PROTECTING THE BOUNDARIES OF RURAL WATER DISTRICTS UNDER FEDERAL LAW
7 U.S.C. §1926(b)

Presented By
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National Rural Water Association
National Convention
Nashville, TN

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7 U.S.C. § 1926(b). This provision prevents local governments from expanding into a rural water association's area and stealing its customers; the legislative history states that the statutory provision was intended to protect “the territory served by such an association facility against [other] competitive facilities” such as local governments, as otherwise rural water service might be threatened by “the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.” S.Rep. No. 87-566, at 67 (1962), reprinted in 1961 U.S.C.C.A.N. 2243, 2309.
Total Annexation = 153 Acres
Future "Net" Revenue/Asset Value
$6,500,000
(Future Revenue Discounted to present day dollars - Calculated by Scott Scultz, CPA and Water District Administrator)
The Rural Water District/Association Must Be Federally Indebted

Being *federally indebted* means:

1. Indebted to USDA/Rural Development on a loan made by that Agency
2. Indebted to any entity that acquired the loan originally made by USDA/Rural Development (for example, CapMark, GECC)
3. Indebted to any private lender on a loan guaranteed by the federal government/USDA/Rural Development

In 1961, Congress amended 7 U.S.C. § 1926(a) to authorize the United States Farmer's Home Administration (FMHA) to make loans to nonprofit water service associations for “the conservation, development, use, and control of water.” FN1 Congress enacted 7 U.S.C. § 1926(b), in turn, to govern the terms of federal loans made to those associations. Section 1926(b) provides that, for an association *indebted by a loan to the federal government* under the statute, “[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.” 7 U.S.C. § 1926(b).

Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, 701 (C.A.10 (Okla.),2004)
Making Service Available

The 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 (At A Cost That Is Not Unreasonable, Excessive and Confiscatory).

Be Closer (Time To Connect)

Have More Water Capacity (Domestic Water – Fire Protection Not Required)

Cost Should Be Consistent With Other Districts (Cannot Be Unreasonable Or Excessive)

To determine whether service was made available, many courts begin with a “pipes in the ground” or “physical ability” approach that examines whether the water association has the physical means presently to serve the area. This inquiry asks whether the association can demonstrate “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 County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1203 (10th Cir.1999) (citation omitted). The Tenth Circuit has adopted this approach but has also required that the water association have the right under state law to serve the area in question. Id. at 1202 n. 8. The Eighth Circuit applies this same test, requiring that a water association show both that it has the physical means to serve the area and that it has a legal right to do so. Rural Water System # 1 v. City of Sioux Center, 202 F.3d 1035, 1037 (8th Cir.), cert. denied, 531 U.S. 820, 121 S.Ct. 61, 148 L.Ed.2d 28 (2000).

Neither of those circuits requires that a water association have a legal duty to serve in order to receive protection under § 1926. That is, however, the approach of the Fourth Circuit, which apparently requires both a state-law duty to serve and a physical ability to serve. Bell Arthur Water Corp. v. Greenville Utils. Comm’n, 173 F.3d 517, 525-26 (4th Cir.1999). FN1 The Fifth Circuit has adopted a far looser approach, apparently holding that service is made available through either a state-law duty to serve or a physical ability to serve. N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 916 (5th Cir.), cert. denied, 519 U.S. 1029, 117 S.Ct. 586, 136 L.Ed.2d 515 (1996).

FN1. The Fourth Circuit in Bell Arthur reports that we also have adopted this approach. See Bell Arthur Water Corp. v. Greenville Utils. Comm’n, 173 F.3d 517, 526 (4th Cir.1999). As we explain below, however, the Bell Arthur court was apparently misreading our decision in Lexington-S. Elkhorn. We have only required (like the Tenth Circuit) a state-law right (not duty) to serve the area to invoke § 1926.


However, rural water associations protected by § 1926 are subject to price restraints under the threat of losing their § 1926 protection. They are not free at their whim to price monopolistically. As we have stated, “even if a rural water district 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, the cost of those services may be so excessive that it has not made those services available under § 1926(b).” Id. at 1271 (majority) (internal citations and quotation marks omitted) (emphasis supplied). “[I]f the city can show that [the rural water district’s] rates or assessments were unreasonable, excessive, and confiscatory,” we stated, “then the water district has not made services available under § 1926(b),” and therefore is not entitled to § 1926 protection. Id. Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, *719
Providing Adequate Service Is Mandatory Under Federal Law

Federal Regulations Specifically Require The Provision Of Adequate Service To Customers “Within The Service Area Who Can Feasibly And Legally Be Served”.

Plaintiff argues, and we agree, that the federal regulations governing the FmHA loan program impose a duty to provide service on loan recipients. In fact, it is clear that by accepting loans from the FmHA, Plaintiff agreed to abide by the governing federal regulations, which specifically require the provision of adequate service to customers “within the service area who can feasibly and legally be served.” 7 C.F.R. § 1942.17(n)(2)(vii); see Wayne v. Village of Sebring, 36 F.3d 517, 528 (6th Cir.1994) (stating that 7 C.F.R. § 1942.17(n)(2)(vii) requires applicants for FmHA funds to “agree, as a condition of receiving funds, that a person within the service area who can feasibly and legally receive water service has a direct and private right of action against the fund recipient if the recipient fails to make adequate service available”).

Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow 191 F.3d 1192, 1203 (C.A.10 (Okla.),1999)
We have noted that *715 “[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the F[M]HA-indebted party seeking protection for its territory.” Sequoyah, 191 F.3d at 1197. See also North Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 915 (5th Cir.1996) (“The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect F[M]HA-indebted rural water associations from municipal encroachments.”).


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. See North Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 913 (5th Cir.1996) (“The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachments.”); see also Jennings Water, Inc. v. City of North Vernon, Ind., 895 F.2d 311, 315 (7th Cir.1989) (listing five federal courts which have concluded that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment).

Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow 191 F.3d 1192, *1197 (C.A.10 (Okla.),1999)
Any Local Or State Law That Purports To Take Away From An Indebted Rural Water Association Any Territory For Which The Association Is Entitled To Invoke The Protection Of § 1926(B) – Is Forbidden And Invalidated.

To the extent that a local or state action encroaches upon the services provided by a protected water association, the local or state act is invalid. See Title Ins. Co. of Minn. v. I.R.S., 963 F.2d 297, 300 (10th Cir.1992) (noting that “under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, federal law preempts and invalidates state law which interferes with or is contrary to federal law.”); Blue Circle Cement, Inc. v. Bd. of County Comm’rs of County of Rogers, 27 F.3d 1499, 1504 n. 4 (10th Cir.1994) (“[F]or the purposes of the Supremacy *716 Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.’ ”) (quoting Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)). There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).

To the extent McAlester invested in infrastructure on the assumption that § 1926 was no bar to sales in the deannexed portion, that assumption was not reasonable.

Pittsburg County Rural Water Dist. No. 7 v. City of McAlester 358 F.3d 694, 715 - 719 (C.A.10 (Okla.),2004)

This seems to be exactly what happened here. **Having a “private” plaintiff bring a state detachment suit does not negate or trump a district's Section 1926 defense.**

STRATEGIES FOR PROTECTING THE TERRITORY OF FEDERALLY INDEBTED RURAL WATER DISTRICTS/ASSOCIATIONS

1. Develop Political Support From Your Membership
   a. Educate the membership on the purposes of 1926(b) ("economy of scale")
   b. Publish a monthly newsletter – to keep the membership informed
   c. Encourage direct participation in monthly meetings

2. Expand the System and Improve Service ("Making Service Available")
   a. Expand the legal territory of your district/association to the maximum
   b. Acquire maximum water rights and sources of supply
   c. Improve volume and pressure to anticipate new developments
   d. Devise long term engineering plans for future services
   e. Extend lines into anticipated growth areas
   f. Maintain Electronic Data on your system (WaterCad, etc.) so you can document your ability to provide service to prospective customers

3. Establish Fair and Equitable Rate Structure – Based on Local and State Criteria
   a. Publish a uniform rate schedule modeled after surrounding cities and other rural water districts/associations. Rates must not be "confiscatory”.

4. Review Your Formation Records – Insure You Remain a Qualified Non-Profit or Quasi Governmental Entity – or State Agency
   a. Obtain complete written documentation of formation
   b. Obtain legal descriptions of service area where you provide service
   c. Obtain complete documentation of Government Loan records

5. Remain Indebted to the Federal Government – and Obtain New Loans
   a. Without Federal Indebtedness – You Have No 1926(b) Protection

6. Don’t Sit On Your Legal Rights – Challenge Encroachment Early
   a. Consult legal counsel to send appropriate warnings to Encroachers.
   b. Engage Encroachers early to attempt to resolve disputes
   c. File suit in Federal Court when all other remedies and options are exhausted
The typical information/documents needed from the Water District to establish entitlement to 7 U.S.C. § 1926(b) protection are as follows:

- **Creation Documents:**
  - Petition to Incorporate and Organize
  - Notice
  - Publication
  - Order Incorporating and Organizing

- **Indebtedness on USDA Loan(s)**
  - Note
  - Mortgage
  - Security Agreement
  - Bond Documents
  - Transcript of Proceedings

- **Made Service Available issue**
  - Identify Disputed Customers
  - Identify when each Disputed Customer requested service from City
  - Identify potable water needs of customers
  - Identify District’s facilities as of the date each Disputed Customer requested water service
  - Engineer Report concerning how District could have provided potable water service to each Disputed Customer and at what cost
  - What does the District charge the customer to connect to its system
    - Membership fee
    - Connection/meter fee
    - Impact fee
    - Cost of facilities
    - Etc.
  - What do other similarly situated water providers charge a customer to connect:
    - Membership fee
    - Connect/meter fee
    - Impact fee
    - Cost of facilities
    - Etc.
  - Has the District ever released a customer to another water provider because it was too expensive to connect the customer to the District’s system
  - What is the practice of the similarly situated water providers in relation to releasing a customer when the cost to serve is high
  - What is the range of charges to connect a customer the District has charged
  - What is the range of charges similarly situated water providers have charged customers

The typical information needed from the City/competitor is as follows:

1. Identification of all water customers served by the City within the service area of the Water District, including name, address and legal description
2. Identification of the date each Disputed Customer requested water service
3. Identification of the estimated potable water requirements of each Disputed Customer
4. Identification of the facilities on each property which requires potable water service
5. Identification of the volume of water delivered to each disputed customer on a monthly basis
6. Identification of all charges the City required each Disputed Customer to pay to obtain water service
7. Identification of the application process by which each Disputed Customer obtained water service
8. Identification of the City’s water distribution system as of the date the first Disputed Customer requested water service and all extensions and improvements made since that date, as well as the date such extension or improvement was made.
9. Identification of the City’s policies regarding who pays for line extensions or facility improvements needed to serve a water customer.

It is important in these cases to have a good expert engineering report to address the “made service available” issue, i.e., to disclose that at the time each Disputed Customer requested water service, the District had facilities in sufficient proximity from which service could have been provided within a reasonable time, as well as address the cost factor outlined by the Ellsworth Case. It is also very helpful if the expert engineer provides a map depicting the District’s boundaries and system as they existed at the time each Disputed Customer requested service and disclosing what improvements or extensions would be needed to serve that customer. You will also need an expert for damage calculations. The damage calculations should be made in such a manner that the damages for service to each Disputed Customer can be identified separately. Residential subdivision, apartment complex and similar developments will be considered one Disputed Customer for purposes of the “made service available” evaluation.
United States Court of Appeals, Eighth Circuit.
PUBLIC WATER SUPPLY DISTRICT NO. 3 OF LACLEDE COUNTY, MISSOURI, Appellant,
v.
CITY OF LEBANON, Missouri, Appellee.

No. 09-2006.
 Filed: May 14, 2010.

Background: Rural water district brought action against nearby city, alleging that the city was illegally providing water and sewer services to customers within the district's boundaries. The United States District Court for the Western District of Missouri granted city's motion for summary judgment, and subsequently dismissed district's state law claims, 2009 WL 982080. The district appealed.

Holdings: The Court of Appeals, Gruender, Circuit Judge, held that:
(1) city did not violate law by continuing to provide service to customers it began serving before district obtained federal loan, and
(2) statutory phrase “the service provided or made available” included only type of service financed by qualifying federal loan.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Water Law 405 § 2111

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2111 k. Encroachment and curtailment in general. Most Cited Cases

Any doubts about whether a water district is entitled to protection from competition under statute protecting a rural water district's service area from certain incursions by nearby cities should be resolved in favor of the United States Department of Agriculture-indebted party seeking protection for its territory. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[2] Constitutional Law 92 § 2488

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2488 k. Policy. Most Cited Cases

A court's role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch.


City did not violate statute protecting rural water district's service area from certain incursions by nearby cities merely by continuing to provide service to those customers it began serving before the district obtained a United States Department of Agriculture loan. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).


