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# FIRE!: WHEN AN OLD RULE CREATES A HOT MESS

Caroline Guerra Wolf\*

## I. INTRODUCTION

Unless you personally have been involved in rural water litigation, there is little reason to know of § 1926(b)—a one-sentence provision buried in Title 7 of the United States Code. Despite its relative obscurity, this fine-print provision has serious consequences for small municipalities and rural areas throughout the country.<sup>1</sup> This article will examine those consequences and make specific recommendations as to how courts can lessen the negative impact of § 1926(b) without forfeiting its original purpose.<sup>2</sup>

Section 1926(b) involves entities called rural water districts, which are generally public, not-for-profit associations that provide water service to rural areas.<sup>3</sup> Each

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1. Twelve states' courts have heard lawsuits involving § 1926(b): Alabama (*see, e.g.*, *City of Wetumpka v. Central Elmore Water Auth.*, 703 So. 2d 907 (Ala. 1997)); Arkansas (*see, e.g.*, *Town of Lead Hill v. Ozark Mountain Reg'l Pub. Water Auth.*, 472 S.W.3d 118 (Ark. 2015)); Colorado (*see, e.g.*, *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995)); Indiana (*see, e.g.*, *Watson Rural Water Co. v. Ind. Cities Water Corp.*, 540 N.E.2d 131 (Ind. Ct. App. 1989)); Kentucky (*see, e.g.*, *Carroll Cty. Water Dist. No. 1 v. Gallatin Cty. Judge/Exec. Gallatin Cty. Water Dist.*, No. 2009-CA-000864-MR, 2010 WL 1628711 (Ky. Ct. App. Apr. 23, 2010)); Mississippi (*see, e.g.*, *Town of Madison v. Bear Creek Water Ass'n, Inc.*, 510 So.2d 800 (Miss. 1987)); Missouri (*see, e.g.*, *In re Detachment of Territory from Pub. Water Supply Dist. No. 8 of Clay Cty.*, 210 S.W.3d 246 (Mo. Ct. App. 2006)); New Mexico (*see, e.g.*, *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 139 P.3d 166 (N.M. 2006)); North Carolina (*see, e.g.*, *Fix v. City of Eden*, 622 S.E.2d 647 (N.C. Ct. App. 2005)); Oklahoma (*see, e.g.*, *Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1, Logan Cty. v. City of Guthrie*, 253 P.3d 38 (Okla. 2010)); Tennessee (*see, e.g.*, *Dyersburg Suburban Consol. Util. Dist. v. City of Dyersburg*, No. W2006-01704-COA-R3-CV, 2007 WL 1859460 (Tenn. Ct. App. June 29, 2007)); Texas (*see, e.g.*, *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Env'tl. Quality*, 307 S.W.3d 505 (Tex. App. 2010)).

Additionally, seven different circuits have handled § 1926(b) cases: the Fourth Circuit (*see, e.g.*, *Chesapeake Ranch Water Co. v. Bd. of Comm'rs of Calvert Cty.*, 401 F.3d 274 (4th Cir. 2005)); the Fifth Circuit (*see, e.g.*, *Bluefield Water Ass'n, Inc. v. City of Starkville*, 577 F.3d 250 (5th Cir. 2009)); the Sixth Circuit (*see, e.g.*, *Trumbull Cty. Bd. of Comm'rs v. Village of Lordstown*, 811 F.3d 226 (6th Cir. 2016)); the Seventh Circuit (*see, e.g.*, *CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir. 1993)); the Eighth Circuit (*see, e.g.*, *Pub. Water Supply Dist. No. 3 of Laclede Cty. v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010)); the Tenth Circuit (*see, e.g.*, *Rural Water Dist. No. 4, Douglas Cty. v. City of Eudora*, 720 F.3d 1269 (10th Cir. 2013)); the Eleventh Circuit (*see, e.g.*, *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009)).

2. *Cf.* Scott Hounsel, *Water Associations and Federal Protection Under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status*, 80 TEX. L. REV. 155, 157 (2001) (arguing in favor of repealing 7 U.S.C. § 1926(b) due to its impact on economic development).

3. *See, e.g.*, OKLA. STAT. ANN. tit. 82, § 1324.3 (West 2016) ("Public nonprofit rural water districts . . . may be organized under this act for the purpose of developing and providing an adequate rural water supply . . . to serve and

state's law sets out its own procedure for creating these districts—typically involving local governmental bodies, such as county boards of commissioners or state courts.<sup>4</sup> For example, rural landowners in Oklahoma wanting to create a new rural water district must file a petition with their county clerk, addressed to the local board of county commissioners.<sup>5</sup> This petition must describe the proposed area covered by the district, state the residents' need for an adequate water supply and related infrastructure, verify that water is available for such purposes, and attest that “such improvements or works will be conducive to and will promote the public health, convenience and welfare.”<sup>6</sup>

Most counties have multiple water districts within them, and some rural water districts cover land in more than one county.<sup>7</sup> Montgomery County in Kansas, for instance, has about a dozen numbered water districts, but districts from neighboring counties also extend over the county line in several places.<sup>8</sup>

It is difficult to find specific data on how many rural water districts exist in a particular state, much less the country as a whole. The state of Oklahoma has over 750 rural water systems in total—a number that includes both rural water districts and small municipal water systems.<sup>9</sup> On a nationwide level, the National Rural Water Association boasts of 31,000 utility system members from across the country.<sup>10</sup>

Though rural water districts are creatures of the state, they may obtain financial support through federal loans from the US Secretary of Agriculture. Title 7, § 1926 of the US Code authorizes loans for “the conservation, development, use, and control of water . . . primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents.”<sup>11</sup> The statute outlines eligibility and application requirements, priorities in selecting aid recipients, maximum amounts for grants and loans, and other pertinent details.<sup>12</sup> Subparts (a)(9) and (10), for example, set out expectations regarding water systems' conformity with drinking water and pollution control standards.<sup>13</sup>

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meet the needs of rural residents within the territory of the district.”); MO. ANN. STAT. §§ 247.010-247.020 (West 2016) (identifying public water supply districts as “political corporations of the state of Missouri” meant to provide “conveniences in the use of water . . . to many inhabitants of our state now denied such privileges . . .”).

4. *See, e.g.*, OKLA. STAT. ANN. tit. 82, § 1324.3 (authorizing each county's board of county commissioners to incorporate rural water districts); KAN. STAT. ANN. § 82a-613 (West 2016) (authorizing boards of county commissioners to incorporate rural water districts); MO. ANN. STAT. § 247.040 (authorizing county circuit courts to incorporate public water supply districts).

5. OKLA. STAT. ANN. tit. 82, § 1324.4.

6. *Id.*

7. *See, e.g.*, MO. ANN. STAT. § 247.040(1) (accounting for situations in which districts cover more than one county); KANSAS RURAL WATER ASS'N, *Boundaries for Rural Water Systems Mapovers*, <http://krwa.net/ONLINE-RESOURCES/RWD-Maps> (last visited Dec. 22, 2016).

8. KANSAS RURAL WATER ASS'N, *RWD Map: Montgomery*, <http://krwa.net/ONLINE-RESOURCES/RWD-Maps/Montgomery> (last visited Dec. 22, 2016).

9. OKLA. WATER RES. BD., *Rural Water Systems*, <https://www.owrb.ok.gov/maps/maps2/ruralwater.php> (last visited Dec. 22, 2016).

10. NAT'L RURAL WATER ASS'N, *Our Association*, <http://nrwa.org/about-us/about-our-association/> (last visited Dec. 22, 2016).

11. 7 U.S.C.A. § 1926(a)(1) (West 2016).

12. § 1926(a).

13. § 1926(a)(9)-(10).

Subpart (b) of 7 U.S.C. § 1926, commonly known as the “anti-curtailement” provision, pertains specifically to water districts that have received federal loans, as opposed to grants or other types of assistance. Section 1926(b) provides a level of protection to districts that take advantage of these loans: “The service provided or made available through any such [indebted] 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 . . . .”<sup>14</sup> Essentially, this provision prohibits other water providers—usually nearby municipalities—from serving customers within the territory of a federally indebted water association.

As suggested by the provision itself, albeit in rather arcane language, rural water districts can find themselves competing with other entities for customers.<sup>15</sup> Problems are especially likely to arise when growing cities and towns annex land within rural water district boundaries.<sup>16</sup> These annexations are common and can be quite dramatic; for example, Tulsa, Oklahoma, tripled in size overnight by annexing over 100 square miles in 1966.<sup>17</sup>

When a neighboring city or town annexes land that falls within a rural water district, the issue then becomes, who has the right to serve customers living in this area of overlap? What are the practical consequences of enforcing that right if the “wrong” party has already constructed the infrastructure and begun to serve those customers, as is often the case?<sup>18</sup> Unfortunately, the application of § 1926(b), particularly in the Tenth Circuit, frequently leads to unsatisfactory results; in the words of one Oklahoma professor, the provision has created an “ongoing zero-sum game resulting in court battles and millions of dollars in legal fees.”<sup>19</sup>

In Part II of this article, an in-depth look at Logan County, Oklahoma, will illustrate the economic costs and other concerns inherent in the present-day enforcement of § 1926(b). Part III will explore the historical context and legislative history of the provision in order to better understand what purpose Congress meant § 1926(b) to serve. Part IV will analyze the courts’ interpretation of § 1926(b) in different jurisdictions, and Part V will focus in on the troubling issue of fire protection

14. § 1926(b) (emphasis added).

