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**APPENDIX A**

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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DEER CREEK WATER CORPORATION,

Plaintiff Counter Defendant - Appellant/Cross-Appellee,

v.

CITY OF OKLAHOMA CITY; OKLAHOMA CITY WATER UTILITIES TRUST,

Defendants Counterclaimants - Appellees/Cross-Appellants,

and

THOMAS WAYNE BOLING; GINA BETH BOLING,

Intervenor Plaintiffs - Appellees/Cross-Appellees.

No. 21-6155

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DEER CREEK WATER CORPORATION,

Plaintiff Counter Defendant - Appellee,

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|---|---|
| and<br><br>THOMAS WAYNE BOLING;<br>GINA BETH BOLING,<br><br>Intervenor Plaintiffs - Appellees,<br><br>v.<br><br>CITY OF OKLAHOMA CITY;<br>OKLAHOMA CITY WATER<br>UTILITIES TRUST,<br><br>Defendant Counterclaimants - Appellants. | No. 21-6164 |

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**Appeals from the United States District Court for the Western District of Oklahoma (D.C. No. 5:19-CV-01116-SLP)**

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(Filed Sep. 18, 2023)

Andrew W. Lester of Spencer Fane LLP (George S. Freedman of Spencer Fane LLP and Carrie L. Vaughn of Trimble Law Group, PLLC, with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff/Counter-Defendant-Appellant/Cross-Appellee.

Scott A. Butcher (L. Mark Walker with him on the brief) of Crowe & Dunlevy, Oklahoma City, Oklahoma, for Intervenor Plaintiffs-Appellees Thomas Wayne Boling and Gina Beth Boling.

Richard N. Mann, Assistant Municipal Counselor (Kenneth Jordan, Municipal Counselor, and Sherri Katz and Craig B. Keith, Assistant Municipal Counselors, with him on the briefs) for Defendants-Appellees/Cross-Appellants City of Oklahoma City and Oklahoma City Water Utilities Trust.

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Before **BACHARACH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

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**MORITZ**, Circuit Judge.

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Deer Creek Water Corporation filed this action against Oklahoma City and Oklahoma City Water Utilities Trust (together, the City) seeking a declaratory judgment that the City may not provide water service to a proposed development on land owned by Thomas and Gina Boling (together, the developers), who later intervened in the action. In support, Deer Creek invoked 7 U.S.C. § 1926(b), a statute that generally prohibits municipalities from encroaching on areas served by federally indebted rural water associations, so long as the rural water association has made water service available to the area. The district court granted the developers' motion for summary judgment after concluding that Deer Creek had not made such service available, and Deer Creek appeals.

Although we reject Deer Creek's arguments related to subject-matter jurisdiction, we agree that the district court erred on the merits. The district court found it dispositive that Deer Creek's terms of service required the developers to construct the improvements necessary to expand Deer Creek's existing infrastructure to serve the proposed development, reasoning that because Deer Creek itself would not be doing the construction, it had not made service available. But nothing in the statute or in caselaw supports stripping a federally indebted rural water association of § 1926(b) protection solely because it places a burden of property development (improving and expanding existing water-service infrastructure) on the landowner seeking to develop property. The district court therefore erred in placing determinative weight on Deer Creek's requirement that the developers construct the needed improvements, and we reverse and remand for further proceedings on whether Deer Creek made service available.

Additionally, the City filed a cross-appeal challenging the district court's order denying its separate motion for summary judgment. The City contends that allowing Deer Creek to claim the protection of § 1926(b) violates the Tenth Amendment because Oklahoma has only consented to allow rural water districts—and not nonprofit corporations that provide water service, like Deer Creek—to incur federal debt under § 1926(a) and be subject to the resulting protections of § 1926(b). But whether viewed as a true cross-appeal or an alternative basis for affirming, this

argument fails because, unlike rural water districts, nonprofit corporations like Deer Creek are not quasi-municipal bodies and therefore do not need Oklahoma's permission before incurring federal debt and any accompanying obligations.

## Background

Deer Creek is a nonprofit corporation indebted to the United States Department of Agriculture (USDA) for loans issued under 7 U.S.C. § 1926(a). In this action, Deer Creek invokes its federal indebtedness to assert a protected right under § 1926(b) to provide water service to 100 acres of property owned by the developers.

Although the City annexed the developers' property in 2011, Deer Creek has historically provided water service to this property through a two-inch water line located on the property. Deer Creek also has four meters on the property, one residential and three for pasture or farming purposes; three of these meters (including the residential one) currently receive water from Deer Creek.

The developers plan to build a residential and commercial development on their property that will require water service. Although the precise details of the development plan have varied over time, it is undisputed that Deer Creek's existing two-inch water line is insufficient to serve the planned development. Deer Creek has a 12-inch water main located about a half mile from the property via a direct route, and connecting to it will require approximately 1.3 miles of

upgraded water main, along with other improvements that Deer Creek's engineer estimated would cost $961,743.83. Deer Creek's proposal for water service requires the developers to construct and pay for these improvements.

The City's water line, on the other hand, is located across the street from the developers' property. In anticipation of their planned development, and without contacting Deer Creek, the developers requested water service from the City and paid approximately $35,000 for the improvements needed to connect to the City's line. After those improvements were complete, the developers connected to the City's water line.

Upon discovering that the developers had done so, Deer Creek filed this action, seeking a permanent injunction prohibiting the City from providing water to the proposed development and a declaratory judgment that it was entitled to protection from municipal encroachment into its service area under § 1926(b). The City counterclaimed for the opposite declaration. And the developers intervened (without opposition), seeking the same declaratory relief as the City.

Deer Creek and the developers each sought preliminary injunctions: Deer Creek asked for an order preventing the City from providing water to the development, and the developers asked that the City be allowed to do so.[1] During a hearing on Deer Creek's motion, the parties reached an agreement under which

[1] The district court had denied Deer Creek's request for a temporary restraining order against the City.

Deer Creek would withdraw its motion and the City would provide water for certain specific construction purposes and leave its lines "charged for fire suppression only"; Deer Creek would "provide all other construction water." App. vol. 7, 248. The district court later denied the developers' preliminary-injunction motion, ruling that they failed to show irreparable harm under the applicable heightened legal standard. As a result of its ruling, the district court noted, the parties' agreement would remain in effect, meaning that "water w[ould] be available for construction purposes on the property, but not for eventual consumptive use until . . . the resolution of this lawsuit." App. vol. 6, 12.

All parties moved for summary judgment. The district court denied the City's motion, rejecting the argument that allowing Deer Creek to claim the protection of § 1926(b) violated the Tenth Amendment.[2] But the district court nevertheless found in the City's favor when it granted the developers' motion for summary judgment (and denied Deer Creek's motion). In this latter ruling, the district court concluded that Deer Creek was not entitled to protection from municipal

[2] The district court also rejected the City's argument that Deer Creek was not entitled to the protection of § 1926(b) because it lacked a defined service area. In particular, the district court determined that although Oklahoma law requires rural water districts to have defined service areas, it does not require the same for nonprofit water associations; nor does § 1926(b) contain any defined-service-area requirement. We do not address this issue because the City does not renew its defined-service-area argument on appeal.

encroachment because it had not made service available to the developers' planned development. The district court accordingly entered judgment for the City and the developers, noting that the developers were "free to obtain water from any other provider, including [the City], without violating § 1926(b)." App. vol. 7, 156.

Deer Creek appeals, challenging the district court's order granting summary judgment to the developers. And the City cross-appeals, challenging the district court's order denying its summary-judgment motion.

## Analysis

### I. Jurisdiction

Deer Creek advances two arguments attacking the district court's subject-matter jurisdiction: that the developers lack standing and that the district court issued an advisory opinion. We take each point in turn, and our review is de novo. *See Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 811 (10th Cir. 2021).

#### A. Standing

Deer Creek first argues that the developers lack standing to assert claims under § 1926(b). Standing doctrine derives from Article III of the United States Constitution, which limits federal jurisdiction to "[c]ases" and "[c]ontroveries." U.S. Const. art. III, § 2. To establish Article III standing, the developers "must

have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Although Deer Creek contends that the developers lack Article III standing, it fails to brief these three essential elements. Nevertheless, because Article III standing is a jurisdictional requirement, we must briefly review those elements to ensure that it exists. *See Felix v. City of Bloomfield*, 841 F.3d 848, 854 (10th Cir. 2016). We have no trouble determining that it does. The developers have an injury traceable to Deer Creek because they allege that they cannot obtain a feasible water supply due to Deer Creek's claim of a protected right to provide water service to their property. *See Garrett Dev., LLC v. Deer Creek Water Corp.*, No. 21-6105, 2022 WL 12184048, at *10 (10th Cir. Oct. 21, 2022) (unpublished) (finding that alleged inability to develop property because of Deer Creek's claimed § 1926(b) protection satisfied injury-in-fact and traceability requirements for Article III standing).[3] And this "alleged injury is redressable by a favorable decision because if Deer Creek" lacks a protected right to provide water service, then the developers "could obtain water service from a different provider." *Id.*

Although the developers satisfy the elements of injury, traceability, and redressability under Article III,

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[3] We find this unpublished decision persuasive. *See* 10th Cir. R. 32.1(A).

Deer Creek argues that they lack standing because their claims are outside the zone of interests protected by § 1926(b). Deer Creek contends that the zone-of-interests inquiry is "[o]ne category of standing analysis." Deer Creek Br. 42. Although traditionally viewed as such, whether a plaintiff's claims fall within the statutory zone of interests "isn't actually a matter of standing at all." *In re Peeples*, 880 F.3d 1207, 1213 (10th Cir. 2018). Instead, the zone-of-interests test "merely asks whether a particular federal cause of action 'encompasses a particular plaintiff's claim.'" *Id.* (quoting *Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014)). That merits inquiry "does not implicate subject-matter jurisdiction." *Lexmark*, 572 U.S. at 128 n.4 (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002)). Thus, "[b]ecause the zone-of-interests inquiry is not jurisdictional, it can be waived." *Garrett*, 2022 WL 12184048, at *11.

And here, Deer Creek never argued below that the developers' claims failed for being outside the zone of interests protected by § 1926(b). Indeed, Deer Creek never moved to dismiss this case for any reason; at most, it asserted perfunctorily in its answer to the developers' cross-complaint that they "lack standing." App. vol. 1, 238. We accordingly decline to consider Deer Creek's zone-of-interests argument, which Deer Creek forfeited by failing to raise below and then waived on appeal by failing to advance a plain-error argument. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011); *Garrett*, 2022 WL

12184048, at *12–13 (declining to consider zone-of-interests challenge because Deer Creek failed to raise it in district court).

### B. Advisory Opinion

Deer Creek also asserts that the district court erred in granting relief to the developers because in so doing, it issued an advisory opinion based on a hypothetical. *See Norvell v. Sangre de Cristo Dev. Co.*, 519 F.2d 370, 375 (10th Cir. 1975) ("It is fundamental that federal courts do not render advisory opinions and that they are limited to deciding issues in actual cases and controversies."). According to Deer Creek, the developers never applied for water service, so it never had an opportunity to make service available—rendering the district court's opinion, premised on Deer Creek's failure to make service available, merely advisory. This argument fails because the underlying factual premise is incorrect: The developers did apply for water service. As the district court noted, it was undisputed that the developers "submitted an application to Deer Creek to ascertain the terms of its water service to the [d]evelopment." App. vol. 7, 141. The developers attached that application to their summary-judgment motion.

To be sure, the developers submitted their application during this litigation, so the letter enclosing the application includes various reservations of rights. And in turn, the response from Deer Creek's engineer was "not intended to be a typical service letter." App.

vol. 4, 136. But the application letter expresses the parties' agreement "that submission of an application was the most practical means for the parties to mutually discover relevant facts relating to [Deer Creek's] ability to serve the [d]evelopment" and that the "application should not expire during the pendency of the litigation." App. vol. 3, 150. Indeed, Deer Creek even admitted below that "despite" the absence of a formal request from the developers, it "has essentially assumed their participation in this lawsuit is such a request and has made service available" via its engineer's report about the infrastructure needed for Deer Creek to provide service. *Id.* at 219. Thus, as the City and the developers argue, the developers did request service. As a result, the district court's opinion was not based on a hypothetical situation, and we reject Deer Creek's advisory-opinion argument.[4]

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[4] Because the prohibition on advisory opinions is more typically treated under a legal framework of either mootness or ripeness, the developers framed their response to Deer Creek's advisory-opinion argument in terms of ripeness. Deer Creek, in reply, disclaimed any ripeness argument, stating that it "did not raise ripeness" on appeal. Deer Creek Rep. Br. 19. Following Deer Creek's lead, we do not frame our analysis in terms of ripeness. But we do note that to the extent constitutional ripeness implicates our duty to examine our own jurisdiction, the developers' claims are ripe. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))). Constitutional ripeness asks whether "a threatened injury is sufficiently 'imminent' to establish standing." *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229 (10th Cir. 2021)

In sum, we see no impediment to subject-matter jurisdiction over this case.

## II. Merits

"We review the district court's rulings on summary judgment de novo." *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1121 (10th Cir. 2021). "Summary judgment is appropriate if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). "For purposes of summary judgment, '[t]he nonmoving party is entitled to all reasonable inferences from the record.'" *Id.* (alteration in original) (quoting *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013)).

This case involves § 1926, which is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921-2009cc-18. Subsection (a) provides for "loans to associations, including corporations not operated for profit . . . and public and quasi-public agencies[,] to provide for . . . the conservation, development, use, and control of water . . . primarily serving farmers, ranchers, farm tenants, farm laborers, rural business, and

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(quoting *Awad v. Ziriax*, 670 F.3d 1111, 1124 (10th Cir. 2012)). And the injury alleged here is sufficiently imminent: The developers allege that water service for their planned development is unavailable due to Deer Creek's claim of a protected right to provide such service, thus prohibiting their development. *See Garrett*, 2022 WL 12184048, at *13 (finding alleged injury of inability to develop property due to Deer Creek's claimed § 1926(b) protection sufficiently imminent for constitutional ripeness).

other rural residents."[5] § 1926(a). For associations that receive such loans, subsection (b) provides a measure of protection against municipal entities that may seek to encroach on their areas of service:

> 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.

§ 1926(b).