170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited
605 F.3d 511
(Cite as: 605 F.3d 511)

Cases

Scope of protection under statute protecting rural water district's service area from certain incursions by nearby cities was a question of statutory interpretation, subject to de novo review. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

Statutes 361 184

Statutes

361 VI Construction and Operation
361 VI(A) General Rules of Construction
361 k180 Intention of Legislature
361 k184 k. Policy and purpose of act.

Most Cited Cases

Statutes 361 208

Statutes

361 VI Construction and Operation
361 VI(A) General Rules of Construction
361 k204 Statute as a Whole, and Intrinsic Aids to Construction
361 k208 k. Context and related clauses.

Most Cited Cases

Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute.

Water Law 405 2111

Water Law

405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405 k2103 Service Areas
405 k2111 k. Encroachment and curtailment in general. Most Cited Cases

Phrase “the service provided or made available,” in statute protecting rural water district's service area from certain incursions by nearby cities, included only the type of service financed by the qualifying federal loan. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

Federal Courts 170 B 776

Federal Courts

170 VIII Courts of Appeals
170 VIII(K) Scope, Standards, and Extent
170 VIII(K)1 In General
170 k776 k. Trial de novo. Most Cited Cases

Question of whether “[t]he service provided or made available” under statute protecting rural water district's service area from certain incursions by nearby cities referred solely to the service for which a qualifying federal loan was obtained and which provided the collateral for the loan, or to all services that a rural district provided, was a question of statutory interpretation, subject to de novo review.

Statutes 361 205

Statutes

361 VI Construction and Operation
361 VI(A) General Rules of Construction
361 k204 Statute as a Whole, and Intrinsic Aids to Construction
361 k205 k. In general. Most Cited Cases

A court does not construe statutory phrases in isolation; it reads statutes as a whole.

Water Law 405 2111

Water Law

405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405 k2103 Service Areas
405 k2111 k. Encroachment and curtailment in general. Most Cited Cases

To qualify for protection under statute protecting rural water district's service area from certain incursions by nearby cities, an entity must: (1) be an “association” under the statute, (2) have a qualifying federal loan, and (3) have provided or made service available to the disputed area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

Water Law 405 2111
Making service available, as a requirement for protection under statute protecting rural water district's service area from certain incursions by nearby cities, has two components: (1) the physical ability to serve an area; and (2) the legal right to serve an area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).


The statute protecting rural water district's service area from certain incursions by nearby cities protects a rural district's service wherever it has been “made available,” without restricting the methods of providing that service. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[12] Water Law 405 \(\text{ regulation of supply and use }\)

Typically, a rural water district has discretion to determine the method of providing service, under statute protecting rural water district's service area from certain incursions by nearby cities, even if it conflicts with a potential recipient's stated preferences. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[13] Water Law 405 \(\text{ regulation of supply and use }\)

A rural water district does not have unlimited discretion to determine the method of providing service under statute protecting rural water district's service area from certain incursions by nearby cities, and a rural district has not “made service available” if the rural district's method of providing service amounts to a constructive denial of service; for instance, failing to provide a type of service that is generally accepted in the industry, failing to comply with state law requirements such as health and sanitation codes, or providing unreasonably costly or delayed service each might amount to such a constructive denial of service. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[14] Water Law 405 \(\text{ regulation of supply and use }\)

Under the “pipes in the ground” test used in water service cases under statute protecting rural water district's service area from certain incursions by nearby cities, courts examine whether a water district has adequate facilities within or adjacent to the area to provide service to the area within a reasonable amount of time after a request for service is made. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[15] Federal Courts 170B \(\text{ regulation of supply and use }\)
Absent exceptional circumstances, a court of appeals cannot consider issues not raised in the district court.

The rationale for the rule that, absent exceptional circumstances, a court of appeals cannot consider issues not raised in the district court, is twofold: first, the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments; second, there is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal.

Under rule requiring issues to be raised before trial court, district courts cannot be expected to consider matters that the parties have not expressly called to their attention, even when such matters arguably are within the scope of the issues that the parties have raised.

Michael D. Davis, argued, Tulsa, OK, (Scott Andrew Robbins, Poplar Bluff, MO, Steven M. Harris, Tulsa, OK, on the brief), for appellant.


Before GRUENDER and SHEPHERD, Circuit Judges, and JARVEY, District Judge.

The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa, sitting by designation.

GRUENDER, Circuit Judge.

Public Water Supply District No. 3 of Laclede County, Missouri (“the District”) brought this suit against nearby City of Lebanon, Missouri (“the City”), alleging that the City is illegally providing water and sewer services to customers within the District’s boundaries. The District argues that the City, in providing services to these customers, violated the requirement of 7 U.S.C. § 1926(b) that “[t]he service provided or made available through [the District] shall not be curtailed or limited.” Because we conclude that the District is not entitled to § 1926(b) protection for any of the disputed customers, with the possible exception of customers at one property development, we affirm in part and reverse and remand the district court's grant of summary judgment to the City.

I. BACKGROUND

The District was created in 1967 to provide water service to customers within boundaries established in the District's Decree of Incorporation. In 1998, the Decree of Incorporation was amended to authorize the District also to provide sewer service. On August 31, 2007, the District closed on a $2 million loan from the United States Department of Agriculture (“the USDA loan”). The USDA loan was made pursuant to 7 U.S.C. § 1926(a) and was for the purpose of extending and improving the District's sewer system. The USDA loan was secured by the District's net revenue from its sewer operations. As a federally indebted rural water association, the District became insulated from competition under 7 U.S.C. § 1926(b), which protects a rural water association's service area from certain incursions by nearby cities.
Specifically, § 1926(b) states that 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.

At the time the District closed on the USDA loan, the City was already providing sewer and water services to some customers within the District's boundaries. After the District closed on the USDA loan, the City extended service to additional customers within the District's boundaries, though not to any customers whom the District was already serving.

On October 2, 2007, the District filed this suit against the City, alleging that the City violated § 1926(b) by providing sewer and water services to certain customers within the District's boundaries. The District sought injunctive relief to prevent the City from continuing to serve these customers, as well as damages from the date the District closed on the USDA loan, August 31, 2007. This dispute centers on the District's claim that, as a result of its USDA loan for sewer development, § 1926(b) entitles the District to be the exclusive sewer and water service provider for customers to whom the District has made service available but to whom the City currently provides service. These disputed customers can be divided into three sets: (1) sewer customers the City began serving before August 31, 2007; (2) water customers, regardless of when the City began providing service to them; and (3) sewer customers living in seven tracts of properties that the City began serving after August 31, 2007. The district court granted the City's motion for summary judgment, holding that § 1926(b) does not entitle the District to be the exclusive service provider for any of these sets of disputed customers. The District appeals.

FN2. For simplicity we use the term “tracts of properties” to refer to these seven clusters of properties, which variously consist of neighborhood developments, nearby groups of residences, and individual residences.

II. DISCUSSION

“[W]e review a district court's grant of summary judgment de novo, construing the record in the light most favorable to the nonmoving party.” Irving v. Dormire, 586 F.3d 645, 647 (8th Cir.2009). The Consolidated Farm and Rural Development Act of 1961 authorizes the USDA to issue loans “to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies.” 7 U.S.C. § 1926(a)(1). We will refer to these associations as “rural districts.” The qualifying federal loans made to rural districts are “to provide for the application or establishment of 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.” Id. When such a loan is made, § 1926(b) protects the federally indebted rural district's service area from certain incursions by nearby cities.

[2][2] We have only once before addressed the merits of a claim based on § 1926(b). See Rural Water Sys. No. 1 v. City of Sioux Center, 202 F.3d 1035 (8th Cir.2000). In Sioux Center, we noted that “any doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the [USDA]-indebted party seeking protection for its territory.” Id. at 1038 (quoting Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1197 (10th Cir.1999)). Nonetheless, “[w]e are resolved that the power to redraft laws to implement policy changes is reserved to the legislative branch.” Doe v. Dep't of Veterans Affairs, 519 F.3d 456, 461 (8th Cir.2008). With these principles in mind, we proceed to address the District's claims with respect to each of the three sets of disputed customers.

A.

[3][4] The District closed on the USDA loan on August 31, 2007. The District argues that as of August 31 the City lost its right to serve sewer customers within the District's boundaries, even though the
City began serving many of those customers before the District obtained the USDA loan. The City urges us to reject the District's "continued service theory" by holding that the City's continuing to provide service to these customers does not violate § 1926(b) because the statute merely prevents cities from commencing service to new customers. Consequently, we must decide whether the timing of the City's initial provision of service to these customers*516 is relevant to whether the City violated § 1926(b). The scope of § 1926(b) protection, which depends in part on the relevance of the timing of the City's initial provision of service, is a question of statutory interpretation, which we review de novo, see Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC, 556 F.3d 690, 693 (8th Cir. 2009).

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." Jimenez v. Quarterman, 555 U.S. ----, 129 S.Ct. 681, 685, 172 L.Ed.2d 475 (2009). The key operative provision of § 1926(b) provides that a rural district's service "shall not be curtailed or limited." In this context, the verbs "curtail" and "limit" connote something being taken from the current holder, rather than something being retained by the holder to the exclusion of another. See The New Shorter Oxford English Dictionary 575, 1591 (4th ed.1993) (defining "curtail" as "[s]horten in ... extent or amount; abridge"; defining "limit" as "set bounds to; restrict"); see also CSL Utils., Inc. v. Jennings Water, Inc., 16 F.3d 130, 135 (7th Cir.1993) ("The cases and fragments of legislative history available to us all seem to have in mind curtailment resulting from substitution of some third party as a water-supplier for [the rural district].") (emphasis added). FN2 Moreover, § 1926(b)'s enumerated methods of curtailing or limiting a rural district's service area—"inclusion of the area ... within the boundaries of any municipal corporation" or "granting of any private franchise for similar service"—reinforce the notion that the statute prevents a city from taking customers served by a rural district, not a city's passive continuation of service to its customers. FN3 Thus, both the terms' ordinary meanings and their particular usages within the statute are inconsistent with the District's argument that it is entitled to take sewer customers whom the City started serving before the District obtained the USDA loan. These key terms suggest that a city curtails or limits service within the meaning of § 1926(b) when it initially provides service to a customer, not when it continues to do so.

FN3. The legislative history is consistent with such a reading. Subsection (b) was added to § 1926 in 1961 "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." S. Rep. 87-566, 1961 U.S.C.C.A.N. 2243, 2309 (emphasis added).

FN4. Section 1926(b) could be read to prohibit a city from curtailing or limiting a rural district's service only by these enumerated methods. While the City has neither altered its boundaries since the District obtained the USDA loan nor granted any franchise for service in the area, the district court held that § 1926(b) is not limited to those two types of incursions. Instead, the district court held that § 1926(b) also protects rural districts against other types of incursions that do not involve a boundary change or franchise grant. See Pub. Water Supply Dist. No. 3 v. City of Lebanon, No. 07-cv-3351, slip op. at 5 (W.D. Mo. June 26, 2008) ("While the City's reliance on the statutory language has some appeal, the remaining provisions of § 1926(b) and the broad application of the statute by the federal courts do not support such a literal reading."). On appeal, the City does not challenge the district court's holding on this issue. We assume for the purposes of this appeal that § 1926(b) protects the District against the City's provision of service, regardless of whether this alleged curtailment or limitation involved the City changing its boundaries or granting a franchise.

Furthermore, the plain language of the statute specifically restricts its application to "such associations." (Emphasis added.) Giving effect to the term "such" requires that we read the statute to protect a subset of all rural districts, namely, only those rural districts that have a qualifying federal*517 loan. Because the District claims that the timing of the City's initial provision of service is irrelevant, the District would essentially remove this limitation from the
statute, 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. Thus, the "well-established principle[ ] of statutory interpretation that require[s] statutes to be construed in a manner that gives effect to all of their provisions," United States ex rel. Eisenstein v. City of New York, --- U.S. ----, 129 S.Ct. 2230, 2234, 173 L.Ed.2d 1255 (2009), counsels against adopting the District's continued service theory as the proper interpretation of § 1926(b). The statute's plain language suggests that the scope of protection against competition is more limited than the District's continued service theory would allow.

Additionally, § 1926(b) includes a specific timing element. In particular, it provides that service "shall not be curtailed or limited during the term of such loan." This phrase limits the scope of a rural district's exclusive provider status to the period during which the qualifying federal loan is outstanding. The District's argument that the City's continuing to provide service to its existing customers violates § 1926(b) effectively eliminates this phrase from the statute. Under the District's view, at any point in time a rural district can obtain a qualifying federal loan and then challenge a city's continuing to provide service, regardless of whether a city's incursion occurred "during the term of such loan." Here again, we reject the District's interpretation as inconsistent with the rule that "statutes [are] to be construed in a manner that gives effect to all of their provisions," Eisenstein, 129 S.Ct. at 2234.\(^\text{FN5}\)

\(^{\text{FN5}}\) Although the District has not argued so, we note that a strict grammatical reading of the statute might suggest that the phrase "during the term of such loan" modifies only the "granting of any private franchise," which it immediately follows, rather than the earlier phrase "shall not be curtailed or limited." However, given the other statutory language we have already discussed and the purposes of the statute discussed below, we decline to adopt this narrower reading. See Crandon v. United States, 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"). Moreover, even under this alternative reading of the statute, the District's continued service theory would nullify the limiting phrase, "during the term of such loan," at least as it pertains to the granting of a franchise.