15. *See, e.g.*, Rural Water Dist. No. 4, Douglas Cty. v. City of Eudora, Kan. (“Eudora I”), 659 F.3d 969 (10th Cir. 2011); Rural Water Sewer and Solid Waste Mgmt., Dist. No. 1, Logan Cty. v. City of Guthrie (“Logan-1”), 654 F.3d 1058 (10th Cir. 2011); Sequoyah Cty. Rural Water Dist. No. 7 v. Town of Muldrow (“Sequoyah-7”), 191 F.3d 1192 (10th Cir. 1999); Glenpool Util. Serv. Auth. v. Creek Cty. Rural Water Dist. No. 2 (“Glenpool II”), No. 91-5047, 1992 WL 37327 (10th Cir. Feb. 25, 1992).

16. *See, e.g.*, *Glenpool II*, No. 91-5047, 1992 WL 37327 at \*1 (involving the City of Glenpool’s annexation of land within the boundaries of Creek County Water District No. 2); Rural Water Dist. No. 5 Wagoner Cty. v. City of Coweta (“Wagoner-5”), 949 F. Supp. 2d 1091, 1095-96 (N.D. Okla. 2013) (involving the City of Coweta’s annexation of land, including three residential subdivisions, within the territory of Wagoner County Rural Water District No. 5).

17. JACK BLAIR, A HISTORY OF TULSA ANNEXATION 12, 20 (Tulsa City Council 2004), <http://www.tulsacouncil.org/media/79331/Annexation%20History.pdf>.

18. *See, e.g.*, *Glenpool II*, No. 91-5047, 1992 WL 37327 at \*4; *Sequoyah-7*, 191 F.3d at 1204; Rural Water, Sewer, and Solid Waste Mgmt. No. 1, Logan Cty. v. City of Guthrie (“Logan-1”), No. CIV-05-786-M, 2016 WL 126877 at \*4 (W.D. Okla. Jan. 11, 2016); Van Mitchell, *Guthrie imposes water line moratorium after trial loss*, EDMONDSUN.COM (Nov. 24, 2014, 3:37 PM), [http://www.edmondsun.com/news/local\\_news/guthrie-imposes-water-line-moratorium-after-trial-loss/article\\_1a883060-7422-11e4-871c-47720b970438.html](http://www.edmondsun.com/news/local_news/guthrie-imposes-water-line-moratorium-after-trial-loss/article_1a883060-7422-11e4-871c-47720b970438.html).

19. *See, e.g.*, John Wood, “Domestic Terrorists” vs. “Blackmailers”: Unresolved Conflict Between Municipalities and Rural Water Districts, OKLA. POL., Nov. 2012, at 73, available at [hd31.org/634](http://hd31.org/634).

under this provision. The last section of this article will consider the incredible water infrastructure deficiencies throughout the United States—a reality that requires us to be particularly mindful of inefficiencies and wasted resources.

## II. LOGAN-1 V. GUTHRIE: A CASE STUDY

One case that illustrates how poorly this type of litigation can play out involves the town of Guthrie, Oklahoma. For more than a decade, Guthrie and the Guthrie Public Works Authority have defended a lawsuit against Rural Water, Sewer and Solid Waste Management District No. 1 in Logan County (“Logan-1”).<sup>20</sup> Logan-1 claims that Guthrie violated the § 1926(b) anti-curtalement provision by providing water service to two developments and numerous other customers in the area (the “Disputed Customers”).<sup>21</sup>

After years of court filings, a jury trial took place in 2014 in the US District Court for the Western District of Oklahoma.<sup>22</sup> At the end of the eight-day trial, the jury filled out an extensive, 165-page verdict form that asked whether Logan-1 had “made potable water service available” to each of the Disputed Customers and whether the Guthrie defendants “limit[ed] or curtail[ed] plaintiff Logan-1’s water service” to the same.<sup>23</sup> If the jury answered “yes” to these questions—and the cost for the customer to obtain water from Logan-1 was not deemed “unreasonable, excessive, and confiscatory”—the jury was directed to write in a dollar amount for damages owed to Logan-1 in relation to that customer.<sup>24</sup> In the end, the court entered a \$1.27 million verdict against Guthrie.<sup>25</sup>

Guthrie is a quaint place, with a population of only around 10,000 people.<sup>26</sup> Almost 22 percent of these residents live below the poverty line.<sup>27</sup> The City of Guthrie speculates in its most recent budget report that it will soon have to eliminate services unless the city’s population or revenue grows—due in part to litigation costs.<sup>28</sup>

Not only has this protracted litigation affected Guthrie’s finances and, ultimately, the town’s taxpayers, it has also had a significant financial impact on the rural

20. The rural water district, Logan-1, filed its initial complaint in 2005, and the most recent order in the case was entered in June 2016. Rural Water, Sewer & Solid Waste Mgmt. Dist. No. 1, Logan Cty. v. City of Guthrie (“Logan-1”), No. CIV-05-786-R, 2007 U.S. Dist. LEXIS 102718, at \*2 (W.D. Okla. 2007); Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1, Logan Cty. v. City of Guthrie (“Logan-1”), No. CIV-05-786-M, 2016 WL 3461526 (June 21, 2016).

21. *Logan-1*, No. CIV-05-786-M, 2016 WL 126877, at \*1.

22. Matt Dinger, *Guthrie City Council freezes some building permits after \$1.27 million jury verdict*, NEWSOK (Nov. 24, 2014), <http://newsok.com/article/5369669>.

23. *Id.*; Supplemental Verdict Form at 1-5, Rural Water, Sewer, and Solid Waste Mgmt. Dist. No. 1, Logan Cty. v. City of Guthrie, No. CIV-05-786-M, 2014 WL 8028461 (W.D. Okla. Nov. 14, 2014).

24. Supplemental Verdict Form, *supra* note 23, at 1-5.

25. *Logan-1*, No. CIV-05-786-M, 2016 WL 126877, at \*1.

26. American FactFinder: Community Facts, UNITED STATES CENSUS BUREAU, [http://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (search “guthrie city, oklahoma”).

27. American FactFinder: Community Facts, UNITED STATES CENSUS BUREAU, [http://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (search “guthrie city, oklahoma”; then click on “Poverty” tab on the left side of the page).

28. CITY OF GUTHRIE OKLAHOMA, FISCAL YEAR 2014-2015 BUDGET AND FINANCIAL PLAN at 25, *available at* <http://www.cityofguthrie.com/DocumentCenter/View/2562>. Many small municipalities have liability insurance policies, but these policies will not necessarily cover 1926(b) damages.

water district itself; according to public audit reports, Logan-1 spent \$483,842 on legal and professional fees in 2015 alone.<sup>29</sup> This represents a dedication of more than a third of the water district's total operating revenue to legal and professional fees—more than any other operating expense, including salaries and maintenance costs.<sup>30</sup> In fact, Logan-1 has spent six figures on this budget item since 2012, if not before.<sup>31</sup>

In comparison, rural water districts not involved in § 1926(b) litigation appear to spend far less on this budget item: for example, Comanche County Rural Water District No. 3 spent only \$9,340 (less than 2 percent of its operating revenue) on legal and professional fees in 2015, Caddo County Rural Water District No. 3 spent \$22,375 (less than 2 percent), and Beckham County Rural Water District No. 1 spent \$8,721 (less than 1 percent).<sup>32</sup>

Logan-1's substantial use of resources to pay attorneys' fees is especially noteworthy in light of the fact Logan-1 has had significant water quality issues during this protracted litigation. In 2012, Logan-1 reported a uranium level of 302 micrograms per liter ( $\mu\text{g}/\text{L}$ ), compared to the Environmental Protection Agency's Maximum Contaminant Level (MCL) of 30  $\mu\text{g}/\text{L}$ .<sup>33</sup> Logan-1 reported violations of the MCL for uranium in 2010 and 2011, as well.<sup>34</sup> The MCL exists because exposure to uranium can cause kidney damage and may increase a person's lifetime risk of getting cancer.<sup>35</sup> One local television report showed a local resident refusing to let even her pet dog drink water from the tap.<sup>36</sup>

Another problem has been the level of beta and photon emitters in Logan-1's water.<sup>37</sup> Beta and photon emitters are radioactive contaminants that typically come from nuclear power plants and facilities using or disposing of radioactive material.<sup>38</sup>

29. LOGAN COUNTY RURAL WATER DISTRICT #1 AUDIT REPORT FOR YEAR ENDING JULY 31, 2015 at 4 (2015), [https://www.sai.ok.gov/olps/uploads/log1audit15\\_u0gr.pdf](https://www.sai.ok.gov/olps/uploads/log1audit15_u0gr.pdf).

30. *Id.*

31. *Id.*; LOGAN COUNTY RURAL WATER DISTRICT #1 AUDIT REPORT FOR YEAR ENDING JULY 31, 2013 at 3 (2013), [https://www.sai.ok.gov/olps/uploads/logan\\_1\\_audit\\_rep\\_13\\_t504.pdf](https://www.sai.ok.gov/olps/uploads/logan_1_audit_rep_13_t504.pdf). Logan-1 reports having spent \$236,153 in 2014, \$314,283 in 2013, and \$113,130 in 2012 on legal and professional fees.

32. BECKHAM COUNTY RURAL WATER DISTRICT #1 AUDIT REPORT FOR YEAR ENDING JUNE 30, 2015 at 4, [https://www.sai.ok.gov/olps/uploads/beck1audit2015\\_jyd7.pdf](https://www.sai.ok.gov/olps/uploads/beck1audit2015_jyd7.pdf); CADDO COUNTY RURAL WATER DISTRICT #3 AUDIT REPORT FOR YEAR ENDING JUNE 30, 2015 at 4, [https://www.sai.ok.gov/olps/uploads/caddo3audit15\\_ejs8.pdf](https://www.sai.ok.gov/olps/uploads/caddo3audit15_ejs8.pdf); COMANCHE COUNTY RURAL WATER DISTRICT #3 AUDIT REPORT FOR YEAR ENDING APRIL 30, 2015 at 4 (2015), [https://www.sai.ok.gov/olps/uploads/com3audit2015\\_3bhg.pdf](https://www.sai.ok.gov/olps/uploads/com3audit2015_3bhg.pdf).

