed with this issue swiftly, finding (1) Butterfield was indeed a non-profit corporation; (2) if it wasn’t truly a not-for-profit corporation, it was still a quasi-public corporation providing an essential public service (as described in the statute); and (3) if there were doubts about whether it was a qualifying entity under §1926(b) - those doubts should be resolved in favor of the party seeking protection (Butterfield). The Court in the Butterfield case cited to the rule of law in *Sequoyah* that doubts about whether a rural water district is entitled to protection should be resolved in favor of the water district.

In certain states a water district is deemed by statute to be a public agency. For example, in Oklahoma, rural water districts formed under the state statute (Title 82) are deemed an agency of the State of Oklahoma. As such they automatically meet the criteria of §1926(b).

It is essential that a water district keep its “legal house” in order to avoid the misstep that it

may have failed to maintain its proper legal status. This is especially true of water districts who claim “non-profit” status. Its an issue easily resolved if resolved early. Neglecting this issue could prove fatal to preserving §1926(b) rights.

Does the Water District Have The Legal Right to Sell Water ?

The legal *right* to sell water must not be confused with the legal *obligation* to provide service. Federal regulations require a federally indebted water district to provide adequate water service to all persons within their service area that can *legally* and *feasibly* be served. 7 C.F.R.⁷ §1942.17(n)(2)(vii)⁸ Rural residents situated within a water district’s service area possess a legal right to bring suit against their local water district for failing to comply with this federal regulation and obtain damages. In the case of *Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir. 1994) area residents sued the Village of Sebring for failing to comply with 7 C.F.R. §1942.17(n)(2)(vii). In this case it was the Village that had the obligation to provide water service since it was the borrower and had pledged to the government that it would comply with §1926(b) regulations. The plaintiffs were successful and received a damage award of \$55,600 plus an attorney fee award of \$81,797.56 which was assessed against the Village.

The *Wayne v. Village of Sebring* case illustrates that the obligation of a rural water district to provide water service to residents within its service area which can be legally and feasibly served is a very real obligation. There is generally no reason why a water district cannot provide service. This is so because the cost to provide service falls predominantly on the person or business applying for service. Failure to comply with §1926(b) regulations carries a genuine risk of liability for both actual damages suffered by a property owner, as well as assessment of substantial attorney fees.

⁷Code of Federal Regulations

⁸See Appendix A for the full text of regulations
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If a rural water district has no legal right (to be distinguished from a legal obligation) to provide service, it is not required by 7 U.S.C. §1942.17(n)(2)(vii) to provide such service, and logically, it also should not obtain protection from §1926(b) for its illegal provision of service.⁹ Many jurisdictions place no restrictions on where and to whom a rural water district may sell water. Other jurisdictions place a legal obligation to serve on the water district within geographical boundaries set by (1) state statute, (2) governing administrative body or (3) local government. To gain §1926(b) protection a water district need only have the legal right (but not necessarily the legal obligation) under state/local law to sell water. A legal right to sell water is likely to be equated to there being no specific prohibition against selling water in the disputed territory. In the case of Lexington-South Elkhorn Water District v. City of Wilmore, Kentucky, 93 F.3d 230 (6th Cir. 1996) a key factor considered by the Court was the water district's failure to apply for a "certificate of convenience and necessity" from the regulating public commission, which it was required to do before it could extend its lines into the disputed territory.¹⁰ In the Lexington-South Elkhorn case, the water district lost its suit seeking protection. The failure of the water district to obtain authority to sell water within the disputed area was but one of several reasons why the water district was denied §1926(b) protection. Another reason for its failure to win its suit, was because of the lack of lines in close proximity to the area in dispute.

If a particular water district must comply with various state and local laws or administrative

⁹The source of this statement is footnote 8 of the Sequoyah case, citing to the City of Sioux Ctr, case - 967 F. Supp. at 1627.

¹⁰Lexington is an unusual case and falls outside the mainstream cases involving §1926(b). This was so in large part because both the municipality and the water district were each indebted to FmHA and each qualified for §1926(b) protection. Further, the evidence showed that the water district did not have facilities in sufficient proximity to the disputed territory.

regulations before it is permitted to sell water in a particular area, it is critical that those laws and regulations be complied with fully and completely in order to satisfy the “legal right” test. However, this issue of compliance is unfortunately more complicated. Courts have held that the legal right issue must be analyzed as of the date the water district first became indebted and entitled to §1926(b) protection, and not at the time an encroachment dispute erupts. This is so because the doctrine of federal preemption applies. The Supremacy Clause of the U.S. Constitution holds that federal law will control over state or local law. State and local law must not conflict with (or frustrate) the objective and purpose of federal law. If state or local law changes “after” a water district was first entitled to 1926(b) protection, these changes in the law could be deemed a curtailment of the water district’s right to serve as it existed at the time the water district first became indebted. (Sometimes the changes in the law are designed specifically to curtail a water district’s service area. When this occurs, federal preemption is the tool to negate such laws.) State, local and administrative governments may not, after the event of a federal loan to a water district, attempt through regulation or new laws, to curtail the pre-existing rights of a federally indebted water district to sell water. Knowing what the status of the law is relative to a water district’s “right to sell” water at the time it first became indebted, becomes critical.