"By enacting § 1926(b), Congress intended to protect rural water [associations] from competition to encourage rural water development and to provide greater security for and thereby increase the likelihood of repayment of [federal] loans." *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1269 (10th Cir. 2001);[6] *see also Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 526 (4th Cir. 1999) (stating that in enacting § 1926(b), "Congress intended (1) to reduce per[-]user cost resulting from the larger base of users, (2) to provide greater security for the federal

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[5] Before 1994, the Farmers Home Administration administered loans issued under this statute, but now the USDA operates this program through the Rural Utility Services. *See Pittsburg Cnty. Rural Water Dis. No. 7 v. City of McAlester* (*Pittsburg II*), 358 F.3d 694, 701 n.1 (10th Cir. 2004).

[6] We will refer to this case as *City of Wilson*, but we note it is sometimes called "*Ellsworth,*" for the county at issue there. *See*, *e.g.*, *Garrett*, 2022 WL 12184048, at *2.

loans made under the program, and (3) to provide a safe and adequate supply of water"). "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the [ ]indebted party seeking protection for its territory." *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999).

To receive the protection of § 1926(b), rural water associations "must have . . . a continuing indebtedness to the USDA and have provided or made available service to the disputed area." *Rural Water Dist. No. 4 v. City of Eudora* (*Eudora I*), 659 F.3d 969, 976 (10th Cir. 2011) (footnote omitted). Indebtedness is not at issue here; the district court found that Deer Creek had "outstanding balances on loans from the USDA issued in 1996 and 2013," and the parties do not challenge that determination on appeal. App. vol. 7, 145–46. Instead, the issue is whether Deer Creek has made service available. And even if it has, the City's cross-appeal asks whether allowing Deer Creek to claim § 1926(b) protection violates the Tenth Amendment. We consider each issue in turn.

### A. Made Service Available

Deer Creek argues that the district court erred in concluding that it did not make service available. This inquiry focuses "primarily on whether the water association has *in fact* 'made service available,' i.e., on whether the association has proximate and adequate 'pipes in the ground' with which it has served or can

serve the disputed customers within a reasonable time.'" *Sequoyah*, 191 F.3d at 1203. "[A] water association meets the 'pipes-in-the-ground' test by demonstrating 'that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made.'" *Id.* (quoting *Bell Arthur*, 173 F.3d at 526). "This is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer." *Id.*

Despite *Sequoyah*'s succinct statement interpreting § 1926(b)'s language about making service available, we later added to the pipes-in-the-ground test in *City of Wilson*, 243 F.3d 1263, a case involving a Kansas rural water district. *See Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262, 1268 (10th Cir. 2002) (noting that *City of Wilson* "added a consideration of costs as relevant to the test whether service is made available"). We held there that even if a water association meets the pipes-in-the-ground test, "the cost of [its] services may be so excessive that it has not made those services 'available' under § 1926(b)." *City of Wilson*, 243 F.3d at 1271. To support expanding *Sequoyah*'s pipes-in-the-ground test for making service available to include an additional excessive-cost test, we invoked § 1926(b)'s purpose of "expanding the number of potential users, resulting in lower costs per user" and cited legislative history similarly reflecting a "concern with costs." *Id.* at 1270. We also relied on a dictionary definition of the statutory word "available" to conclude that "available" service must be "within . . .

reach" of rural water users. *Id.* at 1270–71 (quoting 1 Oxford English Dictionary 812 (2d ed. 1989)). We therefore determined that services provided "at a grossly excessive cost" were effectively unavailable under the statute. *Id.* at 1271. Thus, after *City of Wilson*, the made-service-available inquiry in this circuit has two parts: the pipes-in-the-ground test and the excessive-cost test.[7] Indeed, we "reaffirm[ed] this approach" several years later, noting that it was "a sensible rule as a policy matter" to prevent federally indebted rural water districts from being "free at their whim to price monopolistically." *Pittsburg II*, 358 F.3d at 719.

Here, the district court concluded that Deer Creek failed the pipes-in-the-ground test, so it did not reach the excessive-cost test. We consider each test in turn.

### 1. Pipes in the Ground

The district court reasoned that because Deer Creek placed the onus on the developers to construct the infrastructure needed for Deer Creek to provide

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[7] The dissenting judge in *City of Wilson* would have rejected the excessive-cost test. *See* 243 F.3d at 1276 (Briscoe, J., concurring in part and dissenting in part). The dissent emphasized that "[t]he proper test in determining whether [a rural water association] made service available under § 1926(b) is the 'pipes in the ground' test enunciated in *Sequoyah*." *Id.* And because cost played no role in assessing the pipes in the ground, the dissent reasoned that "the cost to the customer of establishing service cannot be considered in determining whether the rural water [association] has made service available for purposes of protecting it against encroachment by a [municipality] under § 1926(b)." *Id.*

water service, there was "no evidence that Deer Creek ha[d] taken any steps . . . to make the[] necessary infrastructure improvements to serve the [d]evelopment within a reasonable time." App. vol. 7, 152. It therefore concluded that Deer Creek failed to "demonstrate[] that it ha[d] proximate and adequate pipes in the ground with which it ha[d] served or c[ould] serve the . . . [d]evelopment within a reasonable time." *Id.* at 147.

We disagree. A rural water association can satisfy the pipes-in-the-ground test "by demonstrating 'that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made.'" *Sequoyah*, 191 F.3d at 1203 (quoting *Bell Arthur*, 173 F.3d at 526); *see also id.* (explaining that making service available for purposes of the pipes-in-the-ground test is "primarily" about "the *capability* of providing service," or the water association's "capacity to provide water service to a given customer"). Deer Creek has shown as much here. The developers applied for water service from Deer Creek, and Deer Creek's engineer provided a plan for making service available via its adjacent water main.[8]

[8] Because neither the City nor the developers contend on appeal that any portion of the developers' property is outside Deer Creek's service area, we assume that the entire property falls within it. We note that the City did argue below that Deer Creek's service area lacks clearly defined borders. But it does not reassert this argument on appeal. Nor have the City or the developers ever suggested, as the dissent does here, that only some limited portion of the developers' property was properly within Deer Creek's service area. Therefore, to the extent that the dissent "would hold that Deer Creek's service area includes only the portion of the

Deer Creek's engineer also stated, without contradiction in the record, that these infrastructure improvements could be completed within 90 days. And no party contends that 90 days is not a reasonable length of time. *Cf. Bell Arthur*, 173 F.3d at 525–26 (concluding implicitly that failing to take steps to provide water service for more than one year was not reasonable length of time). Deer Creek therefore satisfies the pipes-in-the-ground test.

In reaching the contrary conclusion, the district court relied primarily on the Fourth Circuit's decision in *Bell Arthur*, 173 F.3d 517. There, a nonprofit corporation agreed in writing to provide water service to a planned development on property that had an existing but inadequate water line from the nonprofit; the

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[developers'] property for which Deer Creek is providing water service" and not "the full 100 acres," it reaches well beyond the parties' arguments below and on appeal. Dissent 6; *see also Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (explaining that "we follow the principle of party presentation," under which "we rely on the parties to frame the issues for decision"). What's more, the dissent offers no support for its subdivision approach and fails to explain how treating the developers' property as a whole departs from the typical "customer-by-customer approach in water-district cases." Dissent 5; *see also Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 654 F.3d 1058, 1065 (10th Cir. 2011) (declining to adopt "per se rule" but finding district court correctly applied customer-by-customer approach; noting that parties' customer-by-customer arguments were "consistent with how prior Tenth Circuit cases have addressed" this issue). Indeed, the developers appear to be a single Deer Creek customer, and we decline the dissent's invitation to speculate about a hypothetical world in which the developers "gave up on the development and sold all but their home and small acreage served by the existing water meters." Dissent 5 n.3.

nonprofit estimated that the improvements would cost $650,000, and it planned to construct and pay for the improvements itself. *Id.* at 525. But the nonprofit "took no meaningful steps at that time or within a reasonable time thereafter to undertake construction of a new pipeline"—it did not even obtain a loan for the cost of the required infrastructure until over a year after agreeing to provide service. *Id.* at 525–26. The developers then sought and obtained municipal water, and the nonprofit sued to assert its rights under § 1926(b). But the Fourth Circuit ruled that an "inadequate six-inch pipe in the ground coupled with only a general, unfulfilled intent to provide the necessary 14-inch pipe sometime in the future does not amount to 'service provided or made available.'" *Id.* at 526 (quoting § 1926(b)).

The district court determined that this case was like *Bell Arthur* because Deer Creek's water-service plan required *the developers* to construct the necessary improvements, such that Deer Creek would not itself develop the necessary infrastructure and thus did not make service available. The City and the developers argue the same on appeal, as does the dissent. But which party would bear the responsibility for construction was not at issue in *Bell Arthur*; that case faulted the corporation for an inexplicable nine-month delay in providing the agreed-upon improvements, not for placing the burden of construction on the developer. *See id.* at 525–26. And contrary to the dissent's suggestion, *Bell Arthur* did not hold, as a legal matter, that "the water association was the entity responsible to

finance and construct the needed water pipes." Dissent 9 n.6. Instead, *Bell Arthur* merely arose in a factual situation in which the water association had initially agreed to finance and construct the pipes and then simply failed to follow through.[9] *See* 173 F.3d at 521. This case presents distinct circumstances. Deer Creek agreed to provide water service and showed that it had the capacity to do so, but it never agreed to finance or construct the infrastructure. And although there has been a delay in implementing the improvements necessary for Deer Creek's water service to the development, that delay is the result of this litigation, not Deer Creek's inaction after agreeing to take necessary steps.

The dissent additionally invokes *Sequoyah* to support its position that Deer Creek fails the pipes-in-the-ground test, asserting that "*Sequoyah* says *who* must put the pipes in the ground—the water association." Dissent 8. The dissent discerns this purported

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[9] The dissent states that this factual background in *Bell Arthur* "makes sense" because "Congress didn't enact § 1926 so water associations could tell rural users to collect their pocket change to finance laying pipes or else remain dry and thirsty." Dissent 9 n.6. But the rural users at issue here are neither dry nor thirsty. As customers of Deer Creek, the Bolings have had and will continue to have water service sufficient for their rural home and land. What they lack is sufficient infrastructure to turn their existing property into a commercial and residential development. And to the extent that they seek to do so using the City's water instead of Deer Creek's, at least one circuit has "recognize[d] that § 1926(b) can impose burdens on recipients [of water service], since granting [water associations] an exclusive right to serve certain recipients also prevents recipients from choosing other service providers." *Pub. Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 522 (8th Cir. 2010).

requirement from *Sequoyah*'s statement that the pipes-in-the-ground test asks "whether *a water association* has the capacity to provide water service to a given customer." *Id.* at 992 (quoting *Sequoyah*, 191 F.3d at 1203). But in our view, the dissent emphasizes the wrong language. *Sequoyah*'s focus is on a water association's "*capacity* to provide water service to a given customer." 191 F.3d at 1203 (emphasis added). Indeed, the focus on capacity is why *Sequoyah* went on to hold that even if a water association's existing pipes were inadequate, it could still satisfy the pipes-in-the-ground test by showing that it could provide adequate service "within a reasonable time." *Id.* Simply put, *Sequoyah* does not say that the water association must actually perform or finance the construction.

Moving on, none of the district court's other cited cases—which the City also invokes on appeal—support placing determinative weight, for the pipes-in-the-ground test, on the fact that Deer Creek requires the developers to construct the utility infrastructure necessary for its water service. In each, the water associations had not even *tried* to provide water service; whereas here, Deer Creek has presented a plan to provide service within 90 days and seeks to implement it. *See City of Wilson*, 243 F.3d at 1272 (affirming denial of § 1926(b) protection as to one property because water district "had made no effort to extend service to the property[] and had not commissioned an engineering study to determine if service was feasible"); *Santa La Hill, Inc. v. Koch Dev. Corp.*, No. 3:07-cv-00100, 2008 WL 140808, at *5 (S.D. Ind. Jan. 11, 2008)

(unpublished) (faulting water district for "not hav[ing] a plan in place to meet the growing needs" of development); *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d 38, 49 (Okla. 2010) (noting in passing that "nothing prevents a municipality from extending water service within [a rural] district if the district has made no attempt to provide water to its customer after a request for service is made"); *In re Detachment of Territory from Pub. Water Supply Dist. No. 8*, 210 S.W.3d 246, 250–51 (Mo. Ct. App. 2006) (finding water district did not make service available because despite master plan that would have provided service, water district gave no timeline and had not obtained required state approvals or begun proposed improvements). Simply put, none of these cases say that a water association fails the pipes-in-the-ground test solely because its plan for service to new development requires the developer to construct the necessary infrastructure.[10]

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[10] The district court also relied on *TP Real Estate LLC v. Rural Water, Sewer & Solid Waste Management District No. 1*, No. CIV-09-748, 2010 WL 11508774 (W.D. Okla. Apr. 19, 2010) (unpublished), and the City and the developers do the same on appeal. There, the plaintiffs requested water and sewer service, but the water district's nearest water main was located over seven miles away, and its nearest sewage-treatment plant was over ten miles away. *Id.* at *5-6. Additionally, the water district's proposed plans for water and sewer service were insufficient to serve the proposed development. *Id.* at *3, 6. Based on these two critical facts (neither of which exists in this case), the district court held that the water district had not made service available. *Id.* at *5-6; *see also Sequoyah*, 191 F.3d at 1203 (noting that pipes-in-the-ground test "is essentially an inquiry into whether a water association has the capacity to provide water service to a given

In fact, our caselaw suggests the contrary. We have acknowledged that "requiring the customer to foot the bill for basic utility infrastructure is not entirely unheard of, at least in regard to new developments, *nor is it per se unreasonable*." *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester* (*Pittsburg I*), No. 98-7148, 2000 WL 525942, at *4 n.7 (10th Cir. May 2, 2000) (unpublished) (emphasis added). And in *City of Wilson*, when we created the excessive-cost test, we implicitly confirmed that cost plays no role in the pipes-in-the-ground test. *See City of Wilson*, 243 F.3d at 1269–71. There, the rural water association, as a matter of policy, did "not pay for any water[-]line extensions necessary to establish new water service" and instead "require[d] that the customer pay all costs necessary to establish water service, including the extension of infrastructure"—just like Deer Creek does.[11] *Id.* at 1269–70. But we did not hold that the rural water association failed the pipes-in-the-ground

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customer" using "facilities within or adjacent to the area"). To be sure, *TP Real Estate* suggested in dicta that a water association fails to make service available as a matter of law if it places a construction burden on the developer. *See*, *e.g.*, *id.* at *5 n.14 (citing *Bell Arthur* in a footnote and noting that water district "made no effort to lay pipeline in the area"); *id.* at *6 ("[D]irecting a landowner to bring an existing system into compliance and then deeding it to the district does not constitute the district's making service available"). But we are not bound to follow such nonbinding authority. And for the reasons explained in this opinion, we reject that view as incompatible with § 1926(b) and our precedent governing the made-service-available inquiry.