33. *Logan County RWD #1 Consumer Confidence Report 2012*, LOGAN CTY. RURAL WATER DIST. #1, [http://loganrwd1.org/documents/682/CCRiWriter\\_Report\\_39025.pdf](http://loganrwd1.org/documents/682/CCRiWriter_Report_39025.pdf) (last visited Dec. 23, 2016); *Radionuclides Rule*, UNITED STATES ENVTL. PROT. AGENCY, <http://www.epa.gov/dwreginfo/radionuclides-rule> (last visited Dec. 23, 2016). See also Chris Evans, *DEQ issues water warning for rural water supply*, GUTHRIE NEWS PAGE (Oct. 14, 2012), <https://guthrienevnews.wordpress.com/2012/10/14/deq-issues-water-warning-for-rural-water-supply/>.

34. *Consumer Confidence Report 2010*, LOGAN CTY. RURAL WATER DIST. #1, [http://loganrwd1.org/documents/682/CCRiWriter\\_Report\\_30920.pdf](http://loganrwd1.org/documents/682/CCRiWriter_Report_30920.pdf) (last visited Jan. 5, 2017); *Logan County RWD #1 2011 Consumer Confidence Report*, LOGAN CTY. RURAL WATER DIST. #1, [http://loganrwd1.org/documents/682/CCRiWriter\\_Report\\_2012.pdf](http://loganrwd1.org/documents/682/CCRiWriter_Report_2012.pdf) (last visited Jan. 5, 2017);

35. *Uranium and Your Health*, CENTERS FOR DISEASE CONTROL & PREVENTION (Oct. 26, 2016), <https://eph-tracking.cdc.gov/showUraniumHealth>.

36. *Uranium-Tainted Water Worries Logan County Residents*, NEWS9 (Oct. 12, 2012, 10:42 PM), <http://www.news9.com/story/19810144/uranium-tainted-water-worries-logan-county-residents>.

37. *Consumer Confidence Report 2012*, *supra* note 33.

38. BRUCE J. LESIKAR ET AL., TEXAS A&M AGRILIFE EXTENSION, DRINKING WATER PROBLEMS: RADIONUCLIDES 4, <http://twon.tamu.edu/media/385814/drinking%20water%20problems-radionuclides.pdf> (last visited Dec. 23, 2016).

These contaminants may cause cancer.<sup>39</sup> Due to this health risk, the Environmental Protection Agency has set the MCL for beta and photon emitters at 4 millirems per year (mrem/yr).<sup>40</sup> In clear violation of this MCL, the reported level of beta and photon emitters in Logan-1's water was 69.5 mrem/yr in 2012, 24.9 mrem/yr in 2011, and 87.78 mrem/yr in 2010.<sup>41</sup>

Not surprisingly, it is costly to treat water contaminated with radionuclides such as beta and photon emitters and uranium.<sup>42</sup> Buying treatment units, such as a reverse osmosis device or a distillation unit, can cost a household anywhere from \$300 to \$1,200.<sup>43</sup>

Of course, in bringing its § 1926(b) action, Logan-1 is fighting for customers—which represent its only source of revenue.<sup>44</sup> As of late 2016, Logan-1 has successfully safeguarded its right to provide water service to two housing developments and around 190 individual customers.<sup>45</sup> While it is difficult to know exactly how much that income stream is worth, based on a per-household usage rate of 12,000 gallons of water per month, the 190 homes alone would bring in approximately \$125,000 a year in water sales revenue.<sup>46</sup>

That is a considerable amount of money, but the fact still remains that Logan-1 tied up a sizable amount of its revenue in legal fees for years—when the district could have invested that money in infrastructure or water quality improvements. In fact, in 2012—the same year Logan-1 spent over \$110,000 on legal and professional fees—the water district increased summer rates for their customers, in part to pay for a new water line, well, water tower, and meter system.<sup>47</sup> According to a local homeowner's association president, one family decided to move out of the area after “[f]our straight months of \$600-plus [water] bills.”<sup>48</sup>

Then, the elephant in the room: adding the new customers “won” by Logan-1 in its § 1926(b) case means constructing new water lines to homes and apartment complexes that already have water lines connecting them to the City of Guthrie's

39. *Id.*

40. *Drinking Water Maximum Contaminant Level Limits for Beta Particles and Photo Emitters*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/dwreginfo/drinking-water-maximum-contaminant-level-limits-beta-particles-and-photon-emitters> (last visited Dec. 23, 2016).

41. *Consumer Confidence Report 2012*, *supra* note 33.

42. LESIKAR ET AL., *supra* note 38, at 5-9.

43. *Id.* at 5, 7.

44. Chris Evans, *Dozens speak out on increased water bills*, GUTHRIE NEWS PAGE (Sept. 13, 2012), <https://guthrie-newspage.wordpress.com/2012/09/13/dozens-speak-out-on-increased-water-bills/>.

45. *Logan-1*, No. CIV-05-786-M, 2016 WL 126877, at \*1-2 (granting an injunction “preventing Guthrie from any continued or new violations of Logan-1's rights under § 1926(b) as to the Disputed Customers”); *Logan-1*, No. CIV-05-786-M, 2016 WL 3461526, at \*8 (denying Guthrie's motion for judgment as a matter of law and motion for new trial).

46. The average water usage per month for a family of four is about 12,000 gallons. *Household Water Usage*, CITY OF TULSA, <https://www.cityoftulsa.org/city-services/utilities/your-household-water-usage.aspx> (last visited Jan. 5, 2017). According to Logan-1's current rates, a household would pay approximately \$54.90 dollars for 12,000 gallons in a month (\$658.80/year). *Rates & Policies*, LOGAN CTY. RURAL WATER DIST. #1 (last visited Jan. 5, 2017), <http://loganrwd1.org/rates-and-policies>.

47. AUDIT REPORT FOR YEAR ENDING JULY 31, 2013, *supra* note 31, at 3; Phillip O'Connor, *Soaring water bills anger residents of Oklahoma's Logan County*, NEWSOK (Sept. 11, 2012), <http://newsok.com/article/3708670>.

48. O'Connor, *supra* note 47.

water service.<sup>49</sup> To make matters more complicated, the customers set to transition to Logan-1 water are geographically interspersed among customers who will remain on city water.<sup>50</sup>

Logan-1 hired a licensed engineer to estimate the extent and cost of construction to make these new connections.<sup>51</sup> This expert reported that the district would have to install 15,870 linear feet of eight-inch pipe, 72,300 linear feet of six-inch pipe, 27,481 linear feet of four-inch pipe, and 21,927 linear feet of two-inch pipe in order to serve water to the Disputed Customers in the lawsuit.<sup>52</sup> According to this expert, the cost to make the necessary improvements and extensions would total over \$2 million.<sup>53</sup>

Unfortunately for the residents involved, Logan-1 and other rural water districts have a practice of requiring customers to pay for the aforementioned construction and improvement costs to connect to the district's water service.<sup>54</sup> In other words, these residents will likely have to pay up to \$10,000 each to connect to Logan-1's water, despite already having pipes connected to Guthrie's water service.<sup>55</sup>

Transitioning to Logan-1's water also implicates the quality concerns discussed above, as well as another problem: these customers may have to go without adequate fire protection.<sup>56</sup> Logan-1 does not have traditional fire hydrants; instead, Logan-1 provides what it calls "fill hydrants."<sup>57</sup> This distinction has to do with the water pressure and volume that the hydrants provide.<sup>58</sup> The website for another Oklahoma rural water district notes that its own hydrants are "[s]ometimes . . . called Fire Hydrants but Rural Water cannot use that term as it implies criteria that Rural Water Districts do not meet."<sup>59</sup>

Pumper trucks can still refill their water tanks using these fill hydrants and transport that water to the scene of a fire.<sup>60</sup> In fact, in some parts of the country, pumper trucks must draft water from ponds, lakes, or even swimming pools.<sup>61</sup> If a rural area is fortunate enough to have more than one pumper truck—or a neighboring area is able to lend a hand—these pumper trucks will take turns driving to the

49. Dinger, *supra* note 22.

50. Interview with James C. Milton & Bryan Nowlin, Shareholders, Hall Estill, Counsel for City of Guthrie, in Tulsa, Okla. (Mar. 1, 2016).

51. Declaration and Expert Report of David Wyatt, Rural Water, Sewer and Solid Waste Mgmt. Dist. No. 1, Logan Cty. v. City of Guthrie, No. 05-cv-786 (May 24, 2006), 2006 WL 3938374 at 1.

52. *Id.* at 3-22 (These amounts may include customers that were eventually dropped from the case).

53. *Id.* (This amount reflects the estimated cost as of 2006 and may include customers that were dropped from the case).

54. *Id.* at 23.

55. *Id.*

56. Opening Brief of Plaintiff/Appellee Rural Water, Sewer and Solid Waste Mgmt. Dist. No. 1, Logan Cty. No. 08-6003 (10th Cir. July 15, 2008), 2008 WL 2857815 at \*10-11 ("Logan-1 does not provide 'fire protection.'").