Does the Water District have Continuing Indebtedness to FmHA/RUS ?

If a water district is indebted to FmHA (or Rural Development/RUS) it qualifies for §1926(b) protection from competition. If FmHA has sold the water district’s loan to someone else, and the water district now makes loan payments to a business like GMAC or GECC (assignee of the note or managing agent for an assignee) etc. the district still qualifies for protection. If the water district bought back its loan and the note has been marked “paid”, protection (according to all

federal courts who have decided this issue) under §1926(b) has “ended”. New protection will return if the water district becomes re-indebted to FmHA/RUS.

Federal courts have consistently held that if a federally indebted water district has “bought back” its loan from FmHA, it loses §1926(b) protection. There are at least two state supreme court decisions holding to the contrary. Because nearly all §1926(b) cases are litigated in federal court, and because the federal courts pay little or no attention to the opinions of state supreme courts on interpretations of federal law, the state supreme court decisions to the contrary are best ignored (unless of course you are litigating in a state court system that has held to the contrary view).

Although I disagree with the analysis of the federal courts that a loan buy-back extinguishes §1926(b) protection, I have ceased presenting this argument in litigation (in federal court) as it is it is certain to fail. The U.S. Supreme Court has not considered this issue. It is a rare water district indeed that has the resolve and the money to take a case to the U.S. Supreme Court for a final consideration of this issue.

If a water district has paid off its loan, and later becomes re-indebted, it *may* have protection for the period for which it was previously indebted (to seek damages). It *may* be able to reclaim territory encroached upon during the gap in indebtedness if it later becomes re-indebted. Naturally a water district can recover damages and injunctive relief for encroachments occurring during the period of re-indebtedness or “new” and existing debt. Recovery for damages associated with past encroachment during periods of previous indebtedness (or even continuous indebtedness) brings into play the applicable statutes of limitation. Strangely, which statutes of limitation applies is based on state law, not federal law. Because each state has different statutory periods of repose for which stale claims are barred, recovery for damages may be limited. The issue of statutes of

limitation and how it applies to §1926(b) will be dealt with later in this book. Statutes of limitation governing relief for damages are different when dealing with injunctive relief (Injunctive relief generally comes in the form of a Court Order precluding a competitor from selling water within the water district's service area. It has also taken the form of an order requiring the encroaching municipality to surrender water lines and other facilities to the water district.) Though damages may be cut off, injunctive relief appears to be ever present based on the "continuous violation doctrine" where each day represents a new violation of the statute, re-starting the statutory clock every day with respect to injunctive relief. All federal courts who have considered the issue have concluded that a violation of §1926(b) is a "continuing violation" of federal law and therefore the right to enforce that statute does not expire. In the case of *Pittsburg County Rural Water District #7 v. City of McAlester*, the federal court concluded that the statutes of limitation did not preclude enforcement of §1926(b) even though the city's encroachment had persisted for approximately 15 years before suit was filed!

If FmHA/RUS has assigned/sold a water district's note to some third party (such as the Community Program Loan Trust/Shawmut Bank/GECC/GMAC) protection will continue despite the assignment. In one case, the encroaching entity claimed that because the loan was assigned before the Omnibus Budget Reconciliation Act of 1986 *amendments* were passed (but after the original congressional act was passed), protection was lost. This argument was summarily rejected by the District Court and judgment was entered in favor of the water district. *See Moongate Water Co., Inc. v. Butterfield Park Mutual Domestic Water Association*, 125 F.Supp.2d 1304 (D. New Mexico, 2000) The 10th Circuit in the Sequoyah case made it clear that protection continues whether the FmHA/RUS holds the note, or some third party entity (assignee) holds the note. One rationale

for this is that the purchaser of the note is entitled to the same degree of protection for re-payment of the note as the federal government enjoyed before the note was sold.

Because 1926(b) protection expires when the note is paid (and if no other debt to FmHA exists), it is a good strategy for rural water districts not to pay off their notes any earlier than necessary. The interest expense is a small price to pay for the protection the statute provides. It is also a good reason to apply for another loan (with FmHA/RUS) well in advance of the existing loan reaching maturity.