[11] And, indeed, just as the City does: The developers paid over $35,000 for the improvements needed to connect to the City's water main.

test; instead, we remanded for application of the excessive-cost test. *Id.* at 1271–72.

The district court distinguished *Pittsburg I* and *City of Wilson* on the basis that requiring the customer to pay for the construction is not the same as requiring the customer to perform the construction. Specifically, the district court stated that it was "concerned with the fact that Deer Creek is requiring the developers *to construct* Deer Creek's water system for Deer Creek" but was "not concerned with . . . the costs shifted to the customer for Deer Creek's construction." App. vol. 7, 154. The City and the developers advance the same concern on appeal. But this seems to us a distinction without a difference, inasmuch as it appears that the real burden is the cost—a contractor will perform the actual manual labor regardless of which entity is responsible for the costs. Here, for instance, the developers alleged in their summary-judgment motion that they "*ha*[*d*] *completed* the infrastructure construction to tap into [the City's] water across the street for $35,322.47." App. vol. 3, 113 (emphasis added). Though this statement suggests the developers performed the construction, they attached as support the receipt from the contractor who performed the labor (a receipt that listed the *developers*' email address as the customer contact). Thus, whether the developers themselves were responsible for the construction *and* the cost (as their motion and the receipt suggest) or merely the cost, the result is the same: The contractor performed the labor, and the developers paid the cost. So, as a

practical matter, the district court's distinction between construction and cost does not hold up.

The district court also invoked the purpose behind § 1926(b) to support its focus on Deer Creek's construction requirement—an argument the City echoes on appeal. Reasoning that "the intent of § 1926 is to finance the development of water supply and pipelines in rural communities and reduce the cost per user," the district court noted that Deer Creek was "not using its financing to develop its water system, but rather [wa]s requiring its customer to do so." App. vol. 7, 150. But the plain language of § 1926(b) does not condition its protection on incurring additional debt to finance improvements necessary to make service available; it requires only existing federal indebtedness. For instance, we have specifically rejected the argument that a rural water association's indebtedness incurred for a particular project cannot "be used to obtain protection for other customers served by" the water association. *Sequoyah*, 191 F.3d at 1197 n.5. Other circuits have reached similar conclusions. *See Bell Arthur*, 173 F.3d at 524 ("We can find no statutory support for the . . . position that the scope of § 1926(b) protection is limited to the geographical area being financed by the loan."); *City of Lebanon*, 605 F.3d at 519–20 ("[D]ivorcing 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."). That is, once a rural water association is federally indebted, it obtains the protection of § 1926(b) for its

entire service area, not only for the area served by a particular loan.

In sum, nothing in the statute or in caselaw supports the district court's conclusion that Deer Creek lacked proximate and adequate pipes in the ground simply because it placed the burden of constructing necessary infrastructure on the developers. The dissent concludes otherwise because it "see[s] nothing *supporting* Deer Creek's view that it has 'provided or made available' the needed water service." Dissent 10 (emphasis added) (quoting § 1926(b)). But the dissent has it backwards. Section 1926(b) protection flows from a federal statute, so we start there. And nothing in that statute requires a water association to finance or construct needed infrastructure before being entitled to protection from municipal encroachment—indeed, the dissent does not rely on the statutory language at all. Turning next to our caselaw interpreting and applying § 1926(b), we likewise find no such requirement there. We accordingly conclude that no such requirement exists, and the district court erred in placing determinative weight on the fact that Deer Creek requires the developers to construct the necessary infrastructure. Deer Creek's demonstrated capacity to provide service within a reasonable time satisfies the pipes-in-the-ground test.

### 2. Excessive Cost

We next turn to the excessive-cost test, which considers whether the cost of Deer Creek's services is "so

excessive that it has not made those services 'available' under § 1926(b)." *City of Wilson*, 243 F.3d at 1271 (quoting § 1926(b)); *see also Pittsburg II*, 358 F.3d at 719 (stating that excessive-cost test "condition[s] the right to earn the governmentally sanctioned monopolist status [under § 1926(b)] on the water association's employing prices that, even if high, are not prohibitive"). In *City of Wilson*, we explained that "[a]lthough the costs of services need not be competitive with the costs of services provided by other entities, the protection granted to rural water [associations] by § 1926(b) should not be construed so broadly as to authorize the imposition of *any* level of costs." 243 F.3d at 1271. In other words, the costs cannot "become so high that assessing them upon the user constitutes a practical deprivation of service." *Id.*; *see also Pittsburg II*, 358 F.3d at 719 (reaffirming that rural water association's costs "may be so excessive that it *has not made those services available* under § 1926(b)" (quoting *City of Wilson*, 243 F.3d at 1271)).

As to the specifics of what constitutes an excessive cost, we noted that the rural water district was incorporated in Kansas and accordingly looked to that state's law for guidance; we ultimately remanded for the district court to determine whether the cost was "unreasonable, excessive, and confiscatory" under the totality of the circumstances as guided by relevant factors derived from Kansas caselaw. *City of Wilson*, 243 F.3d at 1271–72 (quoting *Bodine v. Osage Cnty. Rural Water Dist. No. 7*, 263 Kan. 418, 949 P.2d 1104, 1110 (1997)). And at least one other court has applied that

Kansas-derived standard in a Kansas case. *See Eudora I*, 659 F.3d at 981–82 (explaining contours of *City of Wilson*'s excessive-cost test in case involving Kansas rural water association).

However, here our dispute involves an Oklahoma water association, and it is unclear whether and to what extent *City of Wilson*'s Kansas-derived standard carries over to other states.[12] *Cf. Moongate*, 291 F.3d at 1268 (concluding that record supported district court's finding that costs imposed by New Mexico rural water association were not unreasonable without discussing precise governing legal standard). And *Pittsburg II*, which also arose in Oklahoma, is of little guidance. There, we quoted *City of Wilson*'s Kansas-derived "unreasonable, excessive, and confiscatory" standard when reaffirming the excessive-cost test. *Pittsburg II*, 358 F.3d at 719. But we ultimately declined to "define what it means for a price to be 'so excessive that [the rural water association] has not made the services available.'" *Id.* (quoting *City of Wilson*, 243 F.3d at 1271). Instead, we left that question "for the district court to determine on remand, perhaps with the benefit of expert witness testimony on the subject." *Id.*

We take the same path here, largely because the parties merely cite the Kansas-derived standard without

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[12] To be sure, we recently affirmed the use of the Kansas-derived standard in an unpublished decision that also involved Deer Creek and arose in Oklahoma. *See Garrett*, 2022 WL 12184048, at *15-18. But we had no occasion to do otherwise because in *Garrett*, Deer Creek "concede[d] the district court articulated the correct standard to evaluate costs pursuant to § 1926(b)." *Id.* at *16.

explaining whether and how that standard would apply in Oklahoma (in addition to failing to offer much record support for what appears to be a fact-intensive question of whether costs are excessive). The district court should consider on remand "what it means for a price to be 'so excessive that it has not made the services available,' . . . perhaps with the benefit of expert witness testimony on the subject," and in light of the Oklahoma location and our prior decisions on this issue. *Pittsburg II*, 358 F.3d at 719 (quoting *City of Wilson*, 243 F.3d at 1271). After doing so, it should consider whether the developers or the City can show—either on a renewed summary-judgment motion or at trial—that Deer Creek's cost of service is so excessive that its service is effectively unavailable. *See City of Wilson*, 243 F.3d at 1271–72 (remanding to provide city opportunity to show rural water association's costs were excessive); *cf. Garrett*, 2022 WL 12184048, at *6 (noting that district court found pipes-in-the-ground test satisfied at summary judgment but conducted bench trial on disputed factual questions underlying excessive-cost test).

### B. Tenth Amendment

The City argues that the district court should have granted its summary-judgment motion because allowing Deer Creek to claim § 1926(b) protection in the absence of the express consent of the Oklahoma

legislature violates the Tenth Amendment.[13] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people." U.S. Const. amend. X. This amendment "is essentially a tautology": It "confirms that the power of the [f]ederal [g]overnment is subject to limits that may, in a given instance, reserve power to the [s]tates." *New York v. United States*, 505 U.S. 144, 156–57 (1992).

Here, Congress enacted § 1926(b) pursuant to its power under the Constitution's Spending Clause, which provides that "Congress shall have [the p]ower [t]o . . . provide for the . . . general [w]elfare of the United States." U.S. Const. art. I, § 8, cl. 1; *see also Glenpool Util. Servs. Auth. v. Creek Cnty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1215 (10th Cir. 1988) (holding that § 1926(b) "is most appropriately viewed as a congressional enactment resting upon Congress'[s] powers under the [S]pending [C]lause"); *Pittsburg II*, 358 F.3d at 716–17 ("Section 1926 has been repeatedly

[13] We question whether a cross-appeal was necessary. An appellee may "generally seek affirmance on any ground found in the record"; a cross-appeal is required only "if [the appellee] seeks to enlarge its rights and gain 'more than it obtained by the lower-court judgment.' " *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1107 (10th Cir. 2020) (quoting *United States v. Madrid*, 633 F.3d 1222, 1225 (10th Cir. 2011)). But we need not decide that question here. Given that we have determined the district court erred in granting the developers' motion for summary judgment, we must address the City's arguments—even if they are merely alternative bases for affirming—before reversing the district court's judgment.

upheld as a valid exercise of Congress's authority under the Spending Clause."). For legislation passed under the Spending Clause, a state's acceptance of federal funds "entails acceptance of the conditions that accompany them." *Glenpool*, 861 F.2d at 1215. Courts therefore analogize this kind of legislation to a contract, such that "[t]he legitimacy of Congress'[s] power to legislate under the spending power . . . rests on whether the [s]tate voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

Under these principles, a rural water district is a "quasi-municipal corporation" that can only obtain federal loans under § 1926(a) and the accompanying protections under § 1926(b) if the state authorizes rural water districts to do so. *Eudora I*, 659 F.3d at 976; *see also Rural Water Dist. No. 4 v. City of Eudora* (*Eudora II*), 720 F.3d 1269, 1275 (10th Cir. 2013) ("[A] rural water district may only obtain § 1926(b) protection if state law authorizes it to do so."). Indeed, "quasi-municipal corporation[s]" are creatures of the state and therefore "possess[ ] only those powers given to [them] by law." *Eudora I*, 659 F.3d at 976; *see also Eudora II*, 720 F.3d at 1275. As relevant here, "Oklahoma law provides for the creation of rural water districts" and specifically empowers those rural water districts "'to borrow money and accept grants from the United States.'" *Glenpool*, 861 F.2d at 1215–16 (quoting Okla. Stat. tit. 82, § 1324.10(A)(4)); *see also Pittsburg II*, 358 F.3d at 717 (concluding that because "Oklahoma legislature formed the water districts so that the state,

through the water districts, could avail itself of the loans made available through § 1926," state likewise "agreed to abide by § 1926(b)'s proscriptions").

The City asserts that Oklahoma's consent to the conditions of § 1926(b) applies only to rural water districts, and not private nonprofit corporations that provide water service, like Deer Creek. But the very distinction that the City highlights—between a rural water district and a nonprofit corporation like Deer Creek—dooms its Tenth Amendment argument. A nonprofit corporation is a private entity, not a quasi-municipal body with limited powers under the control of the state.[14] And Oklahoma's incorporation statutes grant corporations the power to "[m]ake contracts" and "borrow money" without limitation. *See* Okla. Stat. tit. 18, § 1016. Thus, as the district court concluded, the only consent necessary in this context is Deer Creek's.[15] *See Garrett Dev. LLC v. Deer Creek Water*

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[14] Contrary to the City's argument, Oklahoma law does not require Deer Creek to form a water district before providing water service. As the district court concluded, although Oklahoma statutes *allow* corporations to form water districts, nothing in those statutes *requires* corporations to do so. *See*, *e.g.*, Okla. Stat. tit. 82, § 1324.31 ("[A]ny corporation which was formed prior to December 1, 1988, may organize and constitute a district. . . ."); *id.* § 1324.35 ("In the event a corporation provides service within the boundaries of an incorporated city or town on the date of organization as a rural water district, the district may continue to serve in that area as permitted by law.").

[15] Notably, Deer Creek's status as a nonprofit corporation does not affect its eligibility for protection under § 1926(b); the statute applies by its own terms "to associations, including corporations not operated for profit." § 1926(a)(1); *see also Ross Cnty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 398 (6th Cir. 2011)

*Corp.*, No. CIV-18-298, 2021 WL 111488, at *4–5 (W.D. Okla. Jan. 12, 2021) (unpublished) ("Deer Creek is a private entity, not a quasi-municipal body. It is Deer Creek that must knowingly and voluntarily accept the conditions associated with the federal funds—not the state."), *aff'd on other grounds*, 2022 WL 12184048. To the extent that the City disagrees with this outcome and desires to prohibit rural water associations from receiving federal funds under § 1926(a), its remedy lies with the state legislature.[16] *Cf. Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d at 50 (noting that state legislature may at any time "amend the Oklahoma [s]tatutes to further limit the rights and duties of rural water districts"). We therefore reject the City's argument that allowing Deer Creek to claim the protection of § 1926(b) violates the Tenth Amendment.

## Conclusion

Deer Creek's challenges to the district court's subject-matter jurisdiction fail: The developers have constitutional standing, Deer Creek failed to preserve its zone-of-interests argument, and the district court did

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("[T]he plain language of [§ 1926(a)(1)] clearly indicates that a non[ ]profit corporation does not need to qualify as a quasi-public agency in order to receive the protections of § 1926(b).").

[16] Indeed, the City notes that Oklahoma recently enacted a statute—prospectively effective in November 2022 and not applicable in this litigation—providing that any corporation borrowing federal money and thereby obtaining the protection of § 1926(b) must first have established a water district with a defined protected service area. *See* Okla. Stat. tit. 18, § 1016.1.

not issue an advisory opinion. We also reject the City's Tenth Amendment argument because a nonprofit corporation like Deer Creek is not quasi-municipal and thus does not need Oklahoma's permission before incurring federal debt and any accompanying obligations.