57. *Id.*

58. *Id.*

59. RURAL WATER DISTRICT 3: PAYNE COUNTY, <http://www.rwd3.com/fillHydrants.asp> (last visited Jan. 5, 2017).

60. Telephone Interview with Steve Pitts, Rural Fire Defense Coordinator, INCOG (Mar. 1, 2016).

61. *Id.*; Kevin Bonsor, *How Fire Engines Work*, HOW STUFF WORKS: SCIENCE (Sept. 18, 2001), <http://science.howstuffworks.com/transport/engines-equipment/fire-engine1.htm>.



water source and relaying water back to the fire truck at the scene.<sup>62</sup> For example, after a March 2015 fire destroyed a vacant home in the Logan-1 service area, a local fire captain explained, “There were no fire hydrants. We had to shuttle water.”<sup>63</sup>

A critical issue is often how far away these hydrants are located; in some rural areas, the water source is miles away from the fire.<sup>64</sup> In November 2015, a detached garage—also in Logan-1’s service area—caught on fire.<sup>65</sup> According to the local paper, “[c]rews were at a disadvantage with no fire hydrants in the area. Firefighters were alternating water from their tankers and engines and were filling the tankers from a hydrant near the Guthrie-Edmond Regional Airport.”<sup>66</sup> This airport is located more than three miles away from where the fire occurred.<sup>67</sup>

A month after the garage fire, a Logan County man died in a fire that completely engulfed his home.<sup>68</sup> A local fire chief noted, “The biggest thing we run into here is the lack of fire hydrants.”<sup>69</sup>

Beyond the obvious safety concerns, the lack of fire hydrants can also cause higher insurance rates.<sup>70</sup> The Insurance Services Office (ISO) assigns a Public Protection Classification (PPC) number to a community in relation to the quality of fire protection available for that community’s residents.<sup>71</sup> Factors such as the existence of fire hydrants play into a community’s ISO rating and, subsequently, the local residents’ insurance rates.<sup>72</sup>

Yet another consequence of the extended litigation between Logan-1 and the City of Guthrie has been a slowdown of growth in the disputed areas. After the million-dollar verdict, the Guthrie City Council issued a resolution putting a hold on new building permits for the area where Guthrie’s city limits overlap with the Logan-1 rural water district’s territory.<sup>73</sup> One of the attorneys representing Guthrie in the lawsuit against Logan-1 told the press that the Council took this action because “the city couldn’t afford any more litigation.”<sup>74</sup> This precautionary measure tends to support one author’s proposition that § 1926(b) “has retarded land development on the urban

62. Telephone Interview with Myron Watson, Retired Volunteer Firefighter & Engineer, Runyan Acres Volunteer Fire Dep’t (Feb. 6, 2016).

63. Diana Baldwin, *Logan County fire destroys vacant house*, NEWSOK (Mar. 5, 2015), <http://newsok.com/article/5398682>.

64. *Id.*

65. *High winds likely the cause for structure fire*, GUTHRIE NEWS PAGE (Nov. 16, 2015), <http://guthriewebsite.com/2015/11/high-winds-likely-the-cause-for-structure-fire/>.

66. *Id.*

67. Driving Directions from Lakewood & Sooner intersection, Guthrie, to Guthrie-Edmond Regional Airport, GOOGLE MAPS, <http://maps.google.com>.

68. Patty Santos, *Neighbors describe how they tried to help man during fatal Logan County fire*, KOCO 5 (Dec. 22, 2015, 6:15 PM), <http://www.koco.com/news/neighbors-describe-how-they-tried-to-help-man-during-fatal-logan-county-fire/37089004>.

69. *Id.*

70. ISO, OK.GOV, [https://www.ok.gov/oid/ISO\\_Ratings.html](https://www.ok.gov/oid/ISO_Ratings.html) (last visited Jan. 5, 2017).

71. *Id.*

72. *Id.*; *Fire Suppression Rating Schedule Overview*, ISO MITIGATION, <https://www.isomitigation.com/fsrs/fire-suppression-rating-schedule-fsrs-overview.html> (last visited Jan. 5, 2017).

73. *See, e.g.*, Mitchell, *supra* note 18.

74. *Id.*

fringe” by protecting rural water districts that often cannot support higher density urban land development.<sup>75</sup>

The varied and far-reaching consequences of this decade-long lawsuit between two public entities gives one pause; in the words of a state representative from Logan County, “[w]hat should have been a minor dispute . . . has turned into a 10-year war that has trapped people in a no-man’s-land and cost the taxpayers and rate payers hundreds of thousands of dollars.”<sup>76</sup> In order to better protect the financial and physical wellbeing of rural residents, courts should take steps to reform this type of litigation by (1) adopting the Eighth Circuit’s more intuitive rule regarding federal indebtedness and (2) taking fire protection capabilities into consideration when determining whether a rural water district has made service available to customers.

### III. THE HISTORY OF § 1926(B)

#### A. *Economic Concerns Lead to Increased Financial Support of Farms and Rural Communities*

The Secretary of Agriculture first began making rural water facility loans back in the 1930s as the Dust Bowl devastated the Great Plains region of the United States.<sup>77</sup> Terrible drought conditions lasted in some areas for up to eight years.<sup>78</sup> In order to address this dismal situation, Congress passed the Water Facility Act of 1937.<sup>79</sup> This Act authorized low-interest loans to help construct water facilities, both for water utilization and storage.<sup>80</sup>

Projects had to meet particular requirements to qualify for loans under the Act.<sup>81</sup> First of all, proposed water facilities had to specifically benefit farms.<sup>82</sup> Additionally, the farms had to be located in arid and semi-arid parts of the country.<sup>83</sup> On top of these restrictions, the maximum loan amount was quite low, which reduced the overall impact of the program.<sup>84</sup>

Congress later increased loan amounts for municipalities and associations to \$250,000 in 1954.<sup>85</sup> The 1954 amendments to the Water Facility Act also expanded the loan program to apply to every state, not just those in arid and semi-arid areas.<sup>86</sup>

Even as the Dust Bowl era came to an end, economic conditions for farmers remained dismal.<sup>87</sup> In his first State of the Union address in January 1961, President

75. Hounsel, *supra* note 2, at 157.

76. Kim Passoth, *Water war rages on in Logan County: Lawmaker calls for resolution*, KOCO 5 (Aug. 1, 2014, 11:06 AM), <http://www.koco.com/article/water-war-rages-on-in-logan-county-lawmaker-calls-for-resolution/4299554>.

77. Terence M. Brady, *The Farmers Home Administration Community Facility Program: A Mandate for Rural Development*, 23 S. D. L. REV. 585, 586 (1978); NAT’L CTRS. FOR ENVTL. INFO., *North American Drought: A Paleo Perspective* (last visited Jan. 5, 2017), [https://www.ncdc.noaa.gov/paleo/drought/drght\\_history.html](https://www.ncdc.noaa.gov/paleo/drought/drght_history.html).

78. NAT’L CTRS. FOR ENVTL. INFO., *supra* note 78.

79. Brady, *supra* note 77, at 586.

80. *Id.*

81. *Id.*

82. *Id.* at 587.

83. *Id.* at 586-87.

84. Brady, *supra* note 77, at 587.

85. *Id.*

86. *Id.*

87. President John F. Kennedy, Annual Message to the Congress on the State of the Union (Jan. 30, 1961),

John F. Kennedy noted that farm income had dropped by a quarter in the preceding nine years.<sup>88</sup> In a separate message to Congress a few months later, President Kennedy continued this discussion and outlined several factors contributing to the decrease in farm income.<sup>89</sup>

First of all, Kennedy pointed to a lack of coordination regarding output—which, in turn, affected the price of crops.<sup>90</sup> An increase in efficiency due to technological advances also affected output and dampened prices.<sup>91</sup> The third factor was ineffective distribution of agricultural goods, which led to the juxtaposition of widespread malnutrition in the United States and abroad in times of remarkable harvest surpluses.<sup>92</sup> Lastly, an increase in farm costs, such as equipment and interest payments, reduced how much net income farmers were able to earn.<sup>93</sup>

This drop in farm income meant rural communities as a whole were struggling; as Kennedy put it, “[t]he small businesses are liquidating, the community facilities are deteriorating, and community institutions are weakened.”<sup>94</sup> Kennedy urged Congress to pass legislation to address the market-related issues directly and to focus on improving the quality of life in these rural communities, reasoning that “substandard conditions on the farms . . . lead directly to substandard conditions in all segments of the national economy.”<sup>95</sup>

A concern for “farm families” was clear in Kennedy’s communications to Congress. In his March message, Kennedy referred to “farm families” or “family farms” six times.<sup>96</sup> Historically, small farms employed a large number of Americans, and family members were the primary laborers.<sup>97</sup> At the beginning of the twentieth century, almost half of the labor force worked in agriculture.<sup>98</sup> This statistic had fallen substantially by the Kennedy era, but agriculture still employed about 7.6 percent of the labor force in 1960.<sup>99</sup> As of 2012, the percentage of Americans employed in agriculture dropped to less than 2 percent.<sup>100</sup> In contrast to small family farms, a few large, efficient farms dominate the agricultural sector in the twenty-first century.<sup>101</sup>

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<http://www.presidency.ucsb.edu/ws/?pid=8045>.

88. *Id.*

89. President John F. Kennedy, *Message from the President of the United States Relative to American Agriculture*, H. DOC. NO. 87-109, at 2 (Mar. 16, 1961).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. H. DOC. NO. 87-109, *supra* note 89, at 7.

95. *Id.* at 2, 8.

96. *Id.* at 2, 3, 10.

97. Carolyn Dimitri, Anne Effland, & Neilson Conklin, *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S. DEPT OF AGRIC.: ECONOMIC RESEARCH SERV. 2 (June 2005). [https://www.ers.usda.gov/webdocs/publications/eib3/13566\\_eib3\\_1\\_.pdf](https://www.ers.usda.gov/webdocs/publications/eib3/13566_eib3_1_.pdf); Patricia A. Daly, *Agricultural employment: has the decline ended?*, MONTHLY LABOR REV., Nov. 1981, at 11, <http://www.bls.gov/opub/mlr/1981/11/art2full.pdf>.

98. Dimitri, *supra* note 97, at 2.

99. U.S. DEPT OF LABOR, HANDBOOK OF LABOR STATISTICS 327 tbl.148 (1977).

100. FED. RESERVE BANK OF ST. LOUIS ECONOMIC RESEARCH, *Percent of Employment in Agriculture in the United States* (June 2010), <https://research.stlouisfed.org/fred2/series/USAPEMANA>.

