

SUPPLEMENTAL QUESTIONS FOR THE RECORD TO:

**MS. RHONDA LOCKLEAR
WATER AND WASTEWATER DIRECTOR
TOWN OF PEMBROKE
PEMBROKE, NORTH CAROLINA
ON BEHALF OF NATIONAL RURAL WATER ASSOCIATION**

**RURAL DEVELOPMENT, BIOTECHNOLOGY, SPECIALTY CROPS,
AND FOREIGN AGRICULTURE
SUBCOMMITTEE HEARING
MARCH 23, 2010**

Committee on Agriculture Staff

Subcommittee on Rural Development, Biotechnology, Specialty Crops, and Foreign Agriculture
Staff Director—Scott Kuschmider
(202) 225-8248

Question Submitted by:

The Honorable Phil Roe of Tennessee

Ms. Locklear, in your view what would be the effect of amending 7 U.S.C. § 1926(b) to allow municipalities the ability to serve customers inside a rural utility district, and what impact might that have on the utility district's ability to fulfill its obligations?

Answer – I have never had any experience with 7 U.S.C. § 1926(b) in my current position as the Water and Wastewater Director for the Town of Pembroke and I don't feel I can adequately answer the question. As a member of the North Carolina Rural Water Association which is a member of the National Rural Water Association, I have asked for their position on this matter which is as follows:

To ensure that small and rural communities would be able to repay loans, Congress included a provision 7 U.S.C. §1926(b) in the Consolidated Farm and Rural Development Act. The purpose of 7 U.S.C. §1926(b) is to protect the integrity of the federal government's outstanding loans by preventing any portion of a water system to be forcibly annexed or cherry picked by another system or municipality. Such annexation would result in the remaining customers being solely responsible for repayment of the loan, with fewer customers to share the burden – resulting in a higher cost (hardship) per customer and greater risk of default. This dilemma is of special concern because USDA loans are only made available to low and moderate-income rural communities based on household per capita income that cannot obtain commercial credit. It is also important to remember that USDA provides both loan and grant to systems based on their financial situation and proposed rate structure at the time the application is processed. Any loss of projected revenue caused by loss of territory jeopardizes this carefully constructed financial arrangement. The 7 U.S.C. §1926(b) provision is an essential stabilizing element and is one of

the reasons that the program works so well. It assures loan repayment, it protects the results of the hard work of rural communities in creating and operating rural systems, and it protects the national priority of providing safe drinking water to all of rural America – especially in our most economically vulnerable areas. These rural water systems provide service to areas when others will not and assume the risk associated with servicing the debt and maintaining the system. To allow others to then take customers from the most desirable portions of the system provides a disincentive for rural systems to continue to reach out to the most unserved areas. The USDA program respects all state planning laws. Every rural water system plan is filed with the state authority and every USDA rural water system is prohibited from unilaterally crossing any state's political subdivisions. Rural water systems were initially built in the outlying rural areas that no public system wanted to serve. When municipalities and large private water systems attempt to lay water lines parallel or lay lines in an area already served by the USDA water system there is always a discussion on who should serve the area. At stake is the alignment of the most profitable area of the USDA system – that is generally why the larger system now wants to take over after many years of sustained disinterest. 7 U.S.C. §1926(b) requires the predatory system to work out an arrangement of mutual interest to both water systems as well as for the customers. The alternative would be to allow larger systems to unilaterally move into the low cost/high revenue portion of the USDA system and jeopardize the viability and future growth of the rural system.

7 U.S.C. § 1926 (b) Should Be the Solution of Last Resort

Most systems are working constructively and cooperatively to resolve local conflicts. Some states have legislation requiring equitable payment agreements and methods of determining the actual value of annexed populations. Numerous neighboring water systems have worked out “good neighbor” relationships through cooperative agreement that provide the highest quality of service to all customers. Rural water systems should only utilize 7 U.S.C. § 1926(b) in extreme cases where expanding systems attempt to unilaterally, without discussion, acquire service areas. Often old political disagreements and local rivalries fuel these arguments. 7 U.S.C. §1926(b) has allowed these disagreements to be resolved.

Court History

In the mid-1980's the city of Madison, Mississippi tried to acquire land and facilities from Bear Creek Water Association (rural water utility) through eminent domain proceedings (condemnation). Bear Creek counter-sued to restrain Madison. The Court in *City of Madison, Miss v. Bear Creek Water Assn, Inc.*, 816 F.2d 1057 (5th. Cir.1987) created the "bright line rule" that "prohibits condemnation through the FmHA loan term." Madison had hoped to defeat 1926(b) protection. The Court responded: "To read a loophole into this absolute prohibition, as Madison would have us do, and allow the city to do via condemnation what is forbidden by other means would render nugatory the clear purpose of 1926(b)." The 5th Circuit showed great insight into the underlying purpose in Madison's attempt to gain territory, facilities, and money from customers. The Court of Appeals stated:

“The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desired to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. Even if fair value is paid for the lost

facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to 'skim the cream' by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts."

In the 1996 decision of *North Alamo Water Supply Corporation v. City of San Juan, Texas*, 90 F.3d 910, (5th Cir.1996), the Court held "*the service area of a federally indebted water association is sacrosanct*" - "*the law gives the Utility (water district) the exclusive right to provide water service to and within the disputed areas.*" The court ordered the facilities constructed inside the water district's territory surrendered to the water district for the reasons stated by the Court: "*The infrastructures are indispensable to providing water service to the residents of the subdivision now that the development is complete. Thus, unless the infrastructures are transferred, the Utility (water district) would not be able to provide efficient and economical water service, and the rights of the Utility that are validated here would be useless.*"

In conclusion, the North Carolina Rural Water Association as a member of the National Rural Water Association supports the existing 1926(b) protection and believes changes to repeal or weaken this provision will create higher utility fees, reduce a rural district's ability to serve more remote and lower-income individuals and jeopardize the district's ability to operate and debt service USDA loans.

NRWA 7 U.S.C. §1926(b) Homepage: www.ruralwater.org/sec1926b

NRWA Contacts:

Bill Simpson <nrwabills@nrwa.org>
Mike Keegan <keegan@ruralwater.org>
National Rural Water Association
Washington, DC
[t] 202-294-4785
[f] 866-385-3160
<http://www.ruralwater.org>