However, we reverse the district court's order granting summary judgment to the developers and remand for further proceedings consistent with this opinion. The district court ruled that Deer Creek failed the pipes-in-the-ground test because it required the developers to construct the improvements necessary to expand Deer Creek's existing infrastructure to serve the proposed development. But nothing in the statute or caselaw makes such considerations dispositive of (or even relevant to) the pipes-in-the-ground portion of the made-service-available inquiry. On the contrary, the summary-judgment record establishes that Deer Creek satisfies the pipes-in-the-ground test: It has proximate and adequate pipes in the ground with which to provide service to the planned development within a reasonable time. That conclusion is insufficient to award summary judgment to Deer Creek, however, because it is only the first step of the made-service-available inquiry. And we decline to reach that second step—the excessive-cost test—for the first time on appeal. We thus remand for the district court to reconsider whether Deer Creek has made service available, an inquiry that will turn, at this point, on whether the City or the developers can establish that the cost of Deer Creek's service is so excessive that its service is effectively unavailable.

21-6155, -6164, *Deer Creek Water Corp., et al. v. City of Oklahoma City, et al.*

**PHILLIPS**, J., concurring in part and dissenting in part.

I agree with all but Section II.A.1 of the majority's opinion, so I would not reach the cost issue in Section II.A.2 (but agree with its reasoning). I disagree that water associations may use § 1926(b) of the Consolidated Farm and Rural Development Act to require developers to finance and lay water pipes as Deer Creek seeks to do here. Instead, to avail itself of § 1926(b)'s protection, a water association must show that a municipality has annexed the association's service area, and that the municipality either (i) has curtailed or limited the water association's existing service to customers there or (ii) is seeking to curtail or limit the association's service to future customers there despite the association's having timely arranged for financing under § 1926(a) to put the necessary pipes in the ground. Because Deer Creek fails each of these showings, I would affirm.

Decades ago, Congress passed the Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294, "which sought to preserve and protect rural farm life in a number of respects." *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 704 (6th Cir. 2003). The Act achieves its purpose by "afford[ing] farmers the opportunity to achieve parity of income with other economic groups" and by "recogniz[ing] the importance of the family farm as an efficient unit of production and as an economic base for towns and cities in rural areas." § 2, 75 Stat. at 294.

Title III of the Act (entitled the Consolidated Farm and Rural Development Act) served to help rural water users by facilitating loans from the U.S. Department of Agriculture. *Id.* § 301, 75 Stat. at 307. "Loans may be made or insured," said Congress, "for acquiring, enlarging, or improving farms, including farm buildings, land and water development, use and conservation, refinancing existing indebtedness, and for loan closing costs." *Id.* § 303, 75 Stat. at 307.

Section 306(a) of the Act, codified at 7 U.S.C. § 1926(a), furthered Congress's goal of water-infrastructure development "primarily" for "farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents" by authorizing the Secretary of Agriculture to lend to nonprofit associations to develop "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."

To safeguard the repayment of these federal loans, Congress protected the indebted nonprofit associations from losing customers to municipal annexation. *See Le-Ax Water Dist.*, 346 F.3d at 705 (noting that Congress enacted § 1926 "to prevent rural water costs from becoming prohibitively expensive to any particular user, to develop a system providing fresh and clean water to rural households, and to protect the federal government as insurer of the loan" (citation omitted)); *see also* S. Rep. No. 87-566, at 67 (1961) ("This provision

authorizes the very 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 reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water.").

Congress accomplished this through § 1926(b) of the Act:

> 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.

As seen, § 1926(b) conditions the protection from municipal annexation on two showings by the water association. First, the water association must show that the location of the disputed water service falls within its existing service area. In cases we've reviewed, the water association has usually been a water district created according to state statute, with

boundaries defined by county commissioners.[1] Here, however, Deer Creek isn't a water district, but a mere water corporation, without legally defined boundaries. For that reason, we face a novel question in our circuit—What is the service area of a nonprofit water corporation? Only if Deer Creek shows that the proposed Country Colonnade development is in Deer Creek's existing service area do we go to the second question of whether Deer Creek has "provided or made available" water service in that area. That, in turn, raises another novel question of whether Deer Creek provides and makes available water service simply by directing the developer to finance and build all water infrastructure for Country Colonnade. In my view, Deer Creek fails on both questions.

## I. Service Area

Because Deer Creek is not a water district under Oklahoma law (though it could seek to be[2]), its service

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[1] Water districts with predefined service areas have pervaded our § 1926(b) jurisprudence. *E.g.*, *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie* (*Logan*), 654 F.3d 1058, 1061 (10th Cir. 2011) (analyzing a nonprofit water district that county commissioners permitted "to provide water service to parts of Logan County, but not within the Guthrie city limits"); *Rural Water Dist. No. 4 v. City of Eudora* (*Douglas*), 659 F.3d 969, 973 (10th Cir. 2011) (analyzing a water district's service area in Douglas County).

[2] *See* Okla. Stat. tit. 82, § 1324.31 (West 2023) (noting that a water corporation formed before December 1988 "*may* organize and constitute a district" (emphasis added)); *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d 38,

area lacks geographically defined boundaries. Instead, its service area is set by the areas in which it has provided and made available water service to its customers. So Deer Creek's service area is that in which it has provided and made available water service, customer by customer.

Even had Deer Creek obtained water-district status, its service area might still be determined on this customer-by-customer basis. In *Logan*, we rejected a water district's attempt to enforce § 1926(b) protection on an "area-wide basis." 654 F.3d at 1065. Instead, based on the parties' arguments, we applied § 1926(b) protection on a "customer-by-customer basis." *Id.* And even if the parties had argued the case differently, we left it as an open question whether the water district's service area would still be based on customers served. We noted that the Eighth Circuit also employed a customer-by-customer approach in water-district cases. *Id.* at 1065–66 (citing *Pub. Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 521–23 (8th Cir. 2010)).

The facts here present an even stronger need for a customer-by-customer approach. Unlike the water district in *Logan*, Deer Creek's service area is not set by state statute, and Deer Creek has no area-wide claim to the developers' (the Bolings') 100-acre lot or to prospective commercial projects on that lot. The majority errs in concluding that Deer Creek's service area covers the entire 100 acres of the Bolings' property

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44-46 (Okla. 2010) (outlining steps for water districts to obtain legal geographic boundaries).

(including the site of the planned Country Colonnade development) based on its two-inch pipe serving the Bolings' residence and four water meters. Section 1926(b) protects Deer Creek from municipal incursions to that limited service already provided by Deer Creek.[3]

Without analysis, the majority summarily concludes that Deer Creek's service area includes the Bolings' entire 100-acre property, including that staked out for the Country Colonnade development. Maj. Op. 16 ("The [Bolings'] property is in Deer Creek's service area. . . .").[4] As mentioned, I would hold that Deer Creek's service area includes only the portion of the Bolings' property for which Deer Creek is providing water service. That credits Deer Creek for the area in which the Bolings are its customers.

I agree that § 1926(b) protects Deer Creek from any municipal encroachment on the Bolings' present

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[3] If the Bolings gave up on the development and sold all but their home and small acreage served by the existing water meters, I am unsure whether the majority would still contend that the rest of the 100 acres would remain part of Deer Creek's service area. The majority doesn't say.

[4] By addressing Deer Creek's service area, the dissent isn't raising a new issue, but instead is evaluating whether Deer Creek meets this required element of § 1926(b). We are obliged to resolve whether the statutory elements are met. That depends on the record evidence, not on the parties' briefing decisions. By passively assuming as a legal matter that Deer Creek's service area includes the Bolings' entire 100 acres, the majority invites a service-area rule into this circuit's precedent. I'd be less troubled if the majority remanded that issue.

water service. That is within Deer Creek's service area. But the full 100 acres is not.

## II. Provided or Made Available

Even if Deer Creek's service area somehow included the full 100 acres, Deer Creek would still fail on the second required showing. As explained below, it has not "provided or made available" service to the proposed Country Colonnade development.[5]

In *Sequoyah County Rural Water District No. 7 v. Town of Muldrow* (*Sequoyah*), 191 F.3d 1192 (10th Cir. 1999), we identified exactly who must have "provided or made available" the water service—that is, put the pipes in the ground. We inquired "whether *a water association* has the capacity to provide water service to a given customer." *Id.* at 1203 (emphasis added) (citations omitted). And we left it to the water association to show that it "has *in fact* 'made service available,' i.e., . . . [that it] has proximate and adequate 'pipes in the ground' with which it has served or can serve the disputed customers within a reasonable time." *Id.*

In *Sequoyah*, we welcomed the Fourth Circuit's analysis in *Bell Arthur Water Corp. v. Greenville Utilities Commission*, 173 F.3d 517 (4th Cir. 1999). *See*

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[5] In its order denying Oklahoma City's motion for summary judgment, the district court "acknowledge[d] that the parties dispute facts regarding the geographic location of Deer Creek's service area." *Deer Creek Water Corp. v. City of Oklahoma City*, No. CIV-19-1116, 2021 WL 5352442, at *5 n.9 (W.D. Okla. Oct. 27, 2021).

*Sequoyah*, 191 F.3d at 1201–03. There, a nonprofit water corporation (Bell Arthur) claimed that it had made service available to a prospective development project, 994 luxury homes and two golf courses, based on its existing six-inch pipeline crossing the development site. *Bell Arthur*, 173 F.3d at 520–21. From this pipe, the water corporation had serviced the developer's construction trailer and eight to twenty other rural households. *Id.* at 525. But the Fourth Circuit rejected Bell Arthur's argument that it had made service available to the development project, concluding that Bell Arthur's six-inch pipeline could not service the water needs of the development project. *Id.* Though noting that Bell Arthur had by then taken out a loan to increase the diameter of its pipeline, the court found this effort untimely. Bell Arthur had applied for the federal loan more than a year after agreeing to provide service. *Id.* at 525–26. So, in applying § 1926, the court ruled that Bell Arthur hadn't shown the "*capability* of providing service or, at a minimum, providing service within a reasonable time." *Id.* at 526.

Under the holdings in *Sequoyah* and *Bell Arthur*, Deer Creek hasn't "provided or made available" water service to prospective water customers at the planned Country Colonnade development. The record reveals that Deer Creek has neither "in fact" made service available to Country Colonnade nor sought to do so by obtaining a loan under § 1926(a) to put pipes in the ground. In fact, Deer Creek presents a much weaker case than did the losing water corporation in *Bell Arthur*. There, the water corporation at least had a water

main across the disputed area and had applied for a federal loan. In contrast, Deer Creek has no pipes at the Country Colonnade site and hasn't even applied for a § 1926(a) loan to put pipes in the ground. And the record shows that Deer Creek is unwilling to apply for a loan.

Though the majority recites *Sequoyah*'s rule early on, it fails to implement it when the time comes. As noted, *Sequoyah* says *who* must put the pipes in the ground—the water association. Nowhere does it even suggest that § 1926(b) protection exists if the water association tries to foist its duty to do so on the developer. And any sensible reading of § 1926 rejects that idea.[6]

Even so, and despite *Sequoyah*'s explicit language, the majority says that the City hasn't cited cases requiring the water district to secure the financing to lay the 1.3 miles of twelve-inch pipe. Maj. Op. 16–20.

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[6] The majority dismisses *Bell Arthur* because "which party would bear the responsibility for construction was not at issue in *Bell Arthur*." Maj. Op. 18. That makes it sound like the court left a contested issue unresolved. In fact, no one even suggested that the water corporation could assign its duties and still obtain § 1926(b) protection. Plainly, as with virtually all the cases, *Bell Arthur* proceeded with an understanding that the water association was the entity responsible to finance and construct the needed water pipes. 173 F.3d at 525–26. Under § 1926's framework and purpose, that understanding makes sense. After all, Congress didn't enact § 1926 so water associations could tell rural users to collect their pocket change to finance laying pipes or else remain dry and thirsty. And calling anticipated Country Colonnade residents "rural users," Maj. Op. at 19 n.10, is blushworthy. That might well explain why Deer Creek hasn't even bothered to seek a loan under § 1926(a).

Despite the cases putting this responsibility on the water association, the majority treats the question like an open one and rules for Deer Creek.

The majority's reasoning is sparse. It primarily relies on what it describes as a later "implicit" ruling in *Rural Water District No. 1 v. City of Wilson* (*Ellsworth*), 243 F.3d 1263 (10th Cir. 2001), that a water association can require a user to lay the water pipes. But the pipes there were off a main line to two duplexes, not to a large residential development like Country Colonnade. *Id.* at 1267–68. In *Ellsworth*, the water user got the entire benefit of the pipe extension—unlike here, where the Bolings must pay for the water infrastructure for all Deer Creek's future customers availing themselves of the new water pipes. And in any event, *Ellsworth* favorably cited *Sequoyah* and certainly didn't seek to overrule it. *Id.* at 1270–71.[7] Further, post-*Ellsworth* cases have continued to quote and rely on the *Sequoyah* standard. *E.g.*, *Douglas*, 659 F.3d at 980; *Logan*, 654 F.3d at 1064–65; *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 700 (10th Cir. 2004); *Moongate Water Co. v. Butterfield Park Mut.*

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[7] The majority also relies on a footnote from an unpublished order in *Pittsburg County Rural Water District No. 7 v. City of McAlester*, No. 98-7148, 2000 WL 525942, at *4 n.7 (10th Cir. May 2, 2000) (unpublished), for its statement that "requiring the customer to foot the bill for basic utility infrastructure is not entirely unheard of, at least in regard to new developments, nor is it per se unreasonable." Maj. Op. 21. Suffice it to say that this unpublished decision doesn't cite *Sequoyah* for that point, let alone explain how it flows from *Sequoyah*'s mandate that water associations take steps to put pipes in the ground.

*Domestic Water Ass'n*, 291 F.3d 1262, 1267–68 (10th Cir. 2002).

In fact, *Ellsworth* is important in a different way—for requiring water associations to provide water service at reasonable, non-excessive costs. The majority remands on that very determination. Maj. Op. 25, 31. But *Ellsworth* does not alleviate a water association's responsibility to put pipes in the ground through timely financing, whether under § 1926(a) or otherwise.

So I see nothing supporting Deer Creek's view that it has "provided or made available" the needed water service. Nothing in § 1926 justifies Deer Creek's approach of "you, the developer, pay for and arrange for construction of the needed water-pipe infrastructure, and we'll take the water fees." By blessing that approach, the majority permits water associations to hinder water development rather than facilitate it as envisioned by § 1926.