101. Dimitri, *supra* note 97, at 2.

In any event, by the time of Kennedy's call to action in 1961, congressional committees had already been discussing problems in rural communities and in the marketplace for agricultural goods, as well as potential legislative responses. In 1960, Kermit H. Hansen, the administrator of the Farmers Home Administration, spoke before a subcommittee of the Senate Committee on Agriculture and Forestry regarding his agency's farm-related loans.<sup>102</sup>

Among other topics, Hansen discussed issues his administration had encountered with the rural water facility loans.<sup>103</sup> Hansen explained that rural water districts could only take out federal loans for domestic water systems if the systems would primarily serve farms and ranches—regardless of other rural residents' water needs.<sup>104</sup> Even rural schools and churches could have difficulty securing water if they were unable to join a system that mostly served farms.<sup>105</sup>

Not only did this requirement hurt non-farmer residents and institutions in rural areas, it actually hurt farmers as well.<sup>106</sup> By excluding would-be customers, this loan requirement that water systems primarily serve farms and ranches increased the cost of water for farmers.<sup>107</sup> In other words, farmers were forced to share the costs of the water system (including repairs, maintenance, etc.) with fewer other customers than they otherwise could.

Ultimately, Congress passed the Agricultural Act of 1961 in August of that year.<sup>108</sup> This Act, which included § 1926, replaced the Water Facility Act and expanded the pre-existing financial assistance program by permitting loans to associations serving all kinds of rural residents.<sup>109</sup> According to the 1961 Senate Report addressing the Act, broadening this loan program would help accomplish three goals: (1) reduce the cost of water per user, (2) add more security to the loans, and (3) provide “a safe and adequate supply of running household water” to rural communities.<sup>110</sup>

In reference to § 1926(b), a new addition to the loan program, the 1961 Senate Report suggests that the provision would help protect indebted water districts from expanding municipalities and other public entities that might compete with them.<sup>111</sup> According to the Oklahoma Supreme Court, protecting the territory of rural water districts serves to keep costs down for each consumer in the district by safeguarding a broad customer base.<sup>112</sup>

102. *Farmers Home Admin. Loans: Hearing on S. 2144 and S. 2891 Before a Subcomm. of the S. Comm. on Agric. & Forestry*, 86th Cong. 22 (1960) (statement of Kermit H. Hansen, Adm'r, Farmers Home Admin.).

103. *Id.*

104. *Id.* at 26.

105. *Id.*

106. *Id.*

107. *Farmers Home*, *supra* note 102, at 26.

108. Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294.

109. Brady, *supra* note 77, at 588; S. REP. NO. 97-566, at 67 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309.

110. S. REP. NO. 97-566, at 67, *referenced in* *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 519-20 (4th Cir. 1999).

111. S. REP. NO. 97-566, at 67.

112. *Rural Water Sewer and Solid Waste Mgmt., Dist. No. 1, Logan Cty. v. City of Guthrie* (“Logan-1”), 2010 OK 51, ¶ 14, 253 P.3d 38, 44.

A main concern behind § 1926(b) is that nearby towns will “skim the cream” by taking over the most densely populated areas of a water district after the district has already invested a significant amount of money in infrastructure.<sup>113</sup> If the number of customers decreases too far, the cost of buying water from the rural water district could become prohibitively expensive—and, as a creditor, the United States has an interest in keeping these water districts solvent.<sup>114</sup> In other words, the § 1926(b) anti-curtailment provision “protects the financial interests of the United States, which is a secured creditor of the water association, from reduction of the water association’s revenue base.”<sup>115</sup>

The world has not changed so much as to make this rationale irrelevant. Low income in rural areas is still a problem in the United States today, as it was during Kennedy’s presidency.<sup>116</sup> The rural poverty rate in 2014, for example, was a little more than 18 percent.<sup>117</sup>

Unlike in the 1960’s—or, for that matter, any period of time on record—the overall population of rural America is now on the decline.<sup>118</sup> Thirteen thousand rural counties saw a decrease in population from 2010 to 2014.<sup>119</sup> This decrease is primarily due to natural change (more deaths than births) and net outmigration.<sup>120</sup> It seems, then, that the customer base for many rural water districts is decreasing on its own, thus strengthening the argument for allowing rural water districts to protect themselves from losing additional customers to competition.<sup>121</sup>

#### B. *Section 1926(b) Withstands Constitutional Challenges in Oklahoma*

An important test of § 1926(b) occurred in Oklahoma in 2010 when the Tenth Circuit certified two questions to the Oklahoma Supreme Court regarding whether § 1926(b) violated the Oklahoma Constitution.<sup>122</sup> Under article V, section 51 of the Oklahoma Constitution, “[t]he Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities with this State.”<sup>123</sup> The City of Guthrie argued that the enforcement of § 1926(b)—limiting its right to serve customers within the Logan-1 rural water district—equated to Oklahoma granting an exclusive franchise, or monopoly, to Logan-1.<sup>124</sup> Guthrie

113. *Id.* (quoting *City of Madison v. Bear Creek Water Ass’n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987)).

114. *Id.* See also *Pittsburg Cty. Rural Water Dist. No. 7 v. City of McAlester* (“Pittsburg-7”), 358 F.3d 694, 715 (10th Cir. 2004).

115. *Pittsburg-7*, 358 F.3d at 715.

116. U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., RURAL AMERICA AT A GLANCE: 2015 EDITION 3 (Jan. 2016) [https://www.ers.usda.gov/webdocs/publications/cib145/55581\\_cib145.pdf](https://www.ers.usda.gov/webdocs/publications/cib145/55581_cib145.pdf).

117. *Id.* at 3.

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. See, e.g., Steven M. Harris, 7 U.S.C. § 1926(b): *Federal Policy to Encourage Rural Development* 15 (2015), [http://1926blaw.com/images/Washington\\_D.C.\\_Conference\\_Book.pdf](http://1926blaw.com/images/Washington_D.C._Conference_Book.pdf) (“Encroachment left unabated, will discourage rural development, deprive the water district members of their economy of scale, and ultimately drive up the per user cost of water because over time there will be fewer members to share in the ever increasing fixed cost of water.”).

122. *Logan-1*, 2010 OK 51, ¶ 1, 253 P.3d at 41.

123. OKLA. CONST. art. 5, § 51 (West current through Nov. 4, 2015).

124. *Logan-1*, 2010 OK 51, ¶ 11, 253 P.3d at 43.

maintained that Logan-1 lacked the authority to sign onto an agreement with a federal agency that would effectively shelter it from competition.<sup>125</sup>

The Oklahoma Supreme Court determined, however, that § 1926(b) did not implicate article V, section 51 of the Oklahoma Constitution.<sup>126</sup> First of all, the court found that state law expressly allowed rural water districts to borrow money from the United States.<sup>127</sup> The court further found that the same state statute impliedly authorized rural water districts to accept the ‘strings attached’ to such loans.<sup>128</sup> Ultimately, the United States Congress gave Logan-1 the right to protect its service area “pursuant to the terms of the USDA loan”—even if those terms limited free-market competition.<sup>129</sup>

The Tenth Circuit Court of Appeals addressed Congress’ authority to include this type of provision in loans to rural water districts back in 1988.<sup>130</sup> In that case, Glenpool Utilities Services Authority, in northeastern Oklahoma, argued that § 1926(b) violated the Tenth Amendment of the US Constitution.<sup>131</sup> The Tenth Circuit disagreed, finding that the Taxing and Spending Clause—found in Article I, section 8—gives Congress broad discretion regarding the conditions tied to federal funds.<sup>132</sup>

In order for a congressional act to be constitutional under the Taxing and Spending Clause, three elements must be met.<sup>133</sup> First of all, the state in question must accept the federal funds and the accompanying terms “voluntarily and knowingly,” just as one becomes party to a contract.<sup>134</sup> Secondly, any conditions tied to the funds must be unambiguous.<sup>135</sup> Lastly, such conditions must be related “to activities fairly within the scope of national power and policy.”<sup>136</sup>

The Tenth Circuit found that the § 1926(b) provision satisfied all of these elements, at least in regard to Oklahoma.<sup>137</sup> First of all, the court determined that Oklahoma had “accepted” the federal funds by expressly authorizing rural water districts to borrow money from federal agencies, such as the FmHA (a former agency under the US Department of Agriculture).<sup>138</sup> Secondly, 7 U.S.C. § 1926 as a whole sets out in detail all of the conditions to these water facility loans, so the court deemed the conditions to be unambiguous.<sup>139</sup> Lastly, the court saw the anti-curtailed provision

125. *Id.*

126. *Logan-1*, 2010 OK 51, ¶ 1, F.3d at 41.

127. *Logan-1*, 2010 OK 51, ¶ 18, F.3d at 46 (referencing OKLA. STAT. ANN. tit. 82, ¶ 1324.10).

128. *Logan-1*, 2010 OK 51, ¶ 18, F.3d at 47.

129. *Logan-1*, 2010 OK 51, ¶ 22, F.3d at 48.

130. *See* *Glenpool Util. Servs. Auth. v. Creek Cty. Rural Water Dist. No. 2* (“Glenpool I”), 861 F.2d 1211 (10th Cir. 1988).

131. *Id.* at 1215; *see also* U.S. CONST. amend. X.

132. *Glenpool I*, 861 F.2d at 1215; *see also* U.S. CONST. art. I, § 8, cl. 1.

133. *Glenpool I*, 861 F.2d at 1215.

134. *Id.*

135. *Id.*

136. *Id.*; *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

137. *Glenpool I*, 861 F.2d at 1215.

138. *Id.* at 1215-16 (referencing OKLA. STAT. tit. 82, § 1324.10(4) (Supp. 1988)).