\(^{[5]}\) Finally, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." Dolan v. U.S. Postal Serv., 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006).\(^{\text{FN6}}\) "Congress enacted section 1926(b) to encourage rural \(\*$\) water development and to provide greater security for [USDA] loans." Sioux Center, 202 F.3d at 1038. Rejecting the District's continued service theory is not inconsistent with these purposes. Again, if § 1926(b) permitted rural districts to capture customers that a city began serving before a rural district obtained a qualifying federal loan, cities would not be willing to invest in the necessary infrastructure to serve customers within a rural district's boundaries because such investments would be rendered worthless by a rural district that obtains a qualifying federal loan. Creating such a disincentive would undermine the purpose of encouraging rural utility development. Additionally, rural districts can continue to use § 1926(b) to protect their exclusive right to serve their existing customer base during the time of the qualifying federal loan, thereby ensuring the continued security of the loan. In sum, the plain language of the statute, the rule in favor of giving effect to all terms in the statute, and our analysis of the statute's purposes all confirm that the City did not violate § 1926(b) merely by continuing to provide service to those customers it began serving before the District obtained the USDA loan.

\(^{\text{FN6}}\) With respect both to the sewer customers served before the District closed on the USDA loan and to water customers, the District argues that the question whether a particular interpretation furthers the policy goals of § 1926(b) is a question of fact, pre-
including summary judgment. We reject this argument. The underlying question remains one of statutory interpretation, a pure question of law. See Chandris, Inc. v. Latsis, 515 U.S. 347, 369, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) (“Because statutory terms are at issue, their interpretation is a question of law....”).

Other circuits have also addressed this question, though in cases presenting somewhat different facts. Analyzing § 1926(b)'s “curtailed” and “limited” language in a similar manner, the Sixth Circuit distinguishes between “offensive” and “defensive” uses of § 1926(b). See Le-Ax Water Dist. v. City of Athens, 346 F.3d 701, 708 (6th Cir.2003) (“The statute's use of phrases like ‘curtailed’ and ‘limited’ to describe the municipality's interference with the rural water association suggests that a rural water association must already be providing service to an area before the protections of § 1926(b) apply.”). In Le-Ax, the Sixth Circuit rejected a rural water district's attempt to use § 1926(b) to become the exclusive service provider for a new development that it had not previously served. Id. The Sixth Circuit adopted a categorical rule prohibiting rural districts from making “offensive” use of § 1926(b) by “seeking to use the statute to foist an incursion of its own on users... that it has never served or made agreements to serve.” Id. at 707. In contrast, the Le-Ax court read § 1926(b) to authorize “defensive” uses, allowing rural districts to “use the statute to protect [their] users or territory from municipal incursion.” Id.

We recognize that the Tenth Circuit has addressed this question twice before and taken a contrary approach, albeit without much discussion of the issue. See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 1192 (10th Cir.1999); Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192 (10th Cir.1999). Both Pittsburg County and Sequoyah County involved rural water districts that were previously federally indebted, but both districts later paid off their qualifying federal loans. Without active loans, § 1926(b) protection did not apply, and nearby cities began providing service to customers within the rural water districts. After the cities started providing service to these customers, the rural water districts acquired new qualifying federal loans under § 1926(a), restoring their § 1926(b) protection. In both cases, the Tenth Circuit held that the districts could sue to reclaim the customers that the cities began serving during the time between the districts' periods of federal indebtedness. On this view, “all § 1926 claims based on service by [a city] to customers within the limitations period were not otherwise barred by the fact that [the city] was serving those customers prior to the [subsequent] loan.” Pittsburg County, 358 F.3d at 713; see also id. (“The fact that a municipality had provided service to those properties prior to the qualifying federal loan was no bar in Sequoyah to claims arising out of a city's service during the period of indebtedness.”).

None of these cases is precisely analogous to this case. In Le-Ax, the rural district brought suit over customers outside the association's boundaries, while here the customers are within the District's boundaries. And unlike the rural districts in Pittsburg County and Sequoyah County, the District never had a qualifying federal loan before August 31, 2007, and thus never had § 1926(b) protection with respect to customers the City served before that date. Nonetheless, neither of those distinctions affects our analysis of this issue. To the extent there is a conflict between these cases, we find the Sixth Circuit's distinction between offensive and defensive uses of § 1926(b) in Le-Ax to be more persuasive and consistent with our reading of the statute. Section 1926(b) provides a shield, not a sword. Because we conclude that the City's continuing to provide service to customers it began serving before the District obtained the USDA loan does not violate § 1926(b), we affirm the district court's grant of summary judgment with respect to this set of customers.

FN7. In Ohio, rural water districts are not confined to providing service solely within their established boundaries. Ohio Rev.Code Ann. § 6119.01(A).

B. [6][7] The District next challenges the City's right to provide water service to customers within the District's boundaries. Although the USDA loan was secured to expand the District's sewer system and was secured only by its sewer revenues, the District argues that the USDA loan also triggers § 1926(b) protection with respect to its water service. We must determine whether “[t]he service provided or made available” under § 1926(b) refers solely to the service...
for which a qualifying federal loan was obtained and which provides the collateral for the loan, as the City argues, or to all services that a rural district provides, as the District would have us hold. This appears to be a question of first impression. As another question of statutory interpretation, we review the issue de novo. See Owner-Operator Indep. Drivers Ass'n, 556 F.3d at 693.

FN8 Other courts have addressed the related question whether § 1926(b) protection is limited to customers receiving service from the particular project being financed by the qualifying federal loan or whether it extends to all customers receiving the type of service financed by the loan. See Sequoyah County, 191 F.3d at 1198 n. 5; Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517, 524 (4th Cir.1999) (“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.”). We need not address this issue, since the District's argument focuses only on protection for other types of services, not other projects or areas receiving the same type of service.

We again begin with the plain language of the statute, Jimenez, 129 S.Ct. at 685, which refers to “[t]he service provided or made available.” Both parties argue that the plain language supports their position, and each accuses the other of reading additional terms into the statute. The District claims that adopting the City's interpretation would change the phrase “the service” into “the financed service,” adding a restrictive term to the statute. The City argues that adopting the District's interpretation would add an expansive term to the statute, changing “the service” into “all services.” These arguments underscore the ambiguity in the phrase “the service provided or made available.” The term “service,” standing alone, reasonably may be read to refer to a single type of service or to multiple types of service. Thus, § 1926(b)'s isolated use of the term “service,” without explanation, provides little insight into the interpretive question before us.

[8] However, “[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole.” United States v. Morton, 467 U.S. 822, 828, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984). Notably, § 1926(a) repeatedly employs both the terms “service” and “services.” In doing so, Congress distinguished between a single “service” and multiple types of “services.” Compare 7 U.S.C. § 1926(a)(4)(B) (“The term ‘project’ shall include facilities providing central service ....”), and 7 U.S.C. § 1926(a)(20)(E) (“[T]he Secretary may make grants to State agencies for use by regulatory commissions in states with rural communities without local broadband service ”), with 7 U.S.C. § 1926(a)(11)(B)(i) (directing the Secretary of Agriculture to consider “the extent to which the applicant provides development services,” which include training, establishing business centers, and analyzing business opportunities), and 7 U.S.C. § 1926(a)(20)(E) (describing grants to “cable operators that establish common carrier facilities and services ”), and 7 U.S.C. § 1926(a)(23) (describing grants “to local governments to improve the infrastructure, services, and business development capabilities of local governments”) (emphasis added throughout). In § 1926(b), Congress used only the singular term “service.” Read in pari materia with 7 U.S.C. § 1926(a), Congress's pattern of using the singular to refer to a single type of service while using the plural to refer to a collection of multiple types of services is decisive. Because § 1926(b) employs the singular term, we conclude that “the service provided or made available” is best interpreted to include only the type of service financed by the qualifying federal loan.

FN9 In this case, the USDA loan was both for improvements to the District's sewer system and was secured by sewer revenues. Therefore, we need not decide whether it is the type of service which provides the collateral for the loan or the type of service for which the loan was made that is entitled to protection. Here, the loan was not made to finance a water project, nor did the District's water revenues secure the loan.

As before, we also look to “the whole statutory text, considering the purpose and context of the statute,” Dolan, 546 U.S. at 486, 126 S.Ct. 1252, which in this case is “to encourage rural water development and to provide greater security for [USDA] loans,” Sioux Center, 202 F.3d at 1038. While adopting the District's broad view of the scope of protection would undoubtedly benefit the District and other rural districts, it would not promote rural water development.
because other services a rural district might happen to provide are irrelevant to maintaining the necessary economies of scale to allow rural utility associations to remain viable and to keep the per-user cost low for the service financed by the loan. See N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 915 (5th Cir.1996) (describing how Congress crafted § 1926(b) to address these issues). The District's position also is incompatible with the purpose of encouraging rural water development because expanding § 1926(b) to protect services unrelated to the qualifying federal loan would prohibit cities from providing other services to customers within a district's boundaries even when the city is perhaps better situated to do so, thereby forcing customers to remain with less desirable service providers. Turning to the second purpose, limiting the District's protection under the statute solely to the type of service being financed—sewer service in this instance—will not appreciably impact the security of the federal loan. The revenues from the District's sewer system secure the USDA loan; the District's water revenues are not collateral for the loan. The District's existing sewer customers and revenues remain protected under § 1926(b). In short, divorcing 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. Because we interpret "the service provided or made available" to be limited to the financed service, sewer service here, we affirm the grant of summary judgment to the City with respect to water customers within the District's boundaries.

C.

The District also challenges the City's provision of sewer service to customers at seven tracts of properties that the City did not begin serving until after the District closed on the USDA loan. This challenge represents a more typical § 1926(b) claim in that it involves both customers who were not served until after the District obtained the USDA loan and the same type of service financed by the loan. We thus apply the well-established test for determining whether a rural district is entitled to protection under § 1926(b). To qualify for protection, an entity must: (1) be an "association" under the statute, (2) have a qualifying federal loan, and (3) have provided or made service available to the disputed area. See, e.g., Sequoyah County, 191 F.3d at 1197. With respect to the customers at these seven tracts, the first two requirements are not in dispute. "Making service available has two components: (1) the physical ability to serve an area; and (2) the legal right to serve an area." Sioux Center, 202 F.3d at 1037. Because the district court granted the City's motion for summary judgment, we view the evidence concerning the District's physical abilities and legal rights in the light most favorable to the District. See Irving v. Dormire, 586 F.3d 645, 647 (8th Cir.2009).

In 1998, the District amended its Decree of Incorporation to authorize providing sewer service in addition to the water service it was already providing. The District claims that, at that time, it began designing and constructing a wastewater treatment facility. However, the District did not secure an operating permit that would allow for discharge of wastewater from that facility until May 30, 2008. By then, the City had already begun serving all of the disputed customers, with the exception of those in one tract known as Castle Rock.

1. Castle Rock

The City does not dispute that the District had the legal right to serve Castle Rock; rather, it challenges whether the District had the physical ability to serve these customers. Although the District had completed its wastewater treatment facility and obtained an operating permit for the facility at the time the City began serving Castle Rock, the District did not propose using this facility to provide service to customers at Castle Rock. Instead, the District proposed having Castle Rock's developer, Becky Burk, construct a new stand-alone treatment facility to serve those customers. This separate facility would treat wastewater using above-ground recirculating sand filters or bioremedia filters. The District does not provide much detail about this proposal, though it appears that individual septic systems would also need to be installed at each house. Indeed, the parties dispute even basic objective facts, such as the visual impact the facility would have on the surrounding development. Nonetheless, the District's expert averred that the facility, in whatever form it would take, would cost Burk approximately $360,000 and take approximately one year to construct.

Burk averred that the District's proposal of forcing her to build a stand-alone treatment facility was unacceptable. Burk intended Castle Rock to be an "upper-end" development, and she insisted that her customers would not tolerate the individual septic systems involved in the District's proposal. In fact,
Burk claimed that she would not have developed Castle Rock had she known that the District's proposed method of providing sewer service would be forced on her. The district court accepted Burk's testimony and held that because the District's proposal would not "reasonably conform to the ideals and standards a developer or customer in a similar situation would expect," the District had not made service available within the meaning of § 1926(b). As a result, the district court granted the City's motion for summary judgment with respect to Castle Rock.