* * *

In sum, I would affirm the district court's grant of summary judgment to the Bolings. I respectfully dissent.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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DEER CREEK WATER CORPORATION,

Plaintiff Counter Defendant - Appellant/Cross-Appellee,

v.

CITY OF OKLAHOMA CITY; OKLAHOMA CITY WATER UTILITIES TRUST,

Defendants Counterclaimants - Appellees/Cross-Appellants,

and

THOMAS WAYNE BOLING; GINA BETH BOLING,

Intervenor Plaintiffs - Appellees/Cross-Appellees.

No. 21-6155
(D.C. No. 5:19-CV-01116-SLP)
(W.D. Okla.)

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DEER CREEK WATER CORPORATION,

Plaintiff Counter Defendant - Appellee,

and

| | |
|---|---|
| THOMAS WAYNE BOLING; GINA BETH BOLING,<br><br>Intervenor Plaintiffs - Appellees,<br><br>v.<br><br>CITY OF OKLAHOMA CITY; OKLAHOMA CITY WATER UTILITIES TRUST,<br><br>Defendant Counterclaimants - Appellants. | No. 21-6164<br>(D.C. No. 5:19-CV-01116-SLP)<br>(W.D. Okla.) |

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**JUDGMENT**

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(Filed Sep. 18, 2023)

Before **BACHARACH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

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These cases originated in the District of Western Oklahoma and were argued by counsel.

The judgment of that court is reversed. These cases are remanded to the United States District Court for the Western District of Oklahoma for

further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

## APPENDIX C

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

| | | |
|---|---|---|
| DEER CREEK WATER CORPORATION,<br><br>Plaintiff/counterclaim defendant,<br><br>v.<br><br>CITY OF OKLAHOMA CITY and OKLAHOMA CITY WATER UTILITIES TRUST,<br><br>Defendants/ counterclaimants,<br><br>THOMAS WAYNE BOLING and GINA BETH BOLING,<br><br>Intervenor-plaintiffs,<br><br>v.<br><br>DEER CREEK WATER CORPORATION,<br><br>Defendant. | ) | Case No. CIV-19-1116-SLP |

**ORDER**

(Filed Oct. 27, 2021)

Before the Court is Defendants' City of Oklahoma City and Oklahoma City Water Utilities Trust Motion for Summary Judgment [Doc. No. 100].[1] It is at issue.

[1] The Court refers to Defendants together as "OKC."

*See* Obj. Supporting Br. of Pl., Deer Creek Water Corporation, to Defs.' Mot. Summ. J. [Doc. No. 135]; Defs.' City of Oklahoma City and Oklahoma City Water Utilities Trust Reply Pl.'s Resp. Defs. Mot. Summ. J. [Doc. No. 144].

## I. Background

This case involves Plaintiff Deer Creek Water Corporation's ("Deer Creek") assertion of an exclusive right to provide water service to land owned by intervenors Tom and Gina Boling, who are constructing a mixed-use development on the property called Country Colonnade ("Development"). Deer Creek claims protection under the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1926(b), which protects federally indebted associations from curtailments or limitations of service during the term of the indebtedness.[2]

Deer Creek is a nonprofit corporation established under state law and is not considered a rural water district. In 2011, the City of Oklahoma City annexed a tract of land that included property owned by the Bolings. Deer Creek has provided water service to the property in the past and has water meters on the property. While Deer Creek also has a water line requiring an extension of over a mile to serve the Development,

[2] Specifically, the statute provides: "[t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan[.]"

the Oklahoma City water system has a water line across the street from the Bolings' property. The Bolings have already connected to the Oklahoma City water line.[3]

Deer Creek sued OKC for (1) a declaratory judgment that (among other things) Deer Creek is entitled to protection under § 1926(b), that the Development is within Deer Creek's protected service area, and that OKC's action in providing service to the Development violates § 1926(b); and (2) the issuance of a temporary restraining order and preliminary and permanent injunctive relief enjoining OKC from supplying water to the Development and curtailing or limiting Deer Creek's service in violation of § 1926(b). Compl. [Doc. No. 1], ¶¶ 17-31.[4] OKC counterclaimed for declaratory

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[3] Included in the preceding paragraphs are those material facts supported by the summary judgment record and not genuinely disputed as required by Federal Rule of Civil Procedure 56(c). Facts proposed by a party that the Court finds irrelevant to the issues addressed herein are omitted.

Additionally, while OKC takes issue with the unconventional way Deer Creek has presented proposed additional material facts (i.e., incorporating and summarizing facts within Deer Creek's separate summary judgment motion), the Court was able to adequately review the disputes of fact in the record for purposes of the instant motion. *See* Pl.'s Obj. [Doc. No. 135], at 8-10; Defs.' Reply [Doc. No. 144], at 6. The Court finds these factual disputes immaterial to the outcome of OKC's summary judgment motion, which (as described more fully herein) turns on legal issues.

[4] The Court denied Plaintiff's request for a temporary restraining order. *See* Order [Doc. No. 5]. While Plaintiff's motion for preliminary injunction was later withdrawn, the Bolings moved for a preliminary injunction to allow OKC to provide water to the Development, which the Court denied. *See* Minute

relief stating, among other things, that Deer Creek is not entitled to protection under 7 U.S.C. § 1926(b) and that OKC may provide water service to the area in dispute without violating that statute. Am. Answer and Countercl. [Doc. No. 45], at 8-9.[5] The instant motion requests summary judgment for OKC on Plaintiff's claims and OKC's counterclaim.

## II. Governing Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether summary judgment is proper, the court does not weigh the evidence, but rather determines whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see also Roberts v. Jackson Hole Mountain Resort Corp.*, 884 F.3d 967, 972 (10th Cir. 2018). If there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way, the issue is "genuine." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). "Material" issues of fact include those that, under the substantive law, are essential to the proper disposition of the claim. *Id.* The district court must consider the factual record and reasonable inferences drawn from the record in the light most favorable to

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Sheet of Proceedings [Doc. No. 36]; Intervenor's Mot. Prelim. Inj. [Doc. No. 76]; Order [Doc. No. 140].

[5] Citations to the parties' submissions reference the Court's ECF pagination.

the nonmoving party. *Banner Bank v. First Am. Title Ins. Co.*, 916 F.3d 1323, 1326 (10th Cir. 2019).

## III. Discussion

### A. Tenth Amendment

OKC asserts that applying § 1926(b) to Deer Creek would violate the Tenth Amendment. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). If Congress acts pursuant to one of its enumerated powers, then it does not violate the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."). It is well-settled that Congress enacted § 1926(b) pursuant to its powers under the Spending Clause. *Glenpool Util. Servs. Auth. v. Creek Cnty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1215 (10th Cir. 1988); *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 716 (10th Cir. 2004) ("Section 1926 has been repeatedly upheld as a valid exercise of Congress's authority under the Spending Clause."). The Spending Clause provides that "Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . " U.S. Const. art. I, § 8,

cl. 1. However, OKC argues that Oklahoma has not "accepted" § 1926(b)'s restrictions with respect to nonprofit corporations, so allowing Deer Creek protection under that provision violates the Tenth Amendment. Instead, according to OKC, Oklahoma has explicitly authorized only rural water districts to borrow money from the federal government under Okla. Stat. tit. 82, § 1324.10, but has not done the same for nonprofit corporations like Deer Creek.[6] OKC also asserts that, to obtain protection under § 1926(b), a nonprofit corporation must create a water district, but Deer Creek has not done so. According to OKC, the term "association" in § 1926(b) cannot override the acceptance requirement under the Spending Clause.

Deer Creek argues that it qualifies for protection under § 1926(b) as an "association" under § 1926(a)(1). Deer Creek is "[a] corporation organized not for profit pursuant to the provisions of the Oklahoma General

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[6] That statute provides:

> Every district . . . shall have power to: . . . Borrow money and otherwise contract indebtedness . . . and . . . 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[.]

Okla. Stat. tit. 82, § 1324.10(A).

Corporation Act for the purpose of developing and providing rural water supply and sewage disposal facilities to serve rural residents[.]" Okla. Stat. tit. 18, § 863. Deer Creek asserts that Okla. Stat. tit. 18, § 863 constitutes the required state acceptance of federal funds for nonprofit corporations. Further, Deer Creek asserts that the Tenth Circuit has already held that § 1926(b) does not run afoul of the Tenth Amendment and that Oklahoma has accepted federal funds under § 1926(b). *See Glenpool Util. Servs. Auth.*, 861 F.2d at 1215. Additionally, Deer Creek argues that Oklahoma statutes permit but do not require corporations to form rural water districts. Unlike a political subdivision (such as a rural water district), Deer Creek posits that a corporation does not need specific statutory authorization to act. A corporation already has the power to borrow money under Okla. Stat. tit. 18, § 1016(13).[7]

As a preliminary point, the Court finds that, as a nonprofit corporation, Deer Creek is an "association" that may be entitled to protection under § 1926(b). The statute explicitly authorizes loans "to associations, including corporations not operated for profit[.]" 7 U.S.C. § 1926(a)(1); *see also Garrett Dev., L.L.C. v. Deer Creek*

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[7] According to that provision,

> Every corporation created pursuant to the provisions of the Oklahoma General Corporation Act shall have power to: . . . borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage, pledge or other encumbrance of all or any of its property, franchises and income . . .

Okla. Stat. tit. 18, § 1016(13).

*Water Corp.*, No. CIV18-298-D, 2021 WL 111488, at *3 (W.D. Okla. Jan. 12, 2021) ("the plain language of § 1926(a) indicates that Deer Creek is an entity that may be protected."), *appeal filed*, No. 21-6105 (10th Cir. Sept. 13, 2021).

OKC fails to convince the Court that any protection under § 1926(b) as applied to Deer Creek would be unconstitutional. Courts have analyzed Spending Clause challenges using a four-part analysis:

> [Congressional] arrangements are a constitutional exercise of the spending power so long as (1) the spending or withholding is in the pursuit of the general welfare; (2) *the conditional nature is clear and unambiguous*; (3) the condition is rationally related to the purpose of the federal interest, program, or funding; and (4) the condition does not require conduct that is barred by the Constitution itself.

*United States v. White*, 782 F.3d 1118, 1127 (10th Cir. 2015) (emphasis added) (cleaned up); *see also S. Dakota v. Dole*, 483 U.S. 203, 207 (1987); *City of McAlester*, 358 F.3d at 717. Congress must impose a condition "unambiguously" so that fund recipients can make a knowing and voluntary acceptance of the terms. Spending Clause legislation is

> much in the nature of a *contract*: in return for federal funds, the recipients agree to comply with federally imposed conditions. . . . Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress' power

> to legislate under the spending power . . . rests on whether the recipient voluntarily and knowingly accepts the terms of the contract. . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

*Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (cleaned up). The Tenth Circuit has rejected Spending Clause challenges as applied to rural water districts and held that Oklahoma accepted § 1926(b)'s conditions by explicitly empowering those districts "to borrow money and accept grants from the United States of America[.]" *Glenpool Util. Servs. Auth.*, 861 F.2d at 1216 (quoting Okla. Stat. tit. 82, § 1324.10); *City of McAlester*, 358 F.3d at 717 (rejecting the city's challenge that conditions were imposed ambiguously and holding that Oklahoma was "on sufficient notice that through their *choice* to borrow money from the federal government, they agreed to abide by § 1926(b)'s proscriptions"); *see also Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d 38, 47 (Okla. 2010) (referencing § 1324.10(A) and observing "the [Oklahoma] Legislature's grant of authority includes authorization to accept conditions that accompany permissible loan and grant programs.").

However, OKC does not assert that § 1926(b) is ambiguous. And there does not appear to be any basis to find that § 1926(b)'s conditions are ambiguous. *See Glenpool Util. Servs. Auth.*, 861 F.2d at 1215. Moreover, the recipient of the federal funds and accompanying conditions in this case is a private entity, not the state.

Another court in this judicial district addressed similar arguments regarding the Spending Clause. *Garrett Dev.*, 2021 WL 111488, at *3-4. In that case, the plaintiff also argued that Oklahoma had not accepted government loans for nonprofits like Deer Creek. *Id.* at *4. The court observed that rural water districts established pursuant to the Oklahoma statutes are quasi-municipal corporations that possess only the powers provided to them by law. *Id.*; *see also* Okla. Stat. tit. 82, § 1324.6 ("the district shall be a body politic and corporate and an agency and legally constituted authority of the State of Oklahoma"); *Rural Water Dist. No. 4 v. City of Eudora*, 659 F.3d 969, 976 (10th Cir. 2011) ("As a quasi-municipal corporation . . . a rural water district possesses only those powers given to it by law or as may necessarily be implied to give effect to powers specifically granted"). Indeed, the Supreme Court of Oklahoma has described Oklahoma law in this regard:

> As a creature of statute, a district may exercise only the powers and jurisdiction delegated to it by the Legislature. . . . In addition, districts are granted certain powers necessary to adequately perform the duties of a rural water district. *See* Okla. Stat. tit. 82, § 1324.10. Included is the ability to borrow money or effectuate a contract in order to carry out the purpose of the district. Okla. Stat. tit. 82, § 1324.10(A)(4). The statutory vehicle enabling rural water districts to enter into loan agreements with the USDA is title 82 section 1324.10.

*City of Guthrie*, 253 P.3d at 46.

*Garrett Development* held that, because Deer Creek is a private nonprofit and not a quasi-municipal body, "[i]t is Deer Creek that must knowingly and voluntarily accept the conditions associated with the federal funds—not the state." 2021 WL 111488, at *5; *see also Atkins v. Christiansen*, No. 1:08-CV-972, 2009 WL 4042756, at *5 (W.D. Mich. Nov. 20, 2009) ("The [spending] power applies to money Congress offers to state recipients as well as private parties."). In any case, the Oklahoma General Corporation Act empowers corporations to borrow money. *Garrett Dev.*, 2021 WL 111488, at *5 (citing Okla. Stat. tit. 18, § 1016). The Court agrees with the analysis in *Garrett Development.* Accordingly, the Court rejects OKC's argument that, to obtain state "acceptance," Deer Creek was required to form a rural water district, as well as Deer Creek's argument that the required "acceptance" is found in Okla. Stat. tit. 18, § 863. The Court does not read the provisions on which OKC relies to mandate that nonprofits form a rural water district. *See* Okla. Stat. tit. 82, § 1324.31 ("any corporation which was formed prior to December 1, 1988, *may* organize and constitute a district . . . ") (emphasis added); *id.* § 1324.35 ("In the event a corporation provides service within the boundaries of an incorporated city or town on the date of organization as a rural water district, the district may continue to serve in that area as permitted by law."). Additionally, Okla. Stat. tit. 18, § 863 simply provides that nonprofits formed "for the purpose of developing and providing rural water supply . . . to serve rural

residents" are exempt from excise taxes and assessments and have rights of eminent domain.[8]

### B. Service Area

OKC also asserts that Deer Creek does not have a geographically defined service area. Pointing to *Le-Ax Water District v. City of Athens*, 346 F.3d 701 (6th Cir. 2003), OKC asserts that Deer Creek is using § 1926(b) as a sword impermissibly to recruit new users outside of its boundaries, rather than a shield. Deer Creek responds that § 1926(b) protects the "service provided or made available" by Deer Creek. According to Deer Creek, as a nonprofit corporation, it is not confined to a specific territory. Further, Deer Creek asserts that the disputed property is within Deer Creek's service area because Deer Creek has been delivering water to the property for years, has pipes in the ground, and has water meters on the property.