139. *Id.* at 1215.

as sufficiently related to national policy, given that it protects federal funds and furthers “a national policy concerned with water management and rural populations.”<sup>140</sup> Congress, as a result, had not violated the Tenth Amendment by including the § 1926(b) anti-curtailment provision.<sup>141</sup>

#### IV. INTERPRETING § 1926(B)

Some of the specifics of how Congress intended § 1926(b) to operate are unclear from the legislative history and the statute itself.<sup>142</sup> A primary example is the lack of a definition or explanation of what it means to “make service available.” With relatively little guidance from legislative history and no amendments to the language of § 1926(b) since it first passed in 1961, courts have had to determine the contours of this provision.<sup>143</sup>

##### A. *The Two-Part Test & the Role of Intent*

The Tenth Circuit Court of Appeals has established a two-part test for determining whether a rural water district or other water association can enjoy § 1926(b) protection against encroachments by a competitor. According to this test, a water association must (1) be indebted to the federal government and (2) have provided service or made service available to the disputed area in order to invoke § 1926(b).<sup>144</sup> If it is a close case, courts should decide in favor of the indebted water association.<sup>145</sup> In one case, the Tenth Circuit quoted the Fifth Circuit in stating that “[t]he service area of a federally indebted water association is sacrosanct” and “[e]very federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations.”<sup>146</sup>

It is important to note that the competitor’s “intent” in encroaching onto a water district’s territory is not part of the test. A nearby town does not have to intentionally poach customers from a rural water district to implicate § 1926(b). That said, whether a neighboring municipality willfully violates § 1926(b) or does so accidentally can make a difference in the outcome of this kind of lawsuit.<sup>147</sup>

In *Glenpool Utility Service Authority v. Creek County Rural Water District No. 2*, the public utilities authority of Glenpool sought a declaratory judgment, claiming it had the right to serve customers in a new residential addition called “Eden South.”<sup>148</sup>

140. *Id.*

141. *Id.*

142. See Scott Hounsel, *supra* note 2, at 159. (“The scant amount of legislative history does not provide any clues to what exactly was protected by statute should a municipality include unserved areas close to the facilities of the indebted association.”).

143. Compare Agricultural Act of 1961, Pub. L. No. 87-128, § 306(b), 75 Stat. 294, reprinted in 1961 U.S.C.C.A.N. 333, 350, with 7 U.S.C.A. § 1926(b) (West 2016).

144. *Sequoyab-7*, 191 F.3d at 1197.

145. *Id.*

146. *Id.* (quoting *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996)).

147. See, e.g., *Glenpool II*, No. 91-5047, 1992 WL 37327.

148. *Id.* at \*1. The local newspaper called Eden South “an Affordable Paradise Garden.” Dana Simon, *Eden South – an Affordable Paradise Garden*, TULSA WORLD, Oct. 27, 1996, [http://www.tulsaworld.com/archives/eden-south—an-affordable-paradise-garden/article\\_5f13811e-7a19-54e6-87b2-58f3ad52645f.html](http://www.tulsaworld.com/archives/eden-south—an-affordable-paradise-garden/article_5f13811e-7a19-54e6-87b2-58f3ad52645f.html).

Glenpool had officially annexed Eden South, but the addition was also within Creek County Rural Water District No. 2's ("Creek-2") service boundaries.<sup>149</sup>

As to the first issue of *which* party had the right to serve Eden South under § 1926(b), the district court sided with Creek-2.<sup>150</sup> Unfortunately, the developer of Eden South had already built water lines connecting the addition to Glenpool and dedicated those lines to Glenpool.<sup>151</sup> Creek-2 wanted the court, under 28 U.S.C. § 2202, to grant a constructive trust transferring ownership of the Eden South water lines to the water district for its use in supplying water to the addition.<sup>152</sup>

In order to grant a constructive trust, the court had to find that Glenpool gained title to the Eden South water lines "by fraud . . . by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or . . . in any way against equity and good conscience."<sup>153</sup> In examining the facts of this case, the court took note that Glenpool was also indebted to the FmHA—just like the rural water district.<sup>154</sup> This may have added confusion to Glenpool's assessment of whether § 1926(b) applied to the customers within Creek-2's territory.<sup>155</sup> Since both parties held FmHA loans, the court determined that Glenpool officials "might reasonably have believed" it could provide water service to the Eden South customers.<sup>156</sup>

Because of this reasonable mistake, the court declined to impose a constructive trust to transfer ownership of the pipelines.<sup>157</sup> The court conceded this put the parties in an awkward position, with the water district holding the right to serve Eden South but not owning the water lines to do so.<sup>158</sup> Instead of outlining a specific plan, the court opted to let the parties work it out amongst themselves, expressing the hope that Glenpool and Creek-2 could find a solution that did not involve building duplicate lines.<sup>159</sup>

### B. Federal Indebtedness: The Continued Service Theory

As discussed above, § 1926(b) applies only when a water association is indebted to the federal government and has provided service or made service available to the area in dispute.<sup>160</sup> First, it is necessary to explore a peculiar aspect of the Tenth Circuit's interpretation of a rural water district's federal indebtedness: the so-called "continued service theory."<sup>161</sup>

149. *Glenpool II*, No. 91-5047, 1992 WL 37327, at \*1.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at \*2.

154. *Glenpool II*, No. 91-5047, 1992 WL 37327, at \*3.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at \*4.

159. *Glenpool II*, No. 91-5047, 1992 WL 37327, at \*4.

160. *Sequoyab-7*, 191 F.3d at 1197.

161. *See* Pub. Water Supply Dist. No. 3 of Laclede Cty. v. City of Lebanon ("Laclede-3"), 605 F.3d 511, 518 (8th Cir. 2010) (rejecting the Tenth Circuit's "continued service theory" approach).



The continued service theory comes into play when a rural water district takes out a new USDA loan after a period in which the district was *not* indebted to the US government—in other words, after a “gap” in federal indebtedness.<sup>162</sup> During one of these gaps in indebtedness, the rural water district does not enjoy protection under § 1926(b).<sup>163</sup> In other words, a competitor is free to provide service to customers within the district’s territory without violating this statutory provision.<sup>164</sup> However, the continued service theory dictates that when the rural water district becomes re-indebted to the federal government, the encroaching competitor is in violation of § 1926(b) if it continues to provide service within the water district’s territory.<sup>165</sup>

One of the key cases illustrating the continued service theory is *Sequoyah County Rural Water District No. 7 v. Town of Muldrow*.<sup>166</sup> In *Sequoyah-7*, the rural water district took out three federal loans in 1969 before deciding to repurchase those notes as part of a government debt buy-back program in 1989.<sup>167</sup> During this period of indebtedness, the nearby town of Muldrow began providing water service to a motel and another development in the rural water district’s territory.<sup>168</sup>

More significantly, Muldrow began to serve five additional customers in Sequoyah-7’s territory *after* Sequoyah-7 had repurchased its federal loans, but *before* Sequoyah-7 took out another FmHA loan in 1994.<sup>169</sup> Once Sequoyah-7 took out the 1994 loan, Muldrow added seven more customers from within the water district’s territory.<sup>170</sup> Sequoyah-7 then filed suit against the Town of Muldrow, as well as the Muldrow Public Works Authority, alleging a § 1926(b) violation in regard to all three periods of time: the original loan years (1969 to 1989), the gap (1989 to 1994), and the later indebtedness period (1994 on).<sup>171</sup>

The *Sequoyah-7* court determined that § 1926(b) clearly protected the water district from encroachments during the first and third periods, since the district was indebted to the FmHA during those times.<sup>172</sup> However, since Sequoyah-7 had repurchased its notes in 1989, thus classifying them as “SATISFIED IN FULL,” the anti-curtailment provision ceased to protect the district from 1989 until 1994.<sup>173</sup>

Surprisingly, even though Sequoyah-7 failed the “federally indebted” element of the two-part test for the years 1989 to 1994, the court continued on to the second

162. *Id.* at 515.

163. *Sequoyah-7*, 191 F.3d at 1200 (holding that “§ 1926(b) protection does not extend to issuers who repurchase their own notes or other obligations from the FmHA and in doing so discharge the underlying debt to the FmHA . . .”); *see also Pittsburg-7 v. City of McAlester*, 358 F.3d at 701, n.6 (determining that the Pittsburg-7 rural water district did not have § 1926(b) protection until it obtained an FmHA loan in 1994).

164. *See Sequoyah-7*, 191 F.3d at 1201.

165. *See Pittsburg-7*, 358 F.3d at 712 (“The fact that a municipality had provided service to those properties prior to the FMHA [sic] loan was no bar in *Sequoyah* to claims arising out of a city’s service *during the period of indebtedness*.”) (emphasis added).

166. *Sequoyah-7*, 191 F.3d 1192.

167. *Id.* at 1194-95.

168. *Id.* at 1195.

169. *Id.*

170. *Id.*

171. *Sequoyah-7*, 191 F.3d at 1194, 1197 (“Plaintiff claims that it has been entitled to continued protection under § 1926(b) since 1969, when it first became indebted to the FmHA.”).

172. *Id.* at 1200.