[11][12][13] The district court misapplied the "made service available" test by improperly focusing on the preferences of the potential recipient of the service. The statute protects a rural district's service wherever it has been "made available," without restricting the methods of providing that service. The district court cited no authority for the proposition that courts should give dispositive effect to "the ideals and standards a developer or customer in a similar situation would expect." And we can find no support for that proposition either in the text of § 1926(b) or in the cases interpreting the statute. Although courts have recognized that a rural district's proposed method of providing service, if unreasonably costly or unreasonably delayed, can constitute a constructive denial of service, see Rural Water District No. 1 v. City of Wilson, 243 F.3d 1263, 1271 (10th Cir.2001), allowing recipients' preferences to restrict the acceptable methods through which a rural district can provide service would significantly dilute § 1926(b)'s protections.

We recognize that § 1926(b) can impose burdens on recipients, since granting rural districts an exclusive right to serve certain recipients also prevents recipients from choosing other service providers. This, however, is the choice Congress made in enacting the statute, and it is not the role of the courts to upset such policy decisions. See Integrity Floorcovering, Inc. v. Broan-Nutone, LLC, 521 F.3d 914, 918-19 (8th Cir.2008). Consistent with the statutory text, the proper inquiry is whether the District had "made service available." Typically, a rural district has discretion to determine the method of providing service, even if it conflicts with a potential recipient's stated preferences.

We therefore reverse the district court's ruling that the District's proposed method of providing service is insufficient under § 1926(b) because it does not conform to the "ideals and standards a reasonable developer or customer would expect."

FN10. The district court correctly held that the reasonableness of imposing the $360,000 cost on the developer depends on disputed issues of fact, and is therefore unsuitable for resolution at the summary judgment stage.

FN11. Of course, a rural district does not have unlimited discretion; a rural district has not "made service available" if the rural district's method of providing service amounts to a constructive denial of service. For instance, failing to provide a type of service that is generally accepted in the industry, failing to comply with state law requirements such as health and sanitation codes, or providing unreasonably costly or delayed service each might amount to such a constructive denial of service.

*523 [14] We decline to decide, in the first instance, whether the District's skeletal proposal is sufficient to satisfy the "made service available" test for the purposes of surviving summary judgment. Under the "pipes in the ground" test used in water service cases, courts examine "whether a water association 'has adequate facilities within or adjacent to the area to provide service to the area within a reasonable amount of time after a request for service is made.' " Sequoyah County, 191 F.3d at 1202 (quoting Bell Arthur, 173 F.3d at 526). Here, the District argues that it has "adequate facilities" in place, despite the fact that its proposal involves no existing facilities. We have not found any cases where a rural district has satisfied the "physical ability to serve" requirement in the absence of any facilities whatsoever. Cf. Lexington-S. Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230, 238 (6th Cir.1996) ("[A]n association's ability to serve is predicated on the existence of facilities within or adjacent to a disputed property." (emphasis added)). However, given the lack of factual development about the District's current infrastructure or its physical ability to provide service to Castle Rock, we remand to the district court for further proceedings concerning whether the District had "made service available" to Castle Rock.

2. The Pre-Permit Customers

In its motion for partial summary judgment, the City only challenged the District's legal right to serve the remaining six tracts, not whether the District had
the physical ability to serve these customers. The City argued, and the district court held, that because the District lacked an operating permit for its wastewater treatment facility, the District lacked the legal right to serve those tracts. The District argued that the lack of an operating permit did not prevent it from providing service, but only from discharging wastewater. The District presented alternative methods for temporarily dealing with the wastewater while the permit application was pending, including holding the wastewater until the District could obtain the necessary permit.

The District has taken a different position on appeal. In an effort to side-step the district court's adverse ruling, the District has abandoned its original proposal to provide service to these customers using its existing treatment facility. See Appellant's Br. at 45 (“The sewer facility ... for which an [o]perating [p]ermit was obtained in May 2008 [ ] is not the facility through which [the District] proposed to provide sewer service to the [d]isputed [c]ustomers.”); id. at 48 (“[The District] did not propose to serve the [p]re-permit customers with these facilities.”).

While it is not entirely clear what proposal the District seeks to substitute for its original plan, the District seems to suggest that it could provide service to these six tracts in a manner similar to its proposal for Castle Rock: forcing developers or customers to construct individual treatment facilities for the tracts of properties. Not only was this new proposal not meaningfully raised before the district court, but the record is almost entirely devoid of evidence regarding the factual details of the District's proposal to make service available, such as the expected cost and time required to build the facilities. FN12 In *524 response to the City's claim that the District is raising this proposal for the first time on appeal, the District has identified only one sentence in its motions before the district court that even arguably introduces the new proposal. See Reply Br. at 26-27 (“One of the ways [the District] has and can provide sewer service is for the developer to construct collection and treatment facilities utilizing recirculating sand filters or bio-media filters designed to meet the needs of the proposed development.”) (quoting Resp. to Mot. for Partial Summ. J. at 15, Dec. 31, 2008)).

FN12 In the same affidavit in which the District's expert estimated the cost and construction time for a stand-alone treatment facility to serve Castle Rock, the expert averred that a similar facility for Ostrich Lake, one of the remaining six tracts, would cost $160,000. Other than attaching the affidavit to its response to the City's motion for summary judgment, the District presented no meaningful argument regarding this new proposal to the district court. There is no evidence regarding facilities for the other five tracts.

[15][16][17] The District's approach to this issue is precisely the type of sandbagging we have frequently criticized. Our well-established rule is that “[a]bsent exceptional circumstances, we cannot consider issues not raised in the district court.” Shanklin v. Fitzgerald, 397 F.3d 596, 601 (8th Cir.2005).

The rationale for the rule is twofold. First, the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments. Second, there is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal. A litigant should not be surprised on appeal by a final decision there of issues upon which they had no opportunity to introduce evidence. A contrary rule could encourage a party to “sandbag” at the district court level, only then to play his “ace in the hole” before the appellate court.

Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373, 376 (8th Cir.1997) (quoting Stafford v. Ford Motor Co., 790 F.2d 702, 706 (8th Cir.1986)). Both rationales are implicated here. The paucity of evidence regarding the nature, cost, and reasonableness of the District's newly proposed facilities for each development would frustrate our analysis of this proposal raised for the first time on appeal. Nor should the District be allowed to avoid the district court's adverse ruling by changing horses midstream. The District opposed the City's partial summary judgment motion focusing exclusively on whether the operating permit for its wastewater treatment facility was necessary to “make service available” and merely proposed temporary solutions for providing service until that permit was issued. Notwithstanding the one vague sentence noted above, the District's new proposal of constructing stand-alone facilities for each property was not meaningfully presented to the dis-
district court. “The district courts cannot be expected to consider matters that the parties have not expressly called to their attention, even when such matters arguably are within the scope of the issues that the parties have raised.” Stafford, 790 F.2d at 706; see also United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”). We therefore decline to entertain the District's new proposal. Having abandoned its previous proposal, the District is left with no support for its claim that it had made service available to the customers at these six tracts of properties. As a result, we affirm the district court's grant of summary judgment to the City with respect to those customers.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment with respect to all of the challenged customers other than those at Castle Rock. With respect to Castle Rock, we remand for consideration of whether the District had “made service available,” without considering the recipient's preferred methods of receiving service. FN13

FN13. The District also argues that the district court erred in dismissing its state law claims without prejudice. The district court did so after finding that Missouri state courts have exclusive jurisdiction over these claims and, alternatively, that it was exercising its discretion to decline supplemental jurisdiction, in part because the state law issues were “novel and complex.” See 28 U.S.C. § 1367(c)(1). The District states that it does not challenge the district court's alternative rationale. “We sit to review judgments, not opinions,” so the District's disagreement with only one of two alternative reasons for the dismissal of its state law claims leaves us with no reason to decide the question. See United States v. Dugan, 912 F.2d 942, 944 (8th Cir. 1990). Because the District does not challenge the district court's discretionary decision not to exercise supplemental jurisdiction over the claims, we affirm the dismissal of these claims.

C.A.8 (Mo.), 2010.
Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo.
605 F.3d 511

United States Court of Appeals,
Tenth Circuit.
RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS, Plaintiff–Appellee/Cross–Appellant,
v.
CITY OF EUDORA, KANSAS, Defendant–Appellant/Cross–Appellee.

Nos. 09–3282, 09–3299.
Sept. 26, 2011.

Background: Rural water district filed § 1983 action alleging that city violated its exclusive right to provide water service to properties within its service area after city annexed certain properties within that area. City filed counterclaims for tortious interference with business advantage, fraud, abuse of process, and declaratory relief. After granting in part and denying in part parties’ cross-motions for summary judgment, 604 F.Supp.2d 1298, and granted in part district's motion to reconsider, 2009 WL 1360182, the United States District Court for the District of Kansas entered judgment on jury verdict in district's favor. Parties filed cross-appeals.

Holdings: The Court of Appeals, McKay, Circuit Judge, held that:
(1) instruction permitting jury to find in district’s favor if its acquisition of loan, rather than its acquisition of federal guarantee, was necessary to carry out its organizational purpose was reversible error;
(2) city had burden of establishing that district's costs of services were unreasonable, excessive, and confiscatory; and
(3) district court did not abuse its discretion by admitting evidence of city's threats to de-annex development.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Federal Courts 170B 908.1

Defendant waived any challenges on appeal to sufficiency of evidence in § 1983 action due to its failure to file renewed motion for judgment as matter of law, including challenges to any decisions at summary judgment where facts were in dispute, but it could still challenge district court's decisions pertaining to issues of law, jury instructions, and admission of evidence. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

To receive protection under statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan, water district must have both continuing indebtedness to United States Department of Agriculture (USDA) and have provided or made available service to disputed area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

To establish claim under statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan, water district must prove that its services were curtailed or limited by competing entity. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).
Although rural water district’s cooperation to secure United States Department of Agriculture (USDA) loan guarantee could qualify it as indebted association protected by statute prohibiting curtailment of any service provided by water district or association that was recipient of federal loan, it was necessary that such cooperation or acceptance of aid furthered purpose of its organization, and did not serve merely as protection against competition, and thus jury instruction permitting jury to find in district’s favor if its acquisition of loan, rather than its acquisition of federal guarantee, was necessary to carry out its organizational purpose was reversible error warranting new trial in district’s action alleging that city violated its exclusive right to provide water service to properties within its service area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[10] Water Law 405 \(\text{Page} \, 1898\)

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)2 Local Water Districts
405k1898 k. Powers and authority in general. Most Cited Cases

Under Kansas law, any reasonable doubt as to existence of water district’s power must be resolved against its existence.


405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

In order to determine whether water association has made service available, such that it is entitled to protection under statute prohibiting curtailment of any service provided by water district or association that was recipient of federal loan, focus is primarily on whether water association has in fact made service available, i.e., on whether association has proximate and adequate pipes in ground with which it has served or can serve disputed customers within reasonable time. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[12] Water Law 405 \(\text{Page} \, 2112\)

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

To establish entitlement to protection under statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan, water district’s costs of service need not be competitive with costs of services provided by other entities, including municipalities, but costs may not be unreasonable, excessive, and confiscatory. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[13] Water Law 405 \(\text{Page} \, 2112\)

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

In determining whether rural water district practices result in rates or assessments that are unreasonable, excessive, and confiscatory, so as to permit encroachment in area by municipal water system despite normal statutory prohibition against competition in areas where district has “made service available,” relevant factors are: (1) whether challenged practice allows district to yield more than fair profit; (2) whether practice establishes rate that is disproportionate to services rendered; (3) whether other, similarly situated districts do not follow the practice; (4) whether the practice establishes an arbitrary classification between various users. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).
In rural water district's action alleging that city violated its exclusive right to provide water service to current and prospective customers, in violation of statute prohibiting curtailment of any service provided by water district or association that was recipient of federal loan, if district established that it had made service available, then city had burden of establishing that district's costs of services were unreasonable, excessive, and confiscatory. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

Fire protection services may be considered solely to determine whether rural water district's prices for water service were unreasonable, excessive, and confiscatory, thus precluding district from asserting protection under statute prohibiting curtailment of any service provided by water district or association that was recipient of federal loan. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

Under Kansas law, water district only has legal right to provide service within its boundaries. West's K.S.A. 82a–619.
boundaries that is protected by statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan, so long as it does not use annexation as means to provide water service or limit water district's services to annexed area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[20] Water Law 405 C2111

405 Water Law
405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2111 k. Encroachment and curtailment in general. Most Cited Cases

Water Law 405 C2112

405 Water Law
405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

Under Kansas law, municipality that annexes property within rural water district is not compelled to engage in some post-annexation conduct that would necessarily curtail or limit water district's ability to serve annexed area. West's K.S.A. 12–540, 12–541(a).

[21] Statutes 361 C227

361 Statutes
361 VI Construction and Operation
361 VI(A) General Rules of Construction
361k227 k. Construction as mandatory or directory. Most Cited Cases

Under Kansas law, failure to comply with mandatory statute's requirements either invalidates purported transactions or subjects noncomplier to affirmative legal liabilities.