Section 1926(b) states: "The service provided or made available through any such association shall not be curtailed or limited by inclusion of the *area served by* such association within the boundaries of any municipal corporation . . . " (emphasis added). The "area served" refers to where the association has "provided

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[8] Additionally, the Court rejects OKC' s argument that any protection afforded to Deer Creek under § 1926(b) would raise a Fifth Amendment taking issue. *See City of McAlester*, 358 F.3d at 71719 (holding that the district court erred in ruling that application of § 1926(b) would constitute a taking); *Garrett Dev.*, 2021 WL 111488, at *5 n.3 (rejecting the argument that Deer Creek's actions equated to a Fifth Amendment government taking).

or made available" service. *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999) ("The purpose of the second inquiry [regarding 'provided or made available service'] is to determine whether the disputed customers are within the water association's service area, i.e., 'that area to which [Plaintiff] provided service or made service available.'" (quoting *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 525 (4th Cir. 1999))); *see also Bell Arthur*, 173 F.3d at 524 ("the area served is defined by where service has been provided or made available").

OKC attempts to add a geographic boundary limitation which, although required under Oklahoma statutes for rural water districts, is not part of the § 1926(b) analysis.[9] The court considered a similar argument regarding Deer Creek's service area in *Garrett Development* and concluded that, while Oklahoma statutes require rural water districts to have defined service areas, the same is not true with respect to nonprofit associations. 2021 WL 111488, at *5. The Court agrees. The "made service available" inquiry asks "whether the association has proximate and adequate 'pipes in the ground' with which it has served or can serve the disputed customers within a reasonable time." *Sequoyah Cnty.*, 191 F.3d at 1203. OKC made no

[9] The Court acknowledges that the parties dispute facts regarding the geographic location of Deer Creek's service area. *See* Pl.'s Obj. [Doc. No. 135], at 10-12; Defs.' Reply [Doc. No. 144], at 56. But the Court finds these facts irrelevant to the legal issue of whether § 1926(b) requires a geographic boundary.

argument in its motion for summary judgment regarding the "made service available" analysis or the pipes-in-the-ground test. Accordingly, OKC's argument regarding Deer Creek's lack of a geographically defined service area fails.[10]

OKC also inaccurately relies on *Le-Ax Water District*, 346 F.3d at 701, for the contention that Deer Creek "uses § 1926(b) as a sword against rural development rather than a shield to protect and promote rural development." Defs.' Mot. Summ. J. [Doc. No. 100], at 30. In *Le-Ax Water District*, the Sixth Circuit held that a rural water district was not protected by § 1926(b) because it was not seeking "to protect its users or territory from municipal incursion" but rather was "seeking to use the statute to foist an incursion of its own on users outside of its boundary that it has

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[10] To the extent OKC's argument could be construed as challenging Deer Creek's "legal right, under state law, to provide service to the customer[,]" *see* Defs.' Mot. Summ. J. [Doc. No. 100], at 16-17, this argument also fails. *Sequoyah Cnty.*, 191 F.3d at 1201 n.8. As previously noted, Deer Creek is not required to have a geographic territory. *Garrett Dev.*, 2021 WL 111488, at *5. And the Court has already rejected OKC's argument that Deer Creek was required to form a rural water district. *See supra* Section III.A. Further, Oklahoma statutes contemplate both nonprofits and rural water districts that supply rural water. *See* Okla. Stat. tit. 18, § 863; Okla. Stat. tit. 82, § 1324.30 (recognizing that a "Corporation" means a nonprofit formed pursuant to the Oklahoma General Corporation Act "for the purpose of developing and providing rural water supplies to serve rural residents[,]" while "District" means "a public nonprofit water district created pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act."). OKC does not otherwise demonstrate that Deer Creek does not have a legal right under state law to provide service to the property.

never served or made agreements to serve." 346 F.3d at 707. However, the district had boundaries defined by state law. *Id.* at 709 ("hold[ing] that when a rural water district's boundaries are geographically determined by the state, a rural water district cannot use § 1926(b) to obtain new customers outside that geographic area."). Importantly, the court "t[ook] care to point out that [the district's] boundaries are clearly defined by state law; *we do not consider here a case where the state has not defined the boundaries of its water districts or associations*." *Id.* at 710 (emphasis added).[11] The Sixth Circuit later rejected the "sword versus shield" argument in a case involving a nonprofit corporation, explaining that "*Le-Ax* is not applicable here because [the water company] was established as a non-profit and is without state-defined geographical boundaries." *Ross Cnty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 401 (6th Cir. 2011).

## IV. Conclusion

IT IS THEREFORE ORDERED that Defendants' City of Oklahoma City and Oklahoma City Water Utilities Trust Motion for Summary Judgment [Doc. No. 100] is DENIED.[12]

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[11] The court observed that some states "apparently do not create boundaries for their water districts." *Id.* at n.2.

[12] Although the Court denies this Motion based on the issues raised therein, ultimately, based on the findings of the Court set forth in the contemporaneous Order issued this same date on the Bolings' and Deer Creek's summary judgment motions, OKC is entitled to the entry of judgment in its favor.

IT IS SO ORDERED this 27th day of October, 2021.

/s/ Scott L. Palk
**SCOTT L. PALK**
**UNITED STATES**
**DISTRICT JUDGE**

## APPENDIX D

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

| | |
|---|---|
| DEER CREEK WATER CORPORATION,<br><br>Plaintiff/counterclaim defendant,<br><br>v.<br><br>CITY OF OKLAHOMA CITY and OKLAHOMA CITY WATER UTILITIES TRUST,<br><br>Defendants/ counterclaimants,<br><br>THOMAS WAYNE BOLING and GINA BETH BOLING,<br><br>Intervenor-plaintiffs,<br><br>v.<br><br>DEER CREEK WATER CORPORATION,<br><br>Defendant. | Case No. CIV-19-1116-SLP |

**ORDER**

(Filed Oct. 27, 2021)

Before the Court is Intervenor's Motion for Summary Judgment [Doc. No. 104]. It is at issue. *See* Defs.' City of Oklahoma City and Oklahoma City Water Utilities Trust Resp. Bolings' Mot. Summ. J. [Doc. No. 134]; Obj. Supporting Br. of Pl., Deer Creek Water

Corporation, to Intervenors' Mot. Summ. J. [Doc. No. 136]; Reply Supp. CrossClaimants'/Intervenors' Summ. J. Mot. [Doc. No. 147]; Notice Suppl. Authority Supporting Cross-Claimants'/Intervenors' Mot. Summ. J. [Doc. No. 162].

Also before the Court is Plaintiff Deer Creek Water Corporation's Amended Motion for Summary Judgment [Doc. No. 107]. It is also at issue. *See* Defs.' City of Oklahoma City and Oklahoma City Water Utilities Trust Resp. Opp'n Deer Creek Water Corporation's Am. Mot. Summary J. [Doc. No. 133]; Intervenor's Resp. Deer Creek's Mot. Summ. J. [Doc. No. 137]; Deer Creek Water Corporation's Reply Br. Supp. Am. Mot. Summ. J. [Doc. No. 146].

Also relevant is the Court's previous order on the summary judgment motion filed by Defendants City of Oklahoma City and Oklahoma City Water Utilities Trust (together, "OKC"). *See* Order [Doc. No. 163].

## I. Background

Plaintiff Deer Creek Water Corporation ("Deer Creek") asserts an exclusive right to provide water service to a proposed residential and commercial development called Country Colonnade ("Development") on land owned by intervenors Tom and Gina Boling. The Bolings already connected to an Oklahoma City water line. Deer Creek claims it has a right under the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1926(b), which protects federally indebted

associations from curtailments or limitations of service during the term of the association's indebtedness.

Deer Creek sued OKC for (1) a declaratory judgment that (among other things) Deer Creek is entitled to protection under § 1926(b) and OKC's action in providing service to the Development violates § 1926(b); and (2) the issuance of a temporary restraining order and preliminary and permanent injunctive relief enjoining OKC from supplying water to the Development and curtailing or limiting Deer Creek's service in violation of § 1926(b). Compl. [Doc. No. 1].[1] OKC counterclaimed for declaratory relief stating, among other things, that Deer Creek is not entitled to protection under 7 U.S.C. § 1926(b) and that OKC may provide water service to the area in dispute without violating that statute. Am. Answer and Countercl. of Defs. [Doc. No. 45].

The Bolings filed a Cross-Complaint in Intervention [Doc. No. 35] seeking a declaratory judgment that Deer Creek does not have a protected service area under § 1926(b), that Deer Creek has not made service available to the Bolings, and that the Bolings may obtain service elsewhere without violating that statute. The Bolings and Deer Creek now each request summary judgment in their favor.

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[1] The Court denied Plaintiff's request for a temporary restraining order. *See* Order [Doc. No. 5]. While Plaintiff's preliminary injunction motion was later withdrawn, the Bolings moved for a preliminary injunction to allow OKC to provide water to the Development, which the Court denied. *See* Minute Sheet of Proceedings [Doc. No. 36]; Intervenor's Mot. Prelim. Inj. [Doc. No. 76]; Order [Doc. No. 140].

## II. Governing Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether summary judgment is proper, the court does not weigh the evidence, but rather determines whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see also Roberts v. Jackson Hole Mountain Resort Corp.*, 884 F.3d 967, 972 (10th Cir. 2018). If there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way, the issue is "genuine." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). "Material" issues of fact include those that, under the substantive law, are essential to the proper disposition of the claim. *Id.* The district court must consider the factual record and reasonable inferences drawn from the record in the light most favorable to the nonmoving party. *Banner Bank v. First Am. Title Ins. Co.*, 916 F.3d 1323, 1326 (10th Cir. 2019).

## III. Undisputed Material Facts[2]

This case concerns who should be allowed to provide water service to a proposed development on a tract of land located near the intersection of 192nd

[2] Included herein are those material facts supported by the summary judgment record and not genuinely disputed as required by Federal Rule of Civil Procedure 56(c). Facts proposed by a party that the Court finds irrelevant to the issues addressed herein are omitted.

Street and Portland Avenue in Oklahoma County owned by the Bolings.[3] OKC annexed the property in 2011. The Bolings are trying to build the Development on this land and they already constructed the infrastructure needed to tap into OKC's water line, which is across the street from the property.

Deer Creek has an existing 2-inch water main on the Bolings' property, but it is incapable of serving the Development. Deer Creek has another 12-inch main located half of a mile away from the property via a direct route, but to connect to it, approximately 1.3 miles of upgraded water main is required. Deer Creek is a nonprofit corporation and not considered a "rural water district" under the Rural Water, Sewer, Gas and Solid Waste Management Districts Act (Okla. Stat tit. 82, § 1324.1 *et seq*.). Additionally, Deer Creek is currently indebted to the United States Department of Agriculture on loans from 1996 and 2013.

In February 2020, the Bolings submitted an application to Deer Creek to ascertain the terms of its water service to the Development. *See* Doc. No. 104-2. The Development is planned to encompass 158 total lots over 103 acres. *Id.*[4] Based on this application, Deer Creek's

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[3] Specifically, the tract of land at issue is made up of 100 acres within the southwest quarter of Section 24, Township 14 North, Range 4 West.

[4] There is some ambiguity over whether this is still the plan for the Development. *See* Pl.'s Obj. [Doc. No. 136], at 8-9. The Bolings state that this application "likely represent[s] the lowest potential cost of service for the Development" because "[a] greater number of residential lots may be developed . . . which could only increase the total cost of service." Intervenor's Mot. Summ. J.

engineer, William Myers, prepared a report addressing Deer Creek's provision of water to the Development. *See* Myers Report [Doc. No. 104-4]. Myers reviewed the February 2020 application and outlined the necessary "improvements to the Deer Creek system." *Id.* at 5-9.[5] According to Myers, the Bolings must:

- construct either 6-inch or 12-inch diameter mains[6] totaling approximately 1.3 miles;[7]

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[Doc. No. 104], at 8-9 n.1. While Deer Creek points out that the Bolings' "water needs may change[,]" Deer Creek does not dispute that the terms of service based on the February 2020 application likely represents the lowest estimate. Deer Creek also admits that its terms of service set forth in the Myers Report (which was based on the February 2020 application) "provide[s] the terms of service should the Bolings ever actually request service from Deer Creek." *Id.* at 10.

[5] Deer Creek has a policy covering the extensions of waterlines to the Deer Creek system. *See* Subdivision Waterline and Acceptance Policy [Doc. No. 104-3]. Myers considered this policy in drafting his expert report. *See* Myers Report [Doc. No. 104-4], at 17.

[6] Six-inch mains would be required for domestic service only, while 12-inch mains would be required for domestic service and fire protection. *Id.* at 6-7. The summary judgment briefing indicates that the Development would require fire protection. However, as explained below, the 6-inch main is relevant to the analysis under § 1926(b).

[7] While the parties assert this distance would total 1.3 miles, this is somewhat belied by the Myers Report, which states that the Bolings are required to construct three line segments totaling approximately 7,800 feet (or about 1.48 miles). *Id.* at 7, 11. Nevertheless, the difference in these distances is not material to the Court's decision. Further, while Deer Creek's 12-inch main is half of a mile away from the property via a direct route, connecting the Development to this main requires an extension of 1.3 miles

- obtain a permit for the water main construction and hire an engineer to prepare the appropriate plans and permit applications for the improvements utilizing Deer Creek specifications;
- dedicate the water rights under the Development to Deer Creek;
- pay for costs related to the development of one water well (subject to a credit from the impact fees paid by the Bolings) while Deer Creek maintains control over design, location, testing procedures, construction, and well development process;
- provide three phase power;
- furnish and install meter cans, setters, curb stops, corporation stops and service lines pursuant to Deer Creek specifications;
- pay an inspection fee equal to 5% of all water system construction costs and well costs;
- pay certain impact fees and membership fee(s).