It has been argued that a “grant” from FmHA/RUS should be considered “indebtedness” under §1926(b). The premise of this argument is that there is some possibility that if the terms of the grant are violated, the grantee might become liable to repay the grant. This argument has been rejected by at least one Court. See *Canadian County Water Authority v. City of Union*, 215 F.3d 1336 (Table, Text in WESTLAW), Unpublished Disposition, 2000 WL 766283 10th Cir.(Okla.) June 14, 2000. The reasoning of the Court was that the term “grant” is distinct from the word “loan” when considering the powers granted to the Department of Agriculture. This reasoning is likely to be followed by other Courts if the argument reappears in litigation.

Making application for a grant versus a loan is at first blush more desirable because it does not have to be repaid. However, in the long run, the lack of §1926(b) protection from competition and the loss of territory and customers, may make this type of funding more expensive to rural residents than a loan that must be repaid. The federal courts have universally recognized the principal of “economies of scale”. The more water customers a system has, the more efficient the system is, and the cost of water is eventually less when compared to systems of fewer customers.

Because protection expires with the satisfaction of the debt, municipalities (and

others) have developed a number of different strategies to attempt to cause the debt to be satisfied earlier than the term of the note. This strategy will be dealt with in greater detail in the “what to be prepared for” chapter of this book. In short, those neighboring water systems that are interested in depriving rural water of its §1926(b) protection, use some or all of the following strategies: (1) urging the Secretary of Agriculture (either directly or through political intermediaries) to demand “graduation” (payoff) of the loan; (2) offering to loan the indebted water district money at a lower interest rate to pay off the debt to FmHA/RUS; (3) arguing that since the indebted district may already have sufficient surplus funds the district should be denied §1926(b) protection. In one recent case (still pending), the competitor offered to payoff the debt of the water district gaining nothing in return for this “gift” (except of course defeating §1926(b) rights and therefor being allowed to take away customers of the water district). None of these strategies have been successful to date. New and more creative methods to attempt to defeat §1926(b) are being developed every day.

“Is The Water District Making Service Available” ?

Section 1926(b) states in part:

“The service provided or made available through any such association shall not be curtailed or limited by...”

To have and keep §1926(b) protection from competition rural water districts must “provide service” and/or have “made service available”. Litigation over this issue has been significant and varied. Predictably municipalities consistently claim a rural water district has not provided service or cannot make service available. This challenge typically comes in the following form: (1) the water district has insufficient water or water facilities to provide for the needs of existing and

potential new customers; (2) the water district will charge more money for line extensions and water itself than a neighboring city/town/utility will charge and therefore because the cost will be greater to the consumer the water district is “not making service available”; (3) the water district’s facilities are too far away from the potential customer (or disputed area) therefore the “disputed area” (area that a competitor wants to serve versus the water district) is not within the “service area” of the water district.

The claim that a water district is not “making service available” is often times preceded by tactics designed take territory at any cost. Cities who are the source of water supply to the water district sometimes threaten to cease selling water, placing an impossible burden on a water district to find an alternative source of supply. Some cities try to make it falsely appear that a water association is not making service available through interference in the process of constructing water line extensions. I have seen and studied the following tactics used by municipalities:

1. Refusal to sell water on reasonable terms. Some cities who are the source of water purchased by water districts to re-distribute to rural residents have threatened to terminate water sales as a means to claim the water district has the inability to serve. The argument essentially goes as follows: Because the city will deny additional requests for water sales to increase volume available for expanding customers in the water district’s service area, the water district will be unable to make service available therefore it should be denied §1926(b) protection.

In one jurisdiction I observed the local newspaper working hard to publicize illegal threats made by city representatives to cut off water knowing the threats would cause near panic among elderly rural residents. There was no mention in the press

articles regarding either the legality or morality of threatening to terminate water to rural residents nor whether such threats constitute a form of domestic terrorism. Threats to terminate water are very “real” threats to the health, safety and financial well being of rural residents. The threats I speak of were openly publicized by city managers (in one case) and the mayor (in another case) to openly attempt to extort concessions from the local water district. These cities adopted a plan to coerce abandonment of valuable federal rights held by the water district. These threats were intended to frighten and intimidate rural residents and they accomplished the desired result. I have first hand experience in seeing the direct affect of these draconian tactics deployed against farmers, ranchers and rural home owners.

2. The city uses mechanisms (by itself or in conjunction with other government entities) to frustrate or block efforts by a water district to use the public rights of way in order to expand lines to serve new customers. Forcing water districts to condemn private property or pay fees for use of private land to lay distributions lines, is part of a strategy to drive up the ultimate cost of water or slow construction. This strategy is used in part, to enable a city to claim the water district cannot make service available within a reasonable amount of time at a reasonable cost.
3. The city (if it is the supplier/seller of water to the water district) will place onerous conditions on the sale of water including (a) restricting the volume or flow rate of water to prevent the water district from serving new areas or new customers; (b) demanding that in order receive water a water district must agree not to sell water in certain areas or to certain users as specified by the city; ©) threaten to

suspend/terminate supplies of water if illegal demands for concessions are not complied with; (d) threaten to raise the price of water exorbitantly so that the city can offer water to end users cheaper than the water district can offer the identical service; (e) demand that the water district agree to absurd “buy-out” formulas where the city can force a buyout of water district facilities at a small fraction of their value.