[22] Water Law 405 C2112

405 Water Law
405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

Statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan must be construed liberally to protect water districts from various forms of municipal encroachment. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[23] Water Law 405 C2112

405 Water Law
405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

Type of encroachment contemplated by statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan is not limited to traditional guise of annexation followed by city's initiation of water service; it also encompasses other forms of direct action that effectively reduce water district's customer pool within its protected area. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).


405 Water Law
405 XII Public Water Supply
405 XII(B) Domestic and Municipal Purposes
405 XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

City's threat to either de-annex protected area or force appraisal process may violate statute prohibiting curtailment of any service provided by water district or association that is recipient of federal loan by dissuading potential customers from seeking water
service from protected water district if customer is effectively forced to make choice between either ceasing water service from water district or finding new provider for all other public services. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

[25] Evidence 157 213(1)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k212 Offers of Compromise or Settlement
157k213 In General
157k213(1) k. In general. Most Cited Cases

Water Law 405 2115

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2115 k. Proceedings to resolve disputes. Most Cited Cases

District court did not abuse its discretion, in rural water district's action alleging that city violated its exclusive right to provide water service to current and prospective customers, in violation of statute prohibiting curtailment of any service provided by water district or association that was recipient of federal loan, by admitting evidence of city's threats to de-annex development if it was unable to provide water service, despite city's contention that statements were made during settlement negotiations, where evidence suggested that city had staked out its position that it would ultimately enforce its appraisal rights without district's immediate capitulation. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b); Fed.Rules Evid.Rules 401, 403, 408, 28 U.S.C.A.

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Before TYMKOVICH, McKAY, and GORSUCH, Circuit Judges.

McKAY, Circuit Judge.

This appeal arises out of a dispute between a city and a rural water district over their rights to serve customers in several recently annexed areas of Douglas County, Kansas. Rural Water District No. 4 (“Douglas–4” or “the District”) brought this suit against the city of Eudora under 42 U.S.C. § 1983, alleging the City violated Douglas–4's exclusive right to provide water service to current and prospective customers in violation of 7 U.S.C. § 1926(b). On appeal, this court is asked to resolve a host of federal and state legal issues concerning the competitive relationship between a dueling water district and local municipality. Finding jurisdiction under 28 U.S.C. § 1291, we affirm in part and reverse in part.

BACKGROUND

The parties are well aware of the facts, which we will not repeat in detail. In basic form, Douglas–4 was created to provide water service to areas of Douglas County, Kansas. Its purpose under Kansas law is to provide water to “promote the public health, convenience and welfare” of the community. See K.S.A. § 82a–614. Under its own bylaws, Douglas–4 was developed, inter alia, to “acquire water and water rights and to build and acquire pipelines and other facilities, and to operate the same for the purpose of furnishing water for domestic, garden, livestock and other purposes to owners and occupants of land located within the District, and others as authorized by these By–Laws.” (Appellant's Add. at 7.) To further its purpose, it is also authorized to borrow money, secure loans, and enter into contracts or cooperate with any person or governmental agency. (Id. at 7–8.)

Beginning in 2000, Douglas–4 developed and then enacted a plan to increase its service area and effectiveness by purchasing water from a nearby water district to meet increasing demand from existing and prospective customers, but it needed to borrow $1.25 million to finance construction of new infrastructure in order to exploit its new water source. It first secured a loan for the full amount from the Kan-
s Department of Health and Environment ("KDHE"), but upon a recommendation by the District's administrator, it decided to obtain part of its financing from a private bank backed by a federal guarantee from the U.S. Department of Agriculture ("USDA"). Ultimately, Douglas–4 decided to separate its debt into two loans: the first $1 million from the KDHE and the remaining $250,000 from First State Bank & Trust, a private bank. First State in turn entered into a guarantee agreement with Rural Development, a lending branch of the USDA. Douglas–4 does not deny that it pursued the guaranteed loan specifically for the added benefit of § 1926(b) protection, despite the additional costs to the District in the form of higher closing fees and interest rates.

In 2006, the city of Eudora, which also provides water service within its boundaries, annexed several areas around the southern edge of its city limits: Fairfield Addition (also known as the "Garber Property"), Meadow Lark Property, Grinnell Property, and Kurtz Addition. From May to September 2007, both Douglas–4 and Eudora repeatedly contacted the Fairfield Addition's owner, Doug Garber, to discuss his water needs. After the City's annexation, Douglas–4 notified Mr. Garber that it possessed the exclusive right to provide water service to his property. It also exchanged correspondence with Mr. Garber regarding cost estimates and a timeline to begin water service. For its part, Eudora informed Mr. Garber that it still intended to obtain water from Douglas–4 but it was still willing to work with him to provide water service. Eudora also informed Mr. Garber that it might de-annex his property should he refuse its water service.

Leading up to and during this same period, the parties communicated extensively with each other. From 2004 to mid–2007, Douglas–4 and Eudora engaged in a series of discussions regarding changes to both parties' territories as a result of the City's annexations. The parties held what would ultimately result in failed negotiations for a repurchase plan, to ensure that Douglas–4 could remain financially viable as Eudora annexed portions of Douglas–4's service area and began serving water to Douglas–4's customers.

Once the Garber property was annexed and Douglas–4 began speaking to Mr. Garber about water service, Douglas–4 notified Eudora that attempts by the City to provide water to the Garber property would violate the District's right to protection under § 1926(b). However, Eudora sought to continue where the failed negotiations ended. It notified Douglas–4 that, unless Douglas–4 submitted to an appraisal to sell its assets to Eudora by the end of September, the City would file suit to compel the District's compliance. Rather than accept the City's demands, Douglas–4 filed a complaint with the district court.

During the course of litigation, the district court issued several critical orders in which it denied both parties' motions for summary judgment, denied Eudora's motions in limine to exclude certain communications by City officials regarding attempts to provide water service to the affected areas, and rejected proposed jury instructions submitted by both parties. At the conclusion of a ten-day trial, the case was submitted to the jury by way of special interrogatories. The jury found that Douglas–4 had obtained § 1926(b) protection and Eudora had violated § 1926(b) in each of the disputed areas. FN1 The district court then enjoined Eudora from serving or limiting Douglas–4's service to these areas. Eudora's appeal and Douglas–4's cross-appeal followed.

FN1. According to the verdict form, the jury first answered “yes” to the general question of whether Douglas–4 had the power under Kansas law to cooperate with and enter into agreements with the federal government. It then determined for each affected property that Douglas–4 made water service available and that Eudora had limited or curtailed Douglas–4's water service. The jury also entered for each property the amount of damages. Specifically, the jury determined that $23,500.00 in damages arose from the Garber property and $1.00 in nominal damages arose from each of the three other properties. (See Appellant's App. at 1666–1669.)

DISCUSSION

[1][2][3] “Where a jury instruction is legally erroneous, we must reverse if the *975 jury might have based its verdict on the erroneously given instruction.” City of Wichita, Kan. v. U.S. Gypsum Co., 72 F.3d 1491, 1495 (10th Cir.1996). We therefore review de novo whether the district court's jury instructions correctly stated the governing law. See United States v. Platte, 401 F.3d 1176, 1183 (10th Cir.2005); Cann v. Ford Motor Co., 658 F.2d 54, 58 (2d...
“We will reverse a judgment entered upon answers to questions ... which inaccurately frame the issues to be resolved by the jury.”). We review evidentiary rulings for abuse of discretion and will not reverse unless the challenging party shows that the ruling was “based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment.” Phillips v. Hillcrest Med. Ctr., 244 F.3d 790, 799 (10th Cir.2001).

In addition to appealing the district court's legal conclusions, jury instructions, and admissions of evidence, Eudora challenges the sufficiency of the evidence at each step of the § 1926(b) analysis. It was required to renew these challenges at the close of all the evidence in a motion for judgment as a matter of law under Rule 50(a) and again after the entry of judgment as a renewed motion under Rule 50(b). Having failed to file a Rule 50(b) motion, Eudora has waived any challenges on appeal to the sufficiency of the evidence, see Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 404, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006), including challenges to any decisions at summary judgment where the facts were in dispute, see Haberman v. Hartford Ins. Gr., 443 F.3d 1257, 1264 (10th Cir.2006). However, it may still challenge the district court's decisions pertaining to issues of law, see Wilson v. Union Pac. R.R., 56 F.3d 1226, 1229 (10th Cir.1995), jury instructions, see Kelley v. City of Albuquerque, 542 F.3d 802, 818–20 (10th Cir.2008), and the admission of evidence, see Fed.R.Evid. 103(a).

FN2. Eudora claims the district court never entered a final judgment, and thus the time to file a 50(b) motion has yet to expire. Even if the district court did not enter a final judgment, we may nevertheless invoke jurisdiction under 28 U.S.C. § 1291. See Bankers Trust Co. v. Mallis, 435 U.S. 381, 386–88, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978); Burlington N. R.R. Co. v. Huddleston, 94 F.3d 1413, 1416 n. 3 (10th Cir.1996) (“Because the district court's order granting Plaintiff its requested relief and effectively terminated the action, we may properly exercise appellate jurisdiction over this appeal under § 1291.”). However, given the absence of a 50(b) motion, Eudora is still unable to challenge the sufficiency of the evidence.


FN4. This presumption does not mean, as Douglas–4 claims, that all doubts and evidentiary uncertainties must be resolved in favor of the indebted water district or that the City must meet a “clear and convincing”
standard on every issue for which it carries the burden of proof. Rather, we simply note that “[e]very federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted.” Sequoyah Cnty., 191 F.3d at 1197 (emphasis added).

We now turn to the first element of § 1926(b): Douglas–4’s qualifying indebtedness.

A. Douglas–4’s cooperation to secure a USDA loan guarantee may qualify it as an indebted association under § 1926(b), but only if its cooperation was necessary to carry out its organizational purpose.

1. Federal and State Law empower Douglas–4 to cooperate for and accept the benefits of a federal guarantee.

To obtain protection, a water district must first show it has a qualifying, continued indebtedness to the federal government, as the water district is protected only “during the term of such loan.” 7 U.S.C. § 1926(b). Under Section 1926(a), “such loans” include loans the government makes or insures, see id. § 1926(a)(1), and loans the government guarantees, see id. § 1926(a)(24). Therefore, under § 1926(b), the federal guarantee of Douglas–4’s private loan may be considered one “such loan” for purposes of meeting the requirements of § 1926(b).

[7][8] In addition to meeting the requirements set forth in § 1926(b), a water district's qualifying action (i.e. assumption of the qualifying loan or guarantee) must also fall within its enumerated powers under state law. As a quasi-municipal corporation, see Dedeke v. Rural Water Dist. No. 5, 229 Kan. 242, 623 P.2d 1324, 1331 (1981), 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, see Wiggins v. Hous. Auth. of Kansas Cty., 22 Kan.App.2d 367, 916 P.2d 718, 720 (1996); Hous. Auth. of Kaw Tribe of Indians of Okla. v. City of Ponca Cty, 952 F.2d 1183, 1192 (10th Cir.1991) (“Since political subdivisions are creatures of the state, they possess no rights independent of those expressly provided to them by the state.”). Indeed, “any reasonable doubt as to the existence of a particular power must be resolved against its existence.” Wiggins, 916 P.2d at 721. The state, by limiting a rural water district’s powers, is “ultimately free to reject both the conditions and the funding [of federal loans], no matter how hard that choice may be.” Pittsburg Cnty., 358 F.3d at 718.

*977 Turning then to K. S.A. § 82a–619, the statute that enumerates a rural water district’s powers, there is only one clause under which Douglas–4 may claim authority to accept a federal loan guarantee. Specifically, Douglas–4 may “cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary’s duly authorized representative necessary to carry out the purposes of its organization.” K.S.A. § 82a–619(g). Thus, Douglas–4 must have either cooperated or entered into an agreement with the USDA, and this cooperation or agreement must be necessary to carry out the purposes of its organization.

FN5. Douglas–4 claims it is also empowered to “accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to 16 U.S.C.A., secs. 590r, 590s, 590x–1, 590x–a and 590x–3, and amendments thereto,” and that this authority does not require that the aid be “necessary” in any form. See K.S.A. § 82a–619(g). However, this clause only applies to financial aid provided under the specific federal statutes listed “and amendments thereto.” The enumerated statutes, first enacted in 1937, were repealed by the Consolidated Farmers Home Administration Act of 1961 and are of no use to Douglas–4. Nor do we consider Congress’s repeal of § 590r et seq, and replacement with a radically different statutory scheme in § 1926 an amendment to the repealed sections. Compare 7 U.S.C. § 1926(b) (providing annexation protection for qualifying loans), with 16 U.S.C. § 590x–3 (no protection from annexation).

Here, although the guarantee agreement was between the USDA and First State Bank, Douglas–4 was the entity that sought the guarantee and hoped to benefit from it. Rural Development, a funding component of the USDA, provided Douglas–4 with a “Conditional Commitment for Guarantee,” which outlined the terms and conditions of the guarantee, and Douglas–4 then signed and returned the Com-
mitment documents to Rural Development. This interaction between Douglas–4 and the USDA may qualify as “cooperation” under K.S.A. § 82a–619(g), but the cooperation must be necessary to carry out a purpose of Douglas–4’s organization. And in this case, if Douglas–4’s cooperation is to be necessary, the guarantee itself must too be necessary.