173. *Id.*

prong of the § 1926(b) inquiry.<sup>174</sup> In doing so, the court explained that the Sequoyah-7 water district could potentially obtain relief for Muldrow's encroachments that started before but continued after the 1994 loan.<sup>175</sup> To recap, even though Muldrow initiating water service to customers in the water district's territory from 1989 to 1994 was *not* a violation of § 1926(b), Muldrow continuing to serve these customers once the water district obtained a new loan *was* a violation—as long as the district had “made service available” to those customers.<sup>176</sup>

While the Tenth Circuit has consistently applied this complicated continued service rule, the Eighth Circuit disagreed with this interpretation of § 1926(b) in an important 2010 case.<sup>177</sup> In *Public Water Supply District No. 3 of Laclede County v. City of Lebanon*, the City of Lebanon began providing service to customers in the Laclede-3 water district's territory while Laclede-3 was not indebted.<sup>178</sup> Laclede-3 later closed on a USDA loan and filed suit against Lebanon, arguing that the city could no longer serve those customers now that Laclede-3 was indebted to the federal government.<sup>179</sup>

The Eighth Circuit first examined the plain language of § 1926(b).<sup>180</sup> The provision expressly prohibits competitors from curtailing or limiting the service of a rural water district.<sup>181</sup> The Eighth Circuit decided that the City of Lebanon's “passive continuation of service” did not rise to the level of curtailing or limiting Laclede-3's service.<sup>182</sup> Merely maintaining customers was not the same as actively taking customers away; thus, the anti-curtailment provision did not apply.<sup>183</sup>

The Eighth Circuit also noted that § 1926(b) references “such associations,” as opposed to *all* associations, but the continued service theory would effectively provide protection to all associations—

forcing cities to operate in the shadow of § 1926(b), even when a nearby rural district had no qualifying federal loan. Under this scenario, cities would face the constant threat that a rural district will someday obtain a qualifying federal loan and bring suit under § 1926(b), thereby stranding the city's investment in infrastructure it had already built to serve those customers. A rural district would be insulated from competition even without a qualifying federal loan because no rational city would make such an investment under those circumstances.<sup>184</sup>

The court expressed concern that this result would weaken infrastructure development in rural areas—the purpose behind the loan program in the first place—by disincentivizing municipalities from getting involved in those types of projects.<sup>185</sup>

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174. *Id.* at 1201.

175. *Id.*

176. *Sequoyah-7*, 191 F.3d at 1201.

177. *Laclede-3*, 605 F.3d at 518.

178. *Id.* at 514.

179. *Id.* at 514-15.

180. *Id.* at 516.

181. § 1926(b). (“The service provided by any such association shall not be curtailed or limited . . . .”)

182. *Laclede-3*, 605 F.3d at 516.

183. *Id.*

184. *Id.* at 517.

185. *Id.* at 518.

At the very least, interpreting § 1926(b) in this way created a situation in which allowable behavior could become a violation of federal law overnight.<sup>186</sup>

The Eighth Circuit ultimately determined that “the plain language of the statute, the rule in favor of giving effect to all terms in the statute, and [the court’s] analysis of the statute’s purposes all ran counter to the continued service theory.”<sup>187</sup> The court came to this conclusion while recognizing that the Tenth Circuit had come to a different conclusion in *Sequoyah-7* and in a later case, *Pittsburg County Rural Water District No. 7 v. City of McAlester*.<sup>188</sup>

One potential problem with adopting the Eighth Circuit’s approach to indebtedness is that rural water districts may have an incentive to take out unnecessary loans in order to maintain protection under § 1926(b). Kansas law used to require that rural water districts show such loans were “necessary to carry out the purposes of its organization.”<sup>189</sup> Seeking § 1926(b) protection was *not* sufficient justification for obtaining a loan.<sup>190</sup> Such state limitations could be an effective means of limiting rural water districts’ ability to take advantage of the anti-curtailment provision; though, notably, the Kansas legislature has since amended the statute so that “water districts may seek § 1926(b) protection without making any showing of necessity.”<sup>191</sup>

### C. Making Service Available: The Pipes-in-the-Ground Test

In order for a rural water district to invoke the protection of § 1926(b), the district must not only show that it held applicable federal loans at the time of the encroachment, but also that the district “made service available” to the customers in dispute.<sup>192</sup> Courts throughout the country have used different approaches to determine whether districts have made service available, but the principal analysis is called the “pipes-in-the-ground” test.<sup>193</sup> Under this test, a water district must have “adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made.”<sup>194</sup>

*Sequoyah County Rural Water District No. 7 v. Town of Muldrow* serves as a helpful illustration of how courts apply this “pipes-in-the-ground” test.<sup>195</sup> Whether a water district has made service available is a question of fact for the factfinder to decide, but the district court in this case had granted summary judgment *against* the water district in respect to this issue.<sup>196</sup> If, as a matter of law, a water district has not made

186. *Id.* at 517.

187. *Id.* at 518.

188. *Id.* The Tenth Circuit applied the continued service rule from *Sequoyah-7* in *Pittsburg-7* in 2004. *Pittsburg-7*, 358 F.3d at 713 (“We analyze whether Pitt-7 qualified for § 1926(b) rights by applying the standards we articulated in *Sequoyah-7*”).

189. *Rural Water Dist. No. 4, Douglas Cty. v. City of Eudora* (“Eudora II”), 720 F.3d 1269, 1274-76 (10th Cir. 2013).

190. *Eudora I*, 659 F.3d at 980.

191. *Eudora II*, 720 F.3d at 1276.

192. *Sequoyah-7*, 191 F.3d at 1202.

193. *Id.*

194. *Id.* (quoting *Bell Arthur*, 173 F.3d at 526).

195. *Id.* at 1203-05.

196. *Id.* at 1206.

service available to the customers in question, the protection of § 1926(b) does not apply.<sup>197</sup>

On appeal, the Tenth Circuit Court of Appeals took each disputed customer one by one to decide whether summary judgment was appropriate.<sup>198</sup> In regard to each customer, the court looked at several facts: (1) whether the Sequoyah-7 water district had water lines near that customer's property and, if so, (2) the size of the lines, (3) when the lines were constructed, (4) the cost, if applicable, of upgrading the lines to meet the needs of the customer, and (5) how far from the property the lines were located.<sup>199</sup> For example, the court noted that Sequoyah-7 had a two-and-a-half inch water line built in 1970 that ran approximately 400 feet to the south of the J.D. Hill Truckwash, a disputed customer in the case.<sup>200</sup>

After surveying the facts related to each customer, the *Sequoyah-7* court held that there were genuine issues of material fact as to whether the water district had made service available to these various customers.<sup>201</sup> Therefore, summary judgment was improper, and the court reversed the district court's decision and remanded the case.<sup>202</sup>

After determining whether a rural water district has met the "pipes-in-the-ground" test in relation to each customer in dispute, the jury must also determine if the cost of buying water from the district would be so outrageous for that customer as to be "unreasonable, excessive, and confiscatory."<sup>203</sup> While the factfinder will generally look to the totality of the circumstances, some factors are particularly relevant: (1) whether the district will end up earning more than a fair profit; (2) whether the rate is disproportionate to the provided water service; (3) how the rate compares to rates in other, similar water districts; and (4) whether the rate "establishes an arbitrary classification between various users."<sup>204</sup> The municipality, not the rural water district, carries the burden of proving that the costs are unreasonable.<sup>205</sup>

Unfortunately, the factual determinations inherent in both the "pipes-in-the-ground" analysis and the cost analysis are highly technical.<sup>206</sup> There are no bright-line rules to serve as guidance for the jury in deciding, for example, what level of cost for water service is "unreasonable," what type of water facilities are "adequate," how much wait time for service is "reasonable," and how close to an area facilities must be to be "adjacent" to an area. Furthermore, the factfinder must typically complete this entire inquiry for every single customer in dispute in the litigation.<sup>207</sup>

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197. See *Sequoyah-7*, 191 F.3d at 1202.

198. *Id.* at 1203-05.

199. *Id.*

200. *Id.* at 1205.

201. *Id.*

202. *Sequoyah-7*, 191 F.3d at 1206.

203. Rural Water Dist. No. 5 Wagoner Cty. v. City of Coweta ("Wagoner-5"), No. 08-CV-252-JED-FHM, 2013 WL 5466651, at \*2 (N.D. Okla. Sept. 30, 2013).

204. *Douglas-4*, 659 F.3d at 981.

205. *Id.*

206. See, e.g., Declaration and Expert Report, *supra* note 51.

207. *Logan-1*, 654 F.3d at 1065-66. For this reason, arbitration or some other type of proceeding might be preferable to the traditional court setting for these types of cases. In arbitration, the parties could agree to have arbitrators that have expertise in civil engineering or have specifically worked with water infrastructure. Using arbitration also

## V. THE FIRE PROTECTION PROBLEM

One factor that is noticeably absent from the “made service available” inquiry is fire protection capabilities.<sup>208</sup> As discussed in Part II, Logan-1 “won” many of the Disputed Customers without being able to provide true fire protection. This result is possible because rural water districts do not have to provide fire protection in Oklahoma and courts have deemed fire protection irrelevant to § 1926(b) determinations.

First of all, neither federal nor Oklahoma state law requires that rural water districts provide fire protection.<sup>209</sup> The US District Court for the Western District of Oklahoma examined the language of 7 C.F.R. § 1780.57, which states that “[w]ater facilities *should* have sufficient capacity to provide reasonable fire protection *to the extent practicable*.”<sup>210</sup> The court also pointed out that the Oklahoma Administrative Code refers to “water systems without full fire protection capabilities.”<sup>211</sup> The court ultimately determined that the regulations “clearly contemplate water systems where fire protection is not provided.”<sup>212</sup>

The US District Court for the Northern District of Iowa came to a similar conclusion regarding Iowa law a few years earlier in the case *Rural Water System No. 1 v. City of Sioux Center*.<sup>213</sup> According to this court, the rural water district in question “was not required to provide fire flow protection by any existing regulations of any governing entity.”<sup>214</sup>

Not only is there no statutory duty to provide fire detection in these states, courts around the country have held that a rural water district’s ability—or inability—to provide fire protection is irrelevant to whether the district can take advantage of § 1926(b) protection.<sup>215</sup> This means that rural water districts can show they “made service available” to disputed customers without making any showing of fire protection capabilities.<sup>216</sup>

In 1979, the US District Court for the Northern District of Oklahoma referred to the available legislative history and determined that the whole statutory scheme (7 U.S.C. § 1921, et. seq.) “was not enacted for the purposes of fire protection—it was

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would likely be faster than taking the dispute to court and might prove to be less adversarial—an important point, since these sparring governmental entities are necessarily neighbors.