*Id.* at 6-9. According to Myers, the total cost to provide the Development with domestic and fire service protection is $961,743.83. *Id.* at 11.

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pursuant to Deer Creek's policy requiring mains to be extended along the border of each section. Pl.'s Obj. [Doc. No. 136], at 9 n.2.

## IV. Discussion

Deer Creek claims it has a protected service area under 7 U.S.C. § 1926. That statute provides:

> The Secretary is . . . authorized to make or insure loans to associations, including corporations not operated for profit . . . to provide for the application or establishment of . . . the conservation, development, use, and control of water . . . and to furnish financial assistance or other aid in planning projects for such purposes.

7 U.S.C. § 1926(a)(1).[8] Further:

> 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.

*Id.* § 1926(b). Section 1926(b) was enacted "as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices,

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[8] The Court has already held that Deer Creek is an "association" under the statute. *See* Order [Doc. No. 163].

water service or management, waste facilities, or essential community facilities to farmers, ranchers, and other rural residents." *Glenpool Util. Servs. Auth. v. Creek Cnty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988). Congress intended the statute to encourage rural water development, reduce the cost per user resulting from a larger customer base, and provide greater security for federal loans. *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1196 (10th Cir. 1999); *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 520 (4th Cir. 1999).[9]

To obtain the protection from competition granted by § 1926(b), a party must (1) have "a continuing indebtedness to the USDA" and (2) "have provided or made available service to the disputed area." *Rural Water Dist. No. 4 v. City of Eudora*, 659 F.3d 969, 976 (10th Cir. 2011). "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Sequoyah Cnty.*, 191 F.3d at 1197.[10] If the water provider

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[9] "Originally the Farmers Home Administration ('FmHA') administered these loans. . . . Since 1994, however, the Department of Agriculture [USDA] has operated this loan program . . . through its Rural Utilities Service." *Rural Water Sewer & Solid Waste Mgmt. v. City of Guthrie*, 344 F. App'x 462, 464 n.1 (10th Cir. 2009).

[10] This does not mean "that all doubts and evidentiary uncertainties must be resolved in favor of the indebted water district"—rather, the statute should be interpreted liberally. *City of Eudora*, 659 F.3d at 976 n.4.

is entitled to protection, then it "must prove that its services were curtailed or limited by the competing entity." *Id.*

### A. Preliminary Arguments

Before turning to the two-prong test under § 1926(b), the Court first disposes of certain already-decided arguments made by the Bolings and OKC regarding the application of § 1926(b) to Deer Creek. First, the Bolings and OKC invoke the Tenth Amendment and the Spending Clause in arguing that the state of Oklahoma has not "accepted" § 1926(b)'s restrictions for a nonprofit. However, the Court has analyzed and rejected this argument made by OKC in its motion for summary judgment. *See* Order [Doc. No. 163]. The analysis in that Order applies equally here. Additionally, OKC and the Bolings challenge Deer Creek's legal right to provide service. The Court has also already rejected this argument. *Id.* According to the Bolings and OKC, Deer Creek also lacks geographically defined boundaries and thus is not entitled to protection under § 1926(b). The Court previously rejected OKC's argument that § 1926(b) requires specific geographic boundaries—instead, the statute's protections apply to where the association has "made service available." *See id.* Because Deer Creek has not made service available to the Development as discussed

more fully below, the Court addresses this argument no further.[11]

### B. § 1926(b)'s Two-Prong Test

As noted previously, a party seeking protection under § 1926(b) must show "continuing indebtedness" on USDA loans and that the party has provided or made water service available to the disputed area. *Sequoyah Cnty.*, 191 F.3d at 1197.

#### i. Continuing indebtedness[12]

The record reflects that Deer Creek has entered into multiple loans with the USDA.[13] Deer Creek has outstanding balances on loans from the USDA issued in 1996 and 2013. *See* Doc. No. 107-8. OKC and the Bolings argue that Deer Creek's loan documents do not

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[11] In its response to Deer Creek's motion, OKC makes a passing reference to article 5, section 51 of the Oklahoma Constitution, which prevents the Oklahoma legislature from passing laws granting exclusive rights. *See* Defs.' Resp. [Doc. No. 133], at 17-18. Although the Court finds that deciding this issue is unnecessary in light of Deer Creek's failure to make service available, it appears that this state constitutional argument is also without merit. *See Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d 38, 41 (Okla. 2010) ("*City of Guthrie II*"); *see also Glenpool Util. Servs. Auth.*, 861 F.2d at 1216.

[12] OKC challenges the terms of Deer Creek's indebtedness to the government. The Bolings have taken inconsistent positions on whether they challenge the indebtedness prong. *Compare* Intervenor's Mot. Summ. J. [Doc. No. 104], at 13, *with* Intervenor's Resp. Deer Creek's Mot. Summ. J. [Doc. No. 137], at 6.

[13] *See* Doc. Nos. 107-3 through 107-8.

show that they were issued specifically pursuant to § 1926. OKC also argues the loans do not grant Deer Creek a protected service area.

The loans contemplated by § 1926(a) "include loans the government makes or insures, *see id.* § 1926(a)(1)[.]" *City of Eudora*, 659 F.3d at 976. The Court finds the "continuing indebtedness" prong is satisfied here based on the evidence of Deer Creek's outstanding loans. *See Sequoyah Cnty.*, 191 F.3d at 1200 ("Because Plaintiff was indebted to the FmHA prior to May 5, 1989, and after September 28, 1994, it has satisfied the first prong of the § 1926(b) analysis with respect to those periods."). The Court discerns no statutory support for the suggestion that a water provider obtains protection under § 1926(b) only upon loans that specifically grant a "service area" or state that the loans are issued specifically under the statute. *See Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass'n*, 125 F. Supp. 2d 1304, 1308 n.1 (D.N.M. 2000) (noting "the fact that the loans were made is not disputed" so there was "no genuine issue of material fact concerning whether [the water provider] obtained FmHA loans"). Accordingly, the Court turns to the analysis of whether Deer Creek has made service available.

### ii. Made service available

The second prong of the analysis "focus[es] primarily on whether the water association has *in fact* 'made service available,' i.e., on whether the association has proximate and adequate 'pipes in the ground'

with which it has served or can serve the disputed customers within a reasonable time." *Sequoyah Cnty.*, 191 F.3d at 1203.

> [A] water association meets the "pipes-in-the-ground" test by demonstrating "that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." . . . This is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer.

*Id.* (quoting *Bell Arthur*, 173 F.3d at 526). It is the water provider's burden to make this showing. *City of Eudora*, 659 F.3d at 976; *TP Real Est. LLC v. Rural Water, Sewer & Solid Waste Mgmt. Dist. No. 1*, No. CIV-09-748-R, 2010 WL 11508774, at *4 & n.12 (W.D. Okla. Apr. 19, 2010). Even if a water provider makes this showing, "the cost of those services may be so excessive that it has not made those services 'available' under § 1926(b)." *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1271 (10th Cir. 2001).

The Bolings assert that Deer Creek has not made service available because its existing 2-inch line on the property is inadequate and Deer Creek is requiring the Bolings to build the necessary infrastructure to connect to Deer Creek's 12-inch main (and then essentially surrender that infrastructure to Deer Creek). According to the Bolings, Deer Creek has no intention of building the necessary infrastructure. Deer Creek responds that, ultimately, it "has virtually three times the capacity to service all of its current members plus

Country Colonnade[.]" Pl.'s Obj. [Doc. No. 136], at 16.[14] With respect to its infrastructure, Deer Creek argues that it "can have the infrastructure improvements ready within ninety days[,]" pointing to an affidavit from Myers. *Id*.; *see also* Myers Aff. [Doc. No. 107-24].

Deer Creek has not demonstrated that it has proximate and adequate pipes in the ground with which it has served or can serve the Bolings' Development within a reasonable time. The court's opinion in *Bell Arthur*—a case involving similar facts—is persuasive. 173 F.3d at 525-26. The court held that a nonprofit water provider was not entitled to § 1926(b)'s protection because the provider did not have the capacity to serve the disputed area or provide service within a reasonable time. *Id.* The water provider had an existing 6-inch pipeline running through the area, but the parties agreed that this line was inadequate to serve the proposed development. *Id.* at 525. The provider determined that it needed a 14-inch pipeline that would cost $650,000 to construct. *Id.* at 521. The court noted that, even after the provider agreed to provide service to the development, the provider "took no meaningful steps at that time or within a reasonable time thereafter to undertake construction of a new pipeline"—the provider failed to even apply for a loan until over a year later to finance the construction of the project. *Id.* at 525-26. The court held that the provider's "inadequate six-inch pipe in the ground coupled with *only a general, unfulfilled intent to provide the necessary 14–inch pipe*

[14] Citations to the parties' submissions reference the Court's ECF pagination.

*sometime in the future* does not amount to 'service provided or made available.'" *Id.* at 526 (emphasis added) (quoting 7 U.S.C. § 1926(b)).

Deer Creek's arguments against *Bell Arthur* are unavailing. Deer Creek asserts that the court analyzed whether the provider had the statutory duty to provide service, which the Tenth Circuit does not require. But the court's analysis of statutory duty in *Bell Arthur* did not impact its analysis of whether the provider was capable of providing service. The court explained that "[e]ven if [the water provider] had an adequate facility[,]" (which it did not), the provider did not have the statutory duty serve the disputed area. *Id.* at 526. Although the Tenth Circuit does not require a statutory duty to serve (although duty is relevant to the analysis), the Tenth Circuit still requires the association to show "that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." *Sequoyah Cnty.*, 191 F.3d at 1203 (quoting *Bell Arthur*, 173 F.3d at 526).

Deer Creek also argues that *Bell Arthur* is factually distinguishable because, according to Deer Creek, the Bolings have not applied for service. This argument fails in light of the facts that the Bolings submitted an application in February 2020 to determine Deer Creek's terms of service (which Deer Creek acknowledges) and Deer Creek has "assumed [the Bolings'] participation in this lawsuit is such a request [for water service.]" Pl.'s Am. Mot. Summ. J. [Doc. No. 107], at

25; *see also* Pl.'s Obj. [Doc. No. 136], at 10.[15] Further, it is Deer Creek's burden to show that it made water service available under § 1926(b).

Additionally, Deer Creek argues that the water provider in *Bell Arthur* was going to perform the necessary construction work, which Deer Creek is not obligated to do. This is the crux of the issue between Deer Creek and the Bolings. Deer Creek asserts that courts have required developers to provide the infrastructure improvements required by their projects, citing *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013) and *Mid-Continent Builders, Inc. v. Midwest City*, 539 P.2d 1377, 1378 (Okla. 1975).[16] But those cases involved constitutional takings issues and not the protection from competition afforded under § 1926(b). *See Koontz*, 570 U.S. at 604-06 (discussing an application of the unconstitutional conditions doctrine regarding applications for land-use permits); *Mid-Continent Builders*, 539 P.2d at 1378 (holding that the requirement that subdividers and developers install water lines is not a taking under the Oklahoma Constitution). Deer Creek's arguments in this regard are unpersuasive.

Further, the intent of § 1926 is to finance the development of water supply and pipelines in rural communities and reduce the cost per user. *See* 7 U.S.C.

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[15] Deer Creek also argues it "has made service available to Country Colonnade through the May 1, 2020 report of its engineer, William Myers." Pl.'s Am. Mot. Summ. J. [Doc. No. 107], at 25

[16] *See* Pl.'s Reply [Doc. No. 146], at 7.

§ 1926(a)(1); *Bell Arthur*, 173 F.3d at 520 (observing that "Congress intended to provide a very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities." (internal quotation marks and citation omitted)). Here, a borrower is not using its financing to develop its water system, but rather is requiring its customer to do so for the borrower. The Court fails to see how the borrower has "provided or made available" service in this scenario. *Cf. Ross Cnty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 400 (6th Cir. 2011) (explaining that a water association's "business decision [to upgrade its system] was consistent with the Department of Agriculture's interest in providing water to rural areas"); *id.* at 402 (explaining that the purpose of § 1926(b) includes "protect[ing] the federal government as the insurer of the loans used to construct the requisite infrastructure."); *Sioux Rural Water Sys., Inc. v. City of Watertown*, No. CV 15-1023-CBK, 2017 WL 1372602, at *1 (D.S.D. Apr. 12, 2017) ("In order to finance the building of its water system, Sioux [Rural Water System, Inc.] took out loans from the United States Department of Agriculture . . . under the Consolidated Farm and Rural Development Act"); *City of Guthrie II*, 253 P.3d at 47 ("the general structure of the USDA loans are described as a federal-state finance program in which the federal government provides assistance to participating states to aid the development of, among other things, water service and management facilities to rural areas.").

Another case from this judicial district also supports the conclusion that, by shifting the expansion of its water system to the customer, Deer Creek has not made service available to the Development. In *TP Real Estate*, the court held that a water provider failed to make service available when it required the landowner plaintiffs to spend the money to connect to the provider's existing lines over seven miles away. 2010 WL 11508774, at *5. Although finding that the provider's pipeline was not "within or adjacent" to the area, the court cited *Bell Arthur* in explaining that, in any case, the provider "still cannot meet the pipes-in-the-ground test *as it has made no effort to lay pipeline to the area*." *Id.* n.14 (emphasis added). The court also addressed the provider's offer to supply sewer service only once the landowner brought retention lagoons up to Oklahoma Department of Environmental Quality ("ODEQ") standards. *Id.* at *4, *6. The court held that this response was "inadequate as a matter of law; directing a landowner to bring an existing system into compliance and then deeding it to the district does not constitute the *district's* making service available." *Id.* at *6. And the provider failed to show "that it has made any effort to serve the Disputed Area by extending service to the area or even by commissioning an engineering study to determine if it would be feasible to provide sewer service." *Id.*[17]

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[17] The Court rejects Deer Creek's arguments that this case is factually distinguishable because it involved sewer service and a provider's ability to serve only a portion of the proposed development once connected to the provider's pipeline. The court applied

Here, it is undisputed that the existing water line on the Development is inadequate. To serve the Development, Deer Creek is requiring the Bolings to, among other things, construct nearly one-and-a-half miles of larger water mains,[18] obtain the proper ODEQ permits for that construction, hire an engineer to prepare the plans utilizing Deer Creek specifications, and furnish and install meter cans, setters, curb stops, corporation stops, and service lines. Myers Report [Doc. No. 104-4], at 6-9. These requirements are consistent with Deer Creek's Subdivision Waterline Design and Acceptance Policy. Myers estimates the costs for only the extension of the 6-inch water mains to be over $300,000. *Id.* at

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the same made-service-available test in analyzing sewer service. *Id.* at *4 n.11. And the court's explanation that the provider could not meet the pipes-in-the-ground test without effort to lay pipeline to the area was made separately from the court's analysis regarding the adjacency of the line and the service to a portion of the proposed households. *Id.* at *5 & n.14. Here, even assuming without deciding that Deer Creek's 1.3-mile-away water main is sufficiently "adjacent" and that Deer Creek's entire system has the capacity to serve the development once the connection is made, Deer Creek fails to show it can make service available within a reasonable time by making the Bolings build the necessary infrastructure to connect to the main.