The district court determined that, in its view, “the guarantee [was] just a piece of” the loan and was not something for which Douglas–4 contracted. (Appellant’s App. at 3417). It therefore considered the guarantee and the loan to be “one and the same.” (Id. at 3402.) Based on this conclusion, it directed the jury at the close of trial to determine whether “the loan guaranteed by [the] Federal Government was necessary.” (Id. at 1648 (emphasis added.).)

By allowing the jury to consider the loan as a trigger for Douglas–4’s indebtedness, the district court shifted the focus of the jury’s inquiry away from the actual subject matter of the cooperation, i.e., the guarantee. Yet while the loan and the guarantee are certainly related, they are not one and the same. A loan may be pursued either with or without a guarantee. Each may be contracted for with or without government assistance. Each has its own unique purpose. Generally, a loan functions as a source of funds, see USDA Rural Development, Water and Waste Disposal Direct Loans and Grants, www.rurdev.usda.gov/UWP-dispdirectloansgrants.htm (last visited Aug. 15, 2011), whereas a guarantee serves to bolster an organization’s existing credit, see USDA Rural Development, Water and Waste Disposal Guaranteed Loans, www.rurdev.usda.gov/UWP-dispguaranteedloan.htm (last visited Aug. 15, 2011).

Although each has its own purpose and must be analyzed independently, without a loan there is nothing to guarantee. Thus, *978 for a guarantee to be necessary the underlying loan must also be necessary. The converse, however, is not always true: not every loan gives rise to a guarantee. Therefore, even if the parties would agree that the loan was necessary to carry out the purposes of Douglas–4’s organization, Douglas–4 must still prove that its cooperation with the USDA—i.e., the guarantee—was also necessary. The jury was not asked to consider this question. This error alone entitles Eudora to a new trial on this one issue.

2. Douglas–4’s cooperation must relate to one of its purposes for the cooperation to be necessary.

Douglas–4 and Eudora also disagree over what exactly constitutes a “necessary” cooperation or agreement under Kansas law, with both parties challenging the district court’s jury instruction on the matter. Instruction No. 17 first stated that the guaranteed loan must be:

necessary for: (1) an operational purpose identified under Kansas law and Douglas–4’s bylaws; (2) a business purpose identified under Kansas law and Douglas–4’s bylaws; or (3) protecting Douglas–4 from impairment of its ability to fulfill an operational or business purposes [sic] identified under Kansas law and Douglas–4’s bylaws.

The term “necessary” does not mean there must be showing of absolute need.

(Appellant’s App. at 1648.) The instruction then listed for the jury Douglas–4’s purposes under Kansas law and its own bylaws. Last, the instruction informed the jury:

Douglas–4 did not have the power under Kansas law to cooperate with and enter into agreements with the Federal Government for the sole purpose of securing federal protection under 7 U.S.C. § 1926(b). If obtaining federal protection under 7 U.S.C. § 1926(b) was Douglas–4’s only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora.

(Id. at 1649.)

Douglas–4 argues that the Kansas legislature left the determination of necessity to the discretion of the acting water district, and that the burden of proof is upon the party challenging the water district’s exercise of discretion to establish that the district’s decision was the result of fraud, bad faith, or abuse of discretion. See, e.g., Steele v. Mo. Pac. R.R. Co., 232 Kan. 855, 659 P.2d 217, 222 (1983) (applying a “reasonable discretion” standard to determine the necessity of a railroad’s exercise of eminent domain). Eudora in turn argues that Kansas’s statutory scheme does not permit Douglas–4 to claim monopoly protection—or the strength of its business that would result from such protection—is necessary to its organization. Nor, it claims, does any statute grant Douglas–4

reasonable discretion or a presumption to determine for itself whether a loan or guarantee is necessary.

The legislature did not further define in K.S.A. § 82a–619 the meaning of “necessary to carry out the purposes of [a water district’s] organization.” However, parallel language exists, at least in part, across Chapter 82a. Other than two similar occurrences within § 619(e) and § 619(h), the only identically worded limitation in Chapter 82a is found in § 606, which authorizes rural water supply districts to “construct, install, maintain and operate such dams, wells, and other works and such appurtenant structures and equipment as may be necessary to carry out the purposes*979 of its organization.” FN6 But while the Kansas legislature limited rural water and water supply districts’ exercise of some powers to those actions necessary to the purposes of their organizations, it expressly granted discretionary power in other circumstances. See K.S.A. § 82a–610 (authorizing a water supply district board to levy maintenance fees of “such amount as in its judgment is necessary to properly maintain and operate such works”); id. § 82a–644 (authorizing water district boards to change the bylaws of consolidated districts “as the directors shall deem necessary”); id. § 82a–1028 (authorizing groundwater management districts to buy and sell water and property rights that, “in the opinion of the board, [are] deemed necessary or convenient”). Other sections employ different language that may at first appear restrictive, but would likely result in a similar grant of discretion. See, e.g., id. § 82a–618 (directing rural water district boards to adopt rules and regulations “as are deemed necessary for the conduct of the business of the district”). Yet, other sections grant express discretionary authority to the state rather than to the district. See, e.g., id. § 82a–1022 (authorizing the chief engineer of Kansas’s Division of Water Resources to “make any necessary modifications” to a proposed water district map “so that, in the opinion of the chief engineer, a manageable area will result”).

FN6. The same language can also be found outside of Section 82a in K.S.A. § 19–3531 and § 80–1618.

Douglas–4 asks this court to view the question of necessity with the same level of deference given under Kansas law to decisions made by public utilities, for, as Douglas–4 points out, “[i]n law and in fact, a rural water district exercises the powers of a public utility.” Dedke, 623 P.2d at 1331. If the deference given to utilities broadly applied to all water-district actions, then presumably Douglas–4 could simply assert any reasonable excuse to justify taking out the private loan. Cf. Schuck v. Rural Tel. Serv. Co., 286 Kan. 19, 180 P.3d 571, 576–78 (2008) (holding that utility company’s exercise of eminent domain was “necessary to [its] lawful corporate purpose” where it unintentionally installed a cable outside of a preexisting easement and then asserted after the fact that placing the cable along the easement would have caused a service interruption).

[10] However, the cases under which the Kansas Supreme Court has favorably compared a water district’s powers to those of a public utility appear limited to the realm of eminent domain. Nor is it clear the reasoning underlying a favorable comparison between public utilities and water districts is even applicable to a case where a water district seeks some form of federal aid to protect it from market competition. For example, in General Communications Sys- tem, Inc. v. State Corp. Commission, 216 Kan. 410, 532 P.2d 1341, 1348 (1975), the Kansas Supreme Court held that, for the issuance of public utility certificates, “necessity does not necessarily mean there must be a showing of absolute need,” but rather that “the word ‘necessity’ means a public need without which the public is inconvenienced to the extent of being handicapped.” It is unclear how this use of the word “necessity” for a “public need” would apply by analogy to the exercise of powers reserved to water districts for at least the incidental benefit of protection from competition. Furthermore, we are reminded that under Kansas law, any reasonable doubt as to the existence of a *980 water district’s power must be resolved against its existence.

Douglas–4’s decision to seek out a federal guarantee must therefore be justified by more than the incidental monopoly protections afforded by § 1926(b); the guarantee must further at least one of the District’s purposes as a rural water service provider as provided in its charter, bylaws, or enacting statutes. Protection from competition does not suffice. Nor can Douglas–4 justify its cooperation by appealing to the abstract goals of maintaining its corporate existence, profits, or integrity without some direct association to an enumerated purpose under its charter, bylaws, or relevant statutes.
This does not mean that Douglas–4's cooperation with the USDA must be “absolutely necessary,” i.e., that it could not receive financing without the guarantee. Nor must Douglas–4 prove that a guarantee was the only or even the cheapest course of action available. Additionally, nothing within §82a–619, or any other section governing water districts, prohibits a water district from benefitting from the protections of §1926(b) so long as its triggering cooperation or acceptance of aid furthered a purpose of its organization.

To conclude, because the jury instructions incorrectly framed the necessity issue, we must reverse, vacate the judgment, and remand for a new trial for the limited purpose of determining whether Douglas–4's cooperation to secure the federal guarantee was necessary for the purposes of its organization.\[12\]

FN7. It is appropriate for the trial court to limit retrial here only to the issue of necessity. “A principal advantage of using a special rather than a general verdict is that an error may only affect a few of the trial court's findings, thus limiting a new trial or vacatur of the judgment to the issues covered by the tainted findings.” United States v. Ofchinick, 883 F.2d 1172, 1180 (3rd Cir.1989); see generally David A. Lombardero, Do Special Verdicts Improve The Structure of Jury Decision-Making?, 36 Jurimetrics J. 275, 277–78 (1996) (observing that special verdicts facilitate appellate review and “may promote judicial economy by limiting the issues in a possible retrial”).

B. The district court's decisions and portions of the jury verdict pertaining to the “made services available” prong are affirmed.

[11] To receive the protections afforded by §1926(b), Douglas–4 must also establish it “made services available” to the affected areas “prior to the time an allegedly encroaching association began providing service.” Sequoyah Cnty., 191 F.3d at 1202 (internal brackets and quotation marks omitted). “In order to determine whether a water association has made service available, the focus is 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 custom-
ers within a reasonable time.” Rural Water Dist. No. 1, 243 F.3d at 1270 (internal quotation marks omitted). To meet this test, the water district must demonstrate 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.

The parties dispute several issues of law pertaining to the “made services available” prong, discussed below.

1. The burden of proving unreasonable, excessive, and confiscatory costs rests with Eudora.

The parties first disagree over whether Eudora must prove that Douglas–4's costs of services are unreasonable, excessive, and confiscatory, or whether Douglas–4 must prove the counterfactual.

*981 [12][13] Even where a rural water district 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)” Id. at 1271. The water district's costs of service need not be competitive with the costs of services provided by other entities, including municipalities, but “the protection granted ... by §1926(b) should not be construed so broadly as to authorize the imposition of any level of costs.” Id. Thus, costs may not be unreasonable, excessive, and confiscatory. See id. Although a determination of the reasonableness of costs is based on the totality of the circumstances, we have also identified four non-exclusive factors from Kansas law which help guide the factfinder in its determination: “(1) whether the challenged practice allows the district to yield more than a fair profit; (2) whether the practice establishes a rate that is disproportionate to the services rendered; (3) whether other, similarly situated districts do not follow the practice; (4) whether the practice establishes an arbitrary classification between various users.” Id.

[14] Eudora argues that Douglas–4 carries the burden of proving that its costs are not unreasonable, excessive, and confiscatory because the question of costs falls under the broader “made services available” prong, which the water district generally must establish. However, we have previously held that even if the water district meets the “pipes in the ground” test, then it is up to the defending city to show that the water district's rates are unreasonable,
excessive, and confiscatory. See id. at 1272 (“[T]he City should be afforded an opportunity to show that Post Rock's practice was excessive, unreasonable, and confiscatory. If the City makes such a showing, then the court should conclude that the water district has not provided or made service available.”) (internal quotation marks and brackets omitted). This distribution of burdens also aligns our case law with the decisions of the Kansas Supreme Court. See, e.g., Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist. No. 6, 217 Kan. 421, 537 P.2d 210, 217 (1975) (holding that water rates set by a municipal corporation such as a water district are generally presumed to be valid and reasonable until the contrary has been established by the challenging party).

2. The district court properly informed the jury that the cost of fire protection is relevant to the issue of whether Douglas–4’s costs of service are unreasonable, excessive and confiscatory.

In its cross-appeal, Douglas–4 challenges the district court's jury instruction that the cost of fire protection services may be considered when determining the reasonableness of its cost of services. Specifically, the court informed the jury in Instruction No. 20 that:

Water service does not include water service for fire protection. Thus, to provide or make service available, Douglas–4 is not required to provide or make water service available for fire protection.

But, in determining whether Douglas–4’s prices for water service were unreasonable, excessive, and confiscatory, you may consider the quality of water service that could be provided by Douglas–4, including whether and to what extent it could provide water for fire protection.

(Appellant's App. at 1652.) Douglas–4 argues that because it is not required to provide fire protection any fees it charges to offer fire protection to its customers are irrelevant.

[15] The District reads too much into this circuit's case law on fire protection. *982 It 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. See, e.g., Rural Water Sewer, 659 F.3d at 1066 (reviewing the case law on fire protection and concluding that the “ability to provide fire protection is simply not relevant to the specific question of whether [a rural water district] has adequate pipes in the ground to ‘make service available’ for purposes of the § 1926(b) protection from competition”); Sequoyah Cnty., 191 F.3d at 1204 n. 10 (“[A] water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b)” (emphasis added). But in cases where a water district's fees are at issue and the fact-finder must—as we have previously held—analyze these costs under the totality of the circumstances, an inspection of the nature and cost of all services offered by the water district might very well include an inquiry into costs associated with fire protection.