208. See *Sequoyah-7*, 191 F.3d at 1202.

209. *Rural Water, Sewer and Solid Waste Mgmt. Dist. No. 1, Logan Cty. v. City of Guthrie* (“Logan-1”), No. CIV-05-786-R, 2007 U.S. Dist. LEXIS 102718, at \*24-26 (W.D. Okla. Sept. 27, 2007), *aff’d in relevant part by Logan-1*, 654 F.3d 1058.

210. *Id.* at \*24-25 (citing to 7 C.F.R. § 1780.57 (emphasis added)).

211. *Id.* at \*25-26 (citing to Okla. Admin. Code tit. 252, § 626-19-4).

212. *Id.* at \*25.

213. 29 F. Supp. 2d 975, 984 (N.D. Iowa 1998).

214. *Id.*

215. See, e.g., *Logan-1*, 654 F.3d at 1067; *Salem Water Users Ass’n v. City of Benton*, 2001 WL 36386246 (E.D. Ark. Aug. 28, 2001) (granting the plaintiff-water association’s motion in limine to exclude evidence and argument related to the association’s ability to provide fire protection); *Sioux Center*, 29 F. Supp. 2d at 992-93 (citing several cases addressing the irrelevancy of fire protection capabilities).

216. See, e.g., Opening Brief, *supra* note 56, at \*10-11; *Logan-1*, No. CIV-05-786-M, 2016 WL 126877, at \*1.

enacted to provide means of securing a ‘safe and adequate supply of running household water.’”<sup>217</sup> If the municipality wanted to maintain a line exclusively for fire protection purposes, it could do so.<sup>218</sup>

Later, in *Sioux Center*, the Northern District of Iowa held that a rural water district could still assert the protection of § 1926(b) even though it could not provide fire protection.<sup>219</sup> The court went as far as to call the defendant-city’s fire-related argument “a red herring.”<sup>220</sup>

In 2010 the Oklahoma Supreme Court considered the argument—made by *amici curiae*—that this approach could leave municipal residents without fire protection at all.<sup>221</sup> In practical terms, a town might not be able to afford to extend water lines only to supply water for fire hydrants.<sup>222</sup> If the municipality could provide basic water supply to residents in an area, the rates from that service would pay for the firefighting water.<sup>223</sup> Without spreading the costs in this way, the municipality might not be able to provide fire protection to these customers, who are taxpaying citizens of the municipality.<sup>224</sup> Without discussion, the court stated that it did not find this argument persuasive.<sup>225</sup>

A complicating factor is that the defendant-municipality might very well have a statutory duty to provide fire protection to all areas within its city limits.<sup>226</sup> In Texas, a municipality must provide full municipal services—including fire protection—to an annexed area within two and a half years of the annexation.<sup>227</sup> In Oklahoma, a municipality planning to involuntarily annex an area has to prepare a plan to provide municipal services, such as fire protection, to that area.<sup>228</sup>

Not every court seems to agree with the prevailing approach to fire protection in regard to the § 1926(b) anti-curtalement provision. The US District Court for the Western District of Oklahoma highlighted the inconsistency in one case, in particular, in which the Tenth Circuit purported to consider fire protection irrelevant, but provided detailed information in its opinion about the cost of upgrading the water district’s system to provide fire protection.<sup>229</sup>

Also, as noted in Part II, there are important safety and economic consequences for residents without nearby access to fire hydrants. Occasionally, a municipality will buy out the rural water district in order to provide potable water and fire service to

217. Rural Water Dist. No. 3, Washington Cty. v. Owasso Utils. Auth., 530 F. Supp 818, 823 (N.D. Okla. 1979).

218. *Id.*

219. *Sioux Ctr.*, 29 F. Supp. 2d at 994, *aff’d in part and rev’d in part on other grounds by* Rural Water Sys. No. 1 v. City of Sioux Ctr., 202 F.3d 1035 (8th Cir. 2000).

220. *Id.* at 993.

221. *Logan-1*, 2010 OK 51, ¶ 24, 253 P.3d at 48-49.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See, e.g.*, TEX. LOC. GOV’T CODE ANN. § 43.056 (West 2015), *cited in* Scott Hounsel, *supra* note 2, at 178-79.

227. § 43.056.

228. OKLA. STAT. ANN. tit. 11, § 21-103(D) (West 2016). In this context, “involuntarily” means “without the written consent of the owners of at least a majority of the acres to be annexed.”

229. *Logan-1*, No. CIV-05-786-R, 2007 U.S. Dist. LEXIS 102718, at \*26 n.15, *rev’d in part, Logan-1*, 654 F.3d 1058 (referencing *Sequoyah-7*, 191 F.3d at 1204-05).

an area, but § 1926(b) arguably puts the municipality in a difficult bargaining position.<sup>230</sup> A rural water district may propose other engineering solutions, in order to supplement the district's water pressure with the city's water, but it is difficult for a non-expert to know how feasible or cost-effective these solutions would be.<sup>231</sup>

Leaving out fire protection from the “made service available” inquiry can lead to problematic, inefficient results.<sup>232</sup> Considering fire protection does not necessarily mean that the municipality will win every time; in *Sioux Center*, the court noted that the rural water district's manager testified she believed her district “could provide adequate fire flow either now or within a reasonable time with some modifications.”<sup>233</sup> In another recent case, the rural water district maintained it had more water flow available for fire protection than the defendant-municipality for all but one of the disputed customers.<sup>234</sup> Allowing the factfinder to consider what fire protection rural water districts already provide and/or the costs of making improvements would give the factfinder a much better sense of what a decision for or against the district would mean for rural customers.

## VI. TODAY'S WATER INFRASTRUCTURE CRISIS

An important consideration that serves as a backdrop to this entire discussion is the alarming state of water infrastructure throughout the United States.<sup>235</sup> According to the most recent Comprehensive Water Plan Executive Report issued by the Oklahoma Water Resources Board (OWRB), the State of Oklahoma needs almost \$38 billion to pay for necessary drinking water infrastructure improvements over the next fifty years.<sup>236</sup> Smaller water systems—each serving fewer than three thousand people—face a “particularly acute” need for these infrastructure improvements; in fact, almost half of the statewide need traces back to smaller water systems.<sup>237</sup>

This water infrastructure crisis extends beyond Oklahoma's borders. In Colorado, the cost of future water infrastructure projects is “daunting.”<sup>238</sup> Kansas is in need of billions of dollars worth of required updates to water mains, treatment plants,

230. Scott Hounsel, *supra* note 2, at 173.

231. *See, e.g.*, Plaintiff's Proposed Final Order and Judgment, *Wagoner-5 v. City of Coweta*, No. 08-CV-252-JED-FHM (Dec. 2, 2015), at 4-5.

232. *See, e.g.*, Rural Water Dist. No. 1, Ellsworth Cty. v. City of Ellsworth, 995 F. Supp. 1164, 1166, 1170 (D. Kan. 1997) (granting a preliminary injunction preventing the City of Ellsworth from providing domestic water service to a new hospital in a water district's territory, even though the hospital would have to obtain water from Ellsworth to meet code requirements for outdoor hydrants).

233. *Sioux Cir.*, 29 F. Supp. 2d at 984.

234. Plaintiff's Proposed Final Order and Judgment, *supra* note 231, at 3.

235. *See, e.g.*, AMERICAN WATER WORKS ASS'N, BURIED NO LONGER: CONFRONTING AMERICA'S WATER INFRASTRUCTURE CHALLENGE (2011), <http://www.awwa.org/Portals/0/files/legreg/documents/BuriedNo-Longer.pdf>.

236. OKLA. WATER RESOURCES BD., OKLAHOMA COMPREHENSIVE WATER PLAN EXECUTIVE REPORT 5 (2012), [http://www.owrb.ok.gov/supply/ocwp/pdf\\_ocwp/Water-PlanUpdate/draftreports/OCWP%20Executive%20Rpt%20FINAL.pdf](http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/Water-PlanUpdate/draftreports/OCWP%20Executive%20Rpt%20FINAL.pdf). (Calculated in 2007 dollars).

237. *Id.*

238. COLO. WATER CONSERVATION BD., *Introduction: Collaborating on Colorado's Water Future*, in COLORADO'S WATER PLAN 4 (last visited Jan. 8, 2017), <https://www.colorado.gov/pacific/cowaterplan/plan>.

and water supply reservoirs.<sup>239</sup> The American Water Works Association estimates that the United States as a whole needs to invest more than \$1 trillion through the year 2035 in order to repair existing waterlines and build new lines to meet population growth and migration.<sup>240</sup>

## VII. CONCLUSION

With such tremendous costs on the horizon, how can a rural water district dedicate over \$400,000 in a single year to legal and professional fees, as Logan-1 did in 2015?<sup>241</sup> How can communities afford to build duplicate pipelines to homes that are already receiving adequate water service? Changing the way some circuits determine a rural water district's indebtedness and how courts across the nation treat fire protection capabilities are not complete solutions to the problem, but they are steps in the right direction away from the "zero-sum game" entangling many of our country's rural counties.

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239. KAN. WATER OFFICE, 2014 KANSAS WATER PLAN (DRAFT) 31, [http://kwo.org/Water%20Plan/KWP2014/Water\\_Supply\\_Infrastructure\\_draft.pdf](http://kwo.org/Water%20Plan/KWP2014/Water_Supply_Infrastructure_draft.pdf).

240. AMERICAN WATER WORKS ASS'N, *supra* note 235, at 10.

241. *See* AUDIT REPORT FOR YEAR ENDING JULY 31, 2015, *supra* note 29, at 3.