4. The city or cooperating governmental entities acting in league with the city, placed restrictions on construction specifications to make it unreasonably difficult to extend lines, or refuse to provide permits timely.
5. Attempt to “pack the board” of the water district with individuals sympathetic to the city’s desire to expand into a rural water service area. The objective was to alter the voting practices of the water district board and cause the “new board” to abandon or sell cheaply the rights of protection enjoyed by the water district members.
6. Illegally “tying” other governmental services to the supply of water to potential water customers. This illegal tying typically comes in the form of a city refusing to provide sewer service or fire protection unless the builder/developer agrees to develop the property under an agreement to accept service only from the city and convey the completed water distribution lines to the city. Other mechanisms are more subtle, such as the suggestion or “hint” that construction plans, platting, zoning and other needs of real estate developers may not go as smoothly or quickly if the developer buys water from the water district.
7. Cities have in the past mounted considerable political pressure against rural water

districts falsely claiming that the water district's right of exclusivity frustrates and delays real estate development, eliminates jobs or slows the progress of the business community. When water districts express a desire to enforce their rights of exclusivity under §1926(b), water districts are flooded with burdensome freedom of information or open records act requests to increase operational expense.

8. Suits are sometimes filed "against" the water district to preempt it and place an economic burden on it. The emotional climate becomes very heated. I've personally heard attendees at a rural water district board meeting begin shouting demands for a "grand jury investigation" if the water district did not agree to waive or forfeit its federal rights of exclusivity under §1926(b).
9. I have seen "first hand" local government refuse to approve use of a public right of way for water line extensions despite the fact that over a hundred identical applications had been approved previously over the years without so much as one word of dissent. In the instance I refer to, the local county commissioners declined to approve a use application for county right of way¹¹ even though (1) the application was on the County's own form, (2) the application complied with the County's own specifications regarding distance from the fence-line and depth for line placement, (3) not one application submitted during the previous 10 years had ever been turned down (the County conceded that there had been over 100 previous applications

¹¹ Oklahoma statutes *require* the county commissioners concur in a water district's request to utilize the county's right of way. Unfortunately, the statute does not specify how long the County Commissioners can delay their concurrence or require the County give a reasonable explanation for their delay in acting on such a request.

submitted and approved). In this particular instance the County claimed (through the voice of one commissioner) that they feared damage to the adjacent road (when no such concern had ever materialized in over 100 previous applications). The county's standard application form utilized for years contemplated that road damage might occur and required the water district to pay for any possible damage to the road. No one suggested that the water district in this instance would decline to or be unable to pay for any such possible (but unlikely) road damage. Moreover, the public right of way use was to parallel the road and was not designed or intended not cross it. The water district filed suit to compel the county to approve the application. After two years of litigation, the county approved the very same "original" application submitted two years earlier, on the day of trial in open court during opening statements by the lawyers. The state district court judge remarkably denied any relief to the rural water district for the county's delay. (Rather than entering judgment in favor of the rural water district based on the concessions made by the county in open court, the trial judge "dismissed" the water district's suit stating that since the water district had now received all it was entitled, there was nothing more to do and the case should be dismissed.) The Court also found no fault with the County's two year delay. The Court denied the rural water district an award of court costs which are regularly awarded to the prevailing party. (The case is presently appeal to the Oklahoma Supreme Court.)

CONCLUSION

If a water district proves requirements 1-3 what does it take to satisfy #4 – "making service

available”. How big and how close must the water pipe be to the area in dispute? How quickly must the water district hook up the potential customer? How much excess capacity must there be? Is the water district required to provide fire protection or sewer? How much can the water district charge end users or developers for line extensions and system improvements? The answer to all of these questions is not scientific. **In one federal district court action, the federal judge held that even though the water supply line ran *through the middle of one of the properties in dispute*, this was not enough. That same Court also held that if the water district was going to charge a water applicant “*anything*” for line extensions such a charge was equivalent to not making service available and thus denied §1926(b) protection. (The District Court that made this ruling was later reversed by the Appellate Court.)**

Despite the obvious challenges to enforcing §1926(b), I firmly believe that with proper planning and solid determination, there is no reason why a water district should not prevail every time this issue arises.

Chapter 2

Making Service Available! How Much is Enough?

Chapter 3

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**How Can A Water District Receive An Attorney Fee Award As The
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