[16] Should a water district decide to provide fire-protection services, its pricing of such services could also bear on several of the factors outlined in Rural Water District No. 1. A water district may charge excessive fees for fire protection where no competing provider exists, or it may charge higher fees for fire protection only to lowball its fees for residential water. Perhaps it charges a flat fee for all water service when only some of its customers receive fire protection, thus providing more benefits to some customers over others. The cost of fire protection within the district's broader pricing scheme could allow the district to yield more than a fair profit, establish a rate that is disproportionate to the services rendered, or establish an arbitrary classification between various users. We therefore find no legal error in the district court's conclusion that fire-protection services may be considered solely to determine whether Douglas–4’s prices for water service were unreasonable, excessive, and confiscatory.

Of course, at no time does a water district's decision to provide or forgo fire-protection services affect its ability to establish that it has sufficient “pipes in the ground” to make service available, and it is up to the party challenging the water district's § 1926(b) protection to prove that the water district's costs are unreasonable, excessive, and confiscatory. Moreover, costs must be examined individually for each property. See Rural Water Dist. No. 1, 243 F.3d at 1271. Thus, the relationship between fire-protection services and costs is highly context-specific.

Last, we note that Eudora cannot now debate
whether Douglas–4's costs of services were in fact unreasonable, excessive, and confiscatory because it has waived its arguments on the sufficiency of the evidence.

3. Douglas–4 lacks the authority under state law to provide service to the Church Property.

Douglas–4 also challenges the district court's dismissal of its claim that Eudora curtailed Douglas–4's service to property owned by the First Southern Baptist Church of Eudora. At issue is whether Douglas–4 may legally serve water to properties outside its boundaries such that it could plausibly make service available and therefore claim protection under § 1926(b). We review the district court's dismissal of Douglas–4's claim de novo, see Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1191 (10th Cir. 2009), reversing only if Douglas–4's complaint states a claim for relief that is plausibly on its face, see *983 Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We do not, however, accept as true any of Douglas–4's legal conclusions. See id.

Eudora annexed the church property after the start of this litigation. At no time was the property within Douglas–4's geographic boundary. Douglas–4 then obtained leave to file a supplement to its first amended complaint, alleging § 1926(b) protection from the City's provision of water service to the church property. It claimed Eudora violated § 1926(b) by annexing the property and then offering incentives to the church to obtain water service from it rather than from Douglas–4. On the City's motion to dismiss, the district court concluded that Kansas law did not authorize Douglas–4 to serve the church property. Viewing the Kansas statutory scheme in its entirety, the court determined that a water district only has the legal right to provide service within its boundaries. On appeal, Douglas–4 challenges the district court's construction of the relevant statutes.

As part of a court's determination that a water district made service available, it must necessarily evaluate whether the water district possesses the legal authority to make service available. See Sequoyah Cnty., 191 F.3d at 1201 n. 8 ("Without a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection."). Kansas law does not expressly permit or prohibit a rural water district from serving customers outside of its boundaries. See K.S.A. § 82a–619. However, a review of the statutes concerning rural water districts reveals a clear association between a water district's geographic boundaries and those laws pertaining to its corporate governance, facilities, and operations. For example, a petition to create a rural water district must be signed by property owners within the district's proposed boundaries and state that lands within the boundaries lack an adequate water supply. See id. § 82a–614. A water district possesses the express power of eminent domain only within its boundaries. See id. § 82a–619(a). It may employ labor "necessary to the proper performance of such work or improvement as is proposed to be done within any such district." Id. § 82a–620 (emphasis added). To attach lands outside the district, the new landowners must follow procedures similar to those in § 82a–614: a petition must be signed by owners of the land within the newly proposed area stating that such lands are without adequate water supply, see id. § 82a–622, and upon the county's approval, those landowners are entitled to subscribe to the water district's benefit units, see id. § 82a–624.

[17] There is no indication within the statutory scheme of any authority that suggests water districts may serve customers outside their boundaries. Cf. id. § 82a–621 (permitting “[o]wners of land located within the district who are not participating members” to subscribe to benefit units) (emphasis added); id. § 82a–619(f) (authorizing the power to contract with cities or counties to treat wastewater “within the boundaries of the district”); id. § 82a–625 (authorizing the power to construct new works “within such district”). Although § 82a–619 does provide water districts with the general power to “contract” and to “construct, install, maintain and operate” facilities “necessary to carry out the purposes of its organization,” the statutory scheme leaves more than a reasonable doubt as to the existence of the power to provide water service outside of a district's boundaries. We thus affirm the court's dismissal of Douglas–4's claim on the church property.

*984 C. The district court's decisions and portions of the jury verdict pertaining to curtailment or limitation of Douglas–4's water service are affirmed.

We next review the legal grounds upon which the district court based its conclusion that Eudora curtailed or limited Douglas–4's water service. With-
out the City's sufficiency-of-the-evidence arguments, we are left with two legal issues to resolve: first, whether a city's annexation of a protected area can, standing alone, violate § 1926(b); and second, whether a city's threats or solicitations regarding water service may, in the alternative, serve as the violative act.

7 U.S.C. § 1926(b) prevents a municipality from curtailing or limiting water service “by inclusion of the area served by [a protected] association within the boundaries of any municipal corporation or other public body.” Although it annexed the affected area, Eudora never actually provided water service to any of Douglas–4’s customers or prospective customers. There are instead two possible bases for Douglas–4’s 1926(b) claim: Eudora's annexation of the affected areas, and Eudora's alleged threats to Douglas–4 and Douglas–4's customers that it might elect to de-annex the affected areas or condemn Douglas–4's assets. Eudora argues that neither annexation nor threats to de-annex or appraise Douglas–4’s assets may be treated as actual curtailments or limitations under § 1926, while Douglas–4 asserts that both acts violate the statute. We address each in turn.

1. Annexation alone does not necessarily curtail water service.

[18][19] As a matter of federal law, annexation alone does not cause curtailment; rather, there must be some further action that limits the protected water district’s ability to serve its customers. See Glenpool, 861 F.2d at 1214 (“A city may not legally use inclusion of [an area] within the boundaries of any municipal corporation as a springboard for providing water service to the area, and thereby limit the service made available by [a protected water district].”) (emphasis added) (internal quotation marks omitted). A city may annex land within a water district’s boundaries so long as it does not use the annexation as a means to provide water service or limit the water district's services to the annexed area.

[20][21] Similarly, as a matter of Kansas law, an annexing municipality is not compelled to engage in some post-annexation conduct that would necessarily curtail or limit a water district's ability to serve the annexed area. K.S.A. §§ 12–540 and 541(a), enacted by the Kansas legislature in 2010, describe the process by which a city may, if it chooses, designate itself or some other water supplier for the recently annexed area.228 Following annexation, the rural water district shall remain the water service provider to the annexed area unless the city gives written notice designating a different supplier.” K.S.A. § 12–541(a). Or, “[f]ollowing annexation ..., the city and the [water] district may contract for the district to provide water service to all or certain portions of the annexed area.” Id. § 12–540. Nor is the city required to impose a franchise, license, or permit should the water district retain its water service over an annexed area. Id. (“If the agreement includes a provision for the payment of a franchise fee to the city, such agreement shall be subject to the provisions of K.S.A. § 12–2001 et seq.”). Because §§ 12–540 and 541(a) do not obligate Eudora to violate § 1926(b), annexation alone cannot serve as the sole ground for Douglas–4’s claim against Eudora.

FN8. K.S.A. § 12–527, the statute cited in Douglas–4’s briefs, stated: “[w]henever a city annexes land located within a rural water district ... the city shall negotiate with the district” to acquire title to the district's assets within the annexed area. However, it was repealed in March 2010 and replaced by K.S.A. § 12–540 et seq. See 2010 Kan. Sess. Laws Ch. 15, House Bill No. 2283 (March 24, 2010). We thus apply the law in existence at the time of this appeal. See State ex rel. Stephan v. Bd. of Cnty. Comm’rs of Lyon Cnty., 234 Kan. 732, 676 P.2d 134, 139 (1984) (“When called upon to consider legislative enactments which follow trial court rulings, this court has not hesitated.”).

Yet, we also conclude that the enactment of K.S.A. § 12–540 et seq. “did [id] nothing more than clarify the ambiguities in the statute rather than [ ] change the law.” Trees Oil Co. v. State Corp. Comm’n, 279 Kan. 209, 105 P.3d 1269, 1285 (2005). Even § 12–527’s directive that the city “shall negotiate with the district” to acquire title would not necessarily compel the City to acquire Douglas–4’s assets. In Kansas, statutory provisions directing these types of proceedings “are not regarded as mandatory[ ] unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.” Paul v. City of Manhattan, 212 Kan. 381,
Similarly, “failure to comply with the requirements of a mandatory statute either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities.” Wilcox v. Billings, 200 Kan. 654, 438 P.2d 108, 111 (1968). Section 12–527 contained neither proviso. Thus, if we apply K.S.A. § 12–527 rather than § 12–540 et seq., we reach the same conclusion.

2. A competing municipality may, however, curtail services through threats if the threats effectively limit the water district’s ability to serve existing customers or acquire potential customers to whom it would otherwise provide service.

We must also determine whether a city’s threat to either de-annex a protected area or force an appraisal process violates 7 U.S.C. § 1926(b) by dissuading potential customers from seeking water service from the protected water district. The district court concluded that threats could limit Douglas–4’s ability to provide water service if the threats deterred existing or potential customers from using the water district’s services. On appeal, Eudora argues that such actions do not rise to the level of “competition” contemplated by § 1926(b).

[22][23] We must first apply the general principle that “§ 1926(b) indicates a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means.” Pittsburg Cnty., 358 F.3d at 715 (emphasis omitted). We therefore construe § 1926(b) liberally to protect water districts from the various forms of municipal encroachment. See id. Indeed, the type of encroachment contemplated by § 1926(b) is not limited to the traditional guise of an annexation followed by the city’s initiation of water service. It also encompasses other forms of direct action that effectively reduce a water district’s customer pool within its protected area. See id. at 716 (“[T]he question becomes whether McAlester’s sales to customers ... purport to take away from Pitt 7’s § 1926 protected sales territory.”).

[24] If a city informs a water district’s customer that it will de-annex his property unless he requests water from the city and not the water district, the customer is effectively forced to make a choice: either cease water service from the water district or find a new provider for all other public services. Under these circumstances, the city’s conduct creates a wedge between the water district and its customer anathematic to the protections intended by Congress. The property owner’s dependence on the city for virtually all non-water services, from road and sewer maintenance to police and fire security, puts him—and by association the servicing water district—in a vulnerable position. It very well may prevent the water district from further developing and maintaining its customer base.

However, a city may instead act in a manner that does not curtail or limit water services provided or made available by a protected district. This might occur where, after annexation, a city allows the water district to continue as before. Or it may initiate negotiations with the district for purchase of the district’s assets. When a city first notifies a water district of its intent, there is nothing impeding a customer from obtaining—or the water district from providing—water services. Under Kansas law, for instance, the parties still must agree on the assets’ value. If they cannot agree, then no change in water service provider shall occur until at least 120 days pass and the parties complete mandatory mediation. See K.S.A. § 12–541(a). If mediation is unsuccessful, only then is a third-party appraiser appointed. Throughout this entire period, the water district may continue to provide or make available water service, and ultimately the city may decide to either assert or waive its appraisal rights as the situation develops. Of course, a city’s assertion of appraisal rights may give rise to an actual curtailment or limitation, but this occurs only when there is evidence that the city’s assertions impeded the water district’s ability to provide or make service available or deterred customers from obtaining the water district’s services.

Eudora’s remaining arguments that target whether its communications to Douglas–4 and Mr. Garber actually curtailed or limited Douglas–4’s ability to provide or make service available to any of the affected properties challenge the sufficiency of the evidence and are waived.

[25] Eudora also objects to the admissibility of
so-called “threat” evidence based on a lack of relevance under Rule 401 and its potential for prejudice under Rule 403. Specifically, it challenges the admission of various letters from Eudora’s attorney to Mr. Garber’s attorney and Douglas–4’s attorney regarding Eudora’s intent to appraise Douglas–4’s property, and statements by Eudora’s attorney to Mr. Garber contemplating de-annexation of Mr. Garber’s development should Eudora be unable to provide water service. Yet, evidence that Eudora sought to influence, deter, or impede potential customers within Douglas–4’s protected service area goes to the very heart of Douglas–4’s theory of the case, and any such communication will make more or less probable that Eudora effectively curtailed or limited Douglas–4’s ability to serve or make available its water service. The district court did not abuse its discretion by admitting such evidence.