[18] Deer Creek would require the Bolings to construct 6-inch diameter mains for domestic service only or 12-inch mains for domestic service and fire protection. The Court considers the terms of service for 6-inch mains because "Mt is well established that a water district's ability to provide water for fire protection is not a factor the court should analyze when determining whether the district has made service available." *City of Eudora*, 659 F.3d at 982. However, the distinction between the sizes of the upgraded mains makes no difference to the outcome of this Order because Deer Creek is still putting the onus on the Bolings to construct the upgraded water mains (however large in diameter).

10. There is no evidence that Deer Creek has taken any steps—including obtaining any needed financing—to make these necessary infrastructure improvements to serve the Development within a reasonable time. Deer Creek's expert's estimation that "the water main infrastructure improvements required by Deer Creek for Phase I and II could be completed within 90 days" does not help Deer Creek. Myers Aff. [Doc. No. 107-24], ¶ 5. This affidavit does not say anything about *Deer Creek's* efforts to construct the mains (and thus appears to estimate how long *the Bolings*' construction would take). Plus, the affidavit only addresses part of the necessary expansion of the Deer Creek system (specifically, the water main construction for Phases 1-2, but not Phase 3 of the Development or the water well construction).[19]

Deer Creek argues that the Tenth Circuit rejected the Bolings' argument in *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 211 F.3d 1279 (10th Cir. 2000) (unpublished). The Tenth Circuit held that the district court misapplied the pipes-in-the-ground test where the water district's expert estimated "the time (ranging from 0 to 90 days) it would take for *the District* to install the appropriate facilities for the various disputed customers." *Id.* at *4 (emphasis added). The Tenth Circuit instructed the district court to address the reasonableness of the time estimates on remand. *Id.* The court of appeals also observed the district court's emphasis on "the fact the District will require the disputed customers to pay for some facility

[19] The required well is included in Phase 3. Myers Report [Doc. No. 104-4], at 8.

improvements in order to provide service." *Id.* n.7. The court then made the uncontroversial statement that "[w]hile certainly a relevant factor for determining the District's ability to provide service in a reasonable time, requiring the customer to foot the bill for basic utility infrastructure is not entirely unheard of, at least in regard to new developments, nor is it *per se* unreasonable." *Id.*[20] Here, the Court is concerned with the fact that Deer Creek is requiring the Bolings *to construct* Deer Creek's water system for Deer Creek. The Court is not concerned with the reasonableness of the time estimated for Deer Creek to complete the infrastructure construction (or the costs shifted to the customer for Deer Creek's construction).

All told, the undisputed facts show that Deer Creek does not have even "a general, unfulfilled intent to provide the necessary [6]–inch pipe sometime in the future[.]" *Bell Arthur*, 173 F.3d at 526. Deer Creek does not intend to construct the necessary upgraded water mains at all. Instead, Deer Creek is requiring the Bolings to do so as a condition to Deer Creek providing service. Accordingly, Deer Creek has not demonstrated that it has adequate facilities within or adjacent to the area to provide service to the Development within a reasonable time. *See City of Wilson*, 243 F.3d at 1272 (affirming the district court's denial of injunctive relief

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[20] Notably, this order was issued before the Tenth Circuit articulated the multifactor analysis used to determine whether the costs of a water district's services are excessive to such a degree that the district has not made service available under § 1926(b). *See City of Wilson*, 243 F.3d at 1271.

to a water district regarding a property where the water district "had made no effort to extend service to the property"); *Santa La Hill, Inc. v. Koch Dev. Corp.*, No. 307-CV-00100-RLY-WGH, 2008 WL 140808, at *5 (S.D. Ind. Jan. 11, 2008) (holding that a water provider could not make service available within a reasonable time where the provider did "not have a plan in place to meet the growing needs" of the customer); *City of Guthrie II*, 253 P.3d at 49 ("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."); *In re Detachment of Territory from Pub. Water Supply Dist. No. 8 of Clay Cnty.*, 210 S.W.3d 246, 251 (Mo. Ct. App. 2006) (holding that a district did not make service available to property where it had insufficient pipelines and the district had not "begun any of the proposed improvements, and did not have a timetable for the proposed improvements to be completed."). Because Deer Creek has not demonstrated that it has provided or made available service to the Bolings' Development, Deer Creek is not entitled to the protection afforded under § 1926(b).[21]

[21] Because Deer Creek has not succeeded on the "pipes-in-the-ground" test, addressing whether Deer Creek's charges are unreasonable, excessive, and confiscatory is unnecessary. *See City of Wilson*, 243 F.3d at 1271; *TP Real Est.*, 2010 WL 11508774, at *4 n.12.

## V. Conclusion

IT IS THEREFORE ORDERED that Plaintiff Deer Creek Water Corporation's Motion for Summary Judgment [Doc. No. 107] is DENIED.

IT IS FURTHER ORDERED that Intervenor's Motion for Summary Judgment [Doc. No. 104] is GRANTED. Intervenors Tom and Gina Boling are entitled to judgment as a matter of law in their favor. A separate judgment shall be entered contemporaneously with this Order.

IT IS SO ORDERED this 27th day of October, 2021.

/s/ Scott L. Palk
**SCOTT L. PALK**
**UNITED STATES**
**DISTRICT JUDGE**

## APPENDIX E

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

| | | |
|---|---|---|
| DEER CREEK WATER CORPORATION,<br><br>Plaintiff/counterclaim defendant,<br><br>v.<br><br>CITY OF OKLAHOMA CITY and OKLAHOMA CITY WATER UTILITIES TRUST,<br><br>Defendants/ counterclaimants,<br><br>THOMAS WAYNE BOLING and GINA BETH BOLING,<br><br>Intervenor-plaintiffs,<br><br>v.<br><br>DEER CREEK WATER CORPORATION,<br><br>Defendant. | ) | Case No. CIV-19-1116-SLP |

**JUDGMENT**

(Filed Oct. 27, 2021)

Pursuant to the Orders [Doc. Nos. 163 and 164] entered this same date, the following declaratory judgment is entered: Plaintiff Deer Creek Water Corporation has not made water service available to the development proposed by Intervenors Tom and Gina

Boling under 7 U.S.C. § 1926(b). Plaintiff is not entitled to protection under § 1926(b) regarding the development. The Bolings are not required to obtain water service from Plaintiff regarding the development and are free to obtain water from any other provider, including Defendants City of Oklahoma City and Oklahoma City Water Utilities Trust, without violating § 1926(b). Thus, judgment is entered in favor of Defendants City of Oklahoma 80a

City and Oklahoma City Water Utilities Trust and Intervenors Tom and Gina Boling against Plaintiff Deer Creek Water Corporation.

ENTERED this 27th day of October, 2021.

/s/ Scott L. Palk
**SCOTT L. PALK**
**UNITED STATES**
**DISTRICT JUDGE**

**APPENDIX F**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| | |
|---|---|
| DEER CREEK WATER CORPORATION,<br>Plaintiff Counter Defendant - Appellant/Cross-Appellee,<br>v.<br>CITY OF OKLAHOMA CITY, et al.,<br>Defendants Counterclaimants - Appellees/Cross-Appellants,<br>and<br>THOMAS WAYNE BOLING; GINA BETH BOLING,<br>Intervenor Plaintiffs - Appellees/Cross-Appellees. | Nos. 21-6155 & 21-6164 (D.C. No. 5:19-CV-01116-SLP) (W.D. Okla.) |

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**ORDER**

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(Filed Nov. 1, 2023)

Before **BACHARACH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

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Appellees'/Cross-Appellants' and Appellees'/Cross-Appellees' petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

## APPENDIX G

[SEAL] **OKLAHOMA**
**State Courts Network**

**Title 82. Waters and Water Rights**

**Oklahoma Statutes Citationized**

**Title 82. Waters and Water Rights**

**Chapter 18 – Rural Water, Sewer, Gas and Solid Waste Management Districts Act**

**Section 1324.2 – Definitions**

Cite as: O.S. §, ___ ___

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As used in this act unless the context clearly requires otherwise:

1. "District" means a public nonprofit water district, a nonprofit sewer district, a public nonprofit natural gas distribution district or a nonprofit solid waste management district or a district for the operation of all or a combination of waterworks, sewage facilities, natural gas distribution facilities and solid waste management systems, created pursuant to this act;

2. "Board" means the governing body of a district;

3. The terms "board of county commissioners" and "county clerk" shall mean, respectively, the board of county commissioners and county clerk of the county in which the greatest portion of the territory of any proposed rural water district, rural sewer district,

rural natural gas distribution district or rural solid waste management district is located;

4. "Corporation" means a not-for-profit corporation organized:

a. pursuant to the provisions of the Oklahoma General Corporation Act for a purpose not involving pecuniary gain to its shareholders or members, paying no dividends or other pecuniary remuneration, directly or indirectly to its shareholders or members as such and having no capital stock, and

b. for the purpose of developing and providing rural water supplies to serve rural residents.

5. "Rural resident" means any natural person, firm, partnership, association, corporation, business trust, federal agency, state agency, state or political subdivision thereof, municipality of ten thousand (10,000) persons or less, or any other legal entity, owning or having an interest in lands within the rural area located within the boundaries of the district;

6. "Rural area" means any area lying outside the corporate limits of any municipal corporation and includes any areas of open country, unincorporated communities, and, with the consent of the governing body thereof by ordinance duly adopted, may include the area within the corporate limits of any municipality having a population of less than ten thousand (10,000) persons according to the last decennial census, when said municipality is one of the petitioners for creation of a district or for the annexation of additional

territory as provided by Section 1324.13 of this title; provided, further, that when a water, sewer, natural gas or solid waste management district is totally within the municipal city limits of a city with ten thousand (10,000) population or less, the board of directors of the sewer, natural gas, water or solid waste management district shall be the governing body of the town. Provided, further, that when a city or town with a population of ten thousand (10,000) or less receives the majority of its water from a rural water, natural gas, sewer or solid waste management district, any resident of said city or town shall be eligible to serve on the board of directors. Provided, further, that areas lying within the corporate limits of any municipality having a population of more than ten thousand (10,000) persons according to the last decennial census may be included in a water, sewer, natural gas or solid waste management district with the consent of the governing body by ordinance duly adopted when such water, sewer, natural gas or solid waste services are not and cannot be provided in a reasonable time by other sources;

7. "Benefit unit" means a legal right to one service connection to the district's facilities and to participate in the affairs of the district;

8. "Participating member" means any rural resident who has subscribed to one or more benefit units;

9. "Sewage facilities" means the necessary facilities of collection, transportation, storage, treatment or processing and disposal or release of sewage;

10. "Solid waste management system" means the entire process of collection, transportation, storage, processing and disposal of solid wastes;

11. "Water works" means the necessary facilities from the initial source to the place for consumer utilization, and includes supply, storage, treatment, transportation and distribution;

12. "Solid waste" means all putrescible and nonputrescible refuse in solid or semisolid form including, but not limited to, garbage, rubbish, ashes or incinerator residue, street refuse, dead animals, demolition wastes, construction wastes, solid or semisolid commercial and industrial wastes and hazardous wastes including explosives, pathological wastes, chemical wastes, herbicide and pesticide wastes; and

13. "Gas distribution facilities" means the necessary facilities from the initial source to the place for consumer utilization and includes supply, transportation and distribution.

***Historical Data***

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Laws 1972, HB 1599, c. 254, § 2; Amended by Laws 1975, SB 145, c. 170, § 2, emerg. eff. May 21, 1975; Amended by Laws 1981, HB 1273, c. 117, § 1, emerg. eff. April 28, 1981; Amended by Laws 1994, HB 2178, c. 175, § 1, eff. September 1, 1994.

***Citationizer© Summary of Documents Citing This Document***

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| ***Cite Name*** | ***Level*** |
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***Oklahoma Attorney General's Opinions***

| *Cite* | *Name* | *Level* |
|---|---|---|
| *1986 OK AG 112* | *Question Submitted by: The Honorable Gerald Wright, Oklahoma State Senate, The Honorable Robert T. Harris, Oklahoma House of Representatives* | *Cited* |

***Oklahoma Supreme Court Cases***

| *Cite* | *Name* | *Level* |
|---|---|---|
| *1997 OK 101, 943 P.2d 625, 68 OBJ 2542,* | *NICKELL v. SUMNER* | *Cited* |

***Citationizer: Table of Authority***

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| ***Cite*** | ***Name*** | ***Level*** |
|---|---|---|

*None Found.*

## APPENDIX H

[SEAL] **OKLAHOMA**
**State Courts Network**

**Title 82. Waters and Water Rights**

**Oklahoma Statutes Citationized**

**Title 82. Waters and Water Rights**

**Chapter 18 – Rural Water, Sewer, Gas and Solid Waste Management Districts Act**

**Section 1324.30 – Definitions**

Cite as: O.S. §, ___ ___

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As used in Sections 1 through 6 of this act:

1. "Corporation" means a not-for-profit corporation organized:

a. pursuant to the provisions of the Oklahoma General Corporation Act for a purpose not involving pecuniary gain to its shareholders or members, paying no dividends or other pecuniary remuneration, directly or indirectly, to its shareholders or members as such and having no capital stock, and

b. for the purpose of developing and providing rural water supplies to serve rural residents; and

2. "District" means a public nonprofit water district created pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act.

***Historical Data***

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Laws 1989, HB 1635, c. 103, § 1, emerg. eff. April 25, 1989; Renumbered from 18 O.S. § 863.1 by Laws 1989, HB 1637, c. 369, § 153, emerg. eff. July 1, 1989.

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*None Found.*