Eudora also claims that letters between its attorney and Douglas–4’s attorney were settlement negotiations and therefore should have been excluded under Rule 408. Upon reviewing the letters, the district court did not find evidence of “discussions between these two parties trying to work this out, trying to settle it, [or] trying to compromise,” (Appellant’s App. at 1805), but rather found evidence suggesting Eudora had staked out its position that it would ultimately enforce its appraisal rights without Douglas–4’s immediate capitulation. For example, in his letter of September 18, 2007, counsel for Eudora informed counsel for Douglas–4 that Eudora planned to file suit against Douglas–4 if it did not begin complying with Kansas’s appraisal law by October 1. And in his letter of September 21, 2007, counsel for Eudora informed Douglas–4 it would immediately file suit if Douglas–4 took “any further action to expand its service into City limits” prior to October 1. (Appellant’s Add. at 52.) By contrast, the district court did exclude portions of an earlier 2006 letter, (id. at 189–90), which contained elements of “a classic settlement offer,” (Appellant’s App. at 2675). We see no abuse of discretion in the district court’s decision to distinguish between letters containing clear settlement offers and letters containing near-term demands for immediate compliance alongside promises of a possible lawsuit.

4. Eudora may not challenge the sufficiency of the evidence pertaining to its curtailment of the other properties.

The City’s challenge to the jury verdict as it pertains to the non-Garber properties is waived for failure to file a Rule 50(b) motion.

D. Douglas–4’s remaining claims on cross-appeal are not subject to review.

Finally, Douglas–4’s remaining challenges in its cross-appeal have no bearing on the ultimate outcome of this case and are therefore unavailable for review. See, e.g., Affiliated Ute Citizens v. Ute Indian Tribe, 22 F.3d 254, 255 (10th Cir.1994) (“A prevailing party may not appeal and obtain a review of the merits of findings it deems erroneous which are not necessary to support the [district court’s] decree.”).

CONCLUSION

The district court’s judgment is REVERSED and the trial verdict VACATED. The matter is REMANDED for further proceedings solely on the issue of whether Douglas–4’s cooperation to secure a Rural Development guarantee was necessary to carry out the purposes of its organization. All other issues on appeal and cross-appeal are AFFIRMED. Both parties’ motions to strike portions of each other’s reply briefs are DENIED.

C.A.10 (Kan.), 2011.
659 F.3d 969

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United States Court of Appeals, Tenth Circuit.

RURAL WATER SEWER AND SOLID WASTE MANAGEMENT, DISTRICT NO. 1, LOGAN COUNTY, OKLAHOMA, an agency and legally constituted authority of the State of Oklahoma, Plaintiff–Counter–Defendant–Appellee,

v.

CITY OF GUTHRIE, an Oklahoma Municipality; The Guthrie Public Works Authority, a public trust, Defendants–Counterclaimants–Third–Party Plaintiffs–Appellants,

v.

Department of Agriculture, Third–Party–Defendant–Appellee, and


Nos. 08–6003, 08–6066.

July 25, 2011.

Background: Rural water, sewer, and solid waste management district filed action against municipality, alleging unlawful encroachment on its service area in violation of federal law that protected rural water districts that remained indebted on loans obtained from United States Department of Agriculture (USDA) from competition from other water districts. Municipality brought counterclaims against district and third–party complaint against USDA, seeking declaratory and injunctive relief. The United States District Court for the Western District of Oklahoma, David Russell, J., granted judgment for district and municipality appealed. The Court of Appeals, Ebel, Circuit Judge, 3 44 Fed.Appx. 462, certified questions to state court. The Oklahoma Supreme Court, Colbert, J., 253 P.3d 38, held that state constitutional ban on legislature's grant of exclusive franchise did not preclude district from either entering into loan agreements with USDA that included provision limiting ability of municipality to curtail water services the district provided or enforcing its claimed federal protection against other water districts.

Holdings: The Court of Appeals, Ebel, Circuit Judge, then held that:
(1) district's protection under federal statute did not violate Oklahoma state constitution;
(2) district court acted within its discretion in determining on customer–by–customer basis whether district made water services available;
(3) district's inability to provide fire protection was irrelevant to determination of whether district made water services available;
(4) exception to general rule that jurisdiction must be established prior to consideration on merits allowed Court of Appeals to decide municipality's third–party claims on merits; and
(5) sovereign immunity barred municipality's third–party claims seeking specific performance under graduation clause of loan agreement between district and USDA.

District court orders affirmed in part and reversed and remanded in part.

West Headnotes

[1] Water Law 405 2112

405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2112 k. Statutorily protected service areas. Most Cited Cases

To be entitled to protection under statute protecting rural water districts, indebted to the United States Department of Agriculture (USDA), against competition from municipalities encroaching upon the districts, the district must establish (1) its continuing indebtedness on loans obtained from the USDA and (2) that it has provided or at least made water service available. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).


405 Water Law
Any doubts about whether a rural water district is entitled to protection under the statute protecting rural water districts, indebted to the United States Department of Agriculture (USDA), against competition from municipalities encroaching upon the districts should be resolved in favor of the USDA–indebted party seeking protection for its territory. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

In order to establish that it has adequately made water service available, for purposes of triggering protection under the federal statute protecting rural water districts, indebted to the United States Department of Agriculture (USDA), against competition from municipalities encroaching upon the districts, a water district must show (1) that it has the legal right to provide water service, (2) that it has, in fact, provided or made water service available, and (3) that it made that water service available prior to a time when an allegedly encroaching entity began providing service. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

District court acted within its discretion, in rural water, sewer, and solid waste management district's action against municipality, in determining that it would decide whether district made services available on customer–by–customer basis, rather than area–wide basis, for purposes of triggering protection under federal statute protecting rural water districts, indebted to United States Department of Agriculture (USDA), against competition from municipalities, where district specifically alleged and argued that municipality violated its alleged statutory protection by providing water to certain customers in district's service area. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).
Rural water, sewer, and solid waste management district's inability to provide its customers with fire protection was irrelevant to question of whether district made water service available to those customers, for purposes of triggering protection under federal statute protecting rural water districts, indebted to United States Department of Agriculture (USDA), against competition from municipalities; USDA regulation provided only that district provided "reasonable fire protection to the extent practicable," and Oklahoma state administrative regulations anticipated that some districts would not provide fire protection. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b); 7 C.F.R. § 1780.57(d).

**[7] Federal Courts 170B 542**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk542 k. Determination of question of jurisdiction. Most Cited Cases

Generally, the Court of Appeals must resolve jurisdictional issues, such as sovereign immunity and standing, before addressing the merits of the claim, even if the jurisdictional questions are difficult and the court could easily decide the merits.

**[8] Federal Courts 170B 542**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk542 k. Determination of question of jurisdiction. Most Cited Cases

Exception to general rule that jurisdiction must be established before turning to merits, allowing Court of Appeals to rule on merits without first establishing jurisdiction where merits were already decided in court's resolution of claim over which it did have jurisdiction, applied to permit court to rule on merits of municipality's third-party claims against United States Department of Agriculture (USDA) based upon asserted conflict between Oklahoma state constitution and federal statute protecting rural water districts, indebted to USDA, against competition from municipalities, where Oklahoma Supreme Court, in resolving certified question raised by rural water district's claims against municipality for violation of its statutory protection, over which court clearly had jurisdiction, rejected merits of municipality's arguments, which, in turn resolved merits of municipality's third-party claims based on same theory. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b); Okla.Const. Art. 5, § 51.

**[9] Federal Civil Procedure 170A 1837.1**

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1837 Effect
170Ak1837.1 k. In general. Most Cited Cases

Dismissal on sovereign immunity grounds or for lack of standing must be without prejudice.

**[10] United States 393 125(9)**

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(9) k. Nature of action in general. Most Cited Cases

Sovereign immunity barred municipality's third-party claims against United States Department of Agriculture (USDA), seeking to enforce graduation clause in rural water, sewer, and solid waste management district's loan agreement with USDA, where municipality's claims sought equitable relief in nature of specific performance, and United States had not waived its sovereign immunity as to such claims. 5 U.S.C.A. § 702.

**[11] United States 393 125(6)**
654 F.3d 1058
(Cite as: 654 F.3d 1058)

393 United States
393 IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(6) k. Construction of waiver or consent in general. Most Cited Cases

Courts must read the Administrative Procedure Act (APA) in conjunction with other jurisdictional statutes waiving sovereign immunity in order to determine whether those statutes forbid the relief sought. 5 U.S.C.A. § 702.


Michael D. Davis (Steven M. Harris, with him on the brief) Doyle Harris Davis & Haughey, Tulsa, OK, for Plaintiff–Appellee Rural Water, Sewer and Solid Waste Management District No. 1.

Steven K. Mullins (John C. Richter, United States Attorney & Kay Sewell, Assistant United States Attorney, on the brief) United States Attorney's Office, Oklahoma City, OK, for Third–Party Defendant–Appellee Department of Agriculture.

Before GORSUCH, EBEL and MATHESON FN*, Circuit Judges.

FN* Judge Michael W. McConnell was the third member of the panel when this case was orally argued and when the panel certified several questions to the Oklahoma Supreme Court. Judge McConnell resigned his commission on August 31, 2009, and did not participate in this opinion. Judge Scott M. Matheson, Jr. replaces Judge McConnell on the panel. Judge Matheson has read the briefs, reviewed the previous oral argument held in this case, and is fully advised on the premises of these appeals. No member of the panel concludes that further oral argument is necessary.

*1061 EBel, Circuit Judge.

This case involves a dispute between two water service providers over which one of them is entitled to serve certain customers located in and around Guthrie, Oklahoma. Plaintiff–Appellee Rural Water, Sewer and Solid Waste Management District No. 1 of Logan County (“Logan–1”) claims that its right to serve these customers is grounded in state law, but is protected from competition from encroaching water districts by a federal statute, 7 U.S.C. § 1926(b). Section 1926(b) protects rural water providers like Logan–1, which are indebted on loans obtained from the United States Department of Agriculture ("USDA"). Logan–1 contends that Defendants–Appellants City of Guthrie and its Guthrie Public Works Authority (collectively "Guthrie") violated § 1926(b) by extending water service to customers located in Logan–1’s designated service area.

In these appeals, Guthrie challenges several district court orders. Having jurisdiction to review some of these orders under 28 U.S.C. § 1292(b), and jurisdiction to review others under Fed.R.Civ.P. 54(b) and 28 U.S.C. § 1291, we AFFIRM in part, REVERSE in part, and REMAND this case to the district court.

1. BACKGROUND

“In 1961 Congress amended the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921–2009n, to allow nonprofit water associations to borrow federal funds for ‘the conservation, development, use, and control of water ... primarily serving ... rural residents.’ ” Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Ass’n, 420 F.3d 1082, 1084 (10th Cir.2005) (quoting 7 U.S.C. § 1926(a)(1)). Originally the Farmers Home Administration ("FmHA") administered these loans. See Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 694, 701 & n. 1 (10th Cir.2004). Since 1994, however, the USDA has operated this loan program, see id. at 701 n. 1, through its Rural Utilities Service. See Rural Water Dist. No. 1, Ellsworth Cnty. v. City of Wilson, 243 F.3d 1263, 1269 n. 3 (10th Cir.2001) (citing 7 C.F.R. § 1780.3(a)).

Beginning in January 1976, Logan–1 obtained a series of five forty-year loans from the USDA—two in 1976, and one each in 1978, 1982 and 2003. Logan–1 is a non-profit association created in 1972 by the Logan County Board of Commissioners to provide water service to parts of Logan County, but not within the Guthrie city limits as those limits existed at that time.
In order to provide greater security for the loans the USDA makes, as well as to promote rural water development, see Pittsburg Cnty., 358 F.3d at 715, Congress, as part of the Consolidated Farm and Rural Development Act, through 7 U.S.C. § 1926(b) prohibited “other water utilities from competing with the borrowing entity within the borrowing entity's service area,” Dona Ana Mut. Domestic Water Consumers Ass'n v. City of Las Cruces, 516 F.3d 900, 902–03 (10th Cir.2008). In 2005, Logan–1 sued Guthrie, claiming Guthrie had encroached on Logan–1's service area, in violation of § 1926(b), by providing water to customers located in Logan–1's service area.

The district court granted Logan–1 partial summary judgment on its § 1926(b) claims, making several legal conclusions *1062 that Guthrie challenges now on appeal. The district court certified these interlocutory decisions for immediate appeal under 28 U.S.C. § 1292(b), and this court accepted the appeal, see Fed. R.App. P. 5.

In addition to Logan–1's § 1926(b) claims against Guthrie, Guthrie filed counterclaims against Logan–1 and a third-party complaint against the USDA. The district court dismissed Guthrie's counterclaim and third-party claims for procedural reasons. Guthrie also challenges those determinations now on appeal. Although the district court's dismissal of Guthrie's counterclaim and third-party claims for procedural reasons was based on a determination that Guthrie did not dispute all of the claims at issue in this case, the district court certified its dismissal of those particular claims as final and appealable under Fed.R.Civ.P. 54(b).

II. LOGAN–1'S § 1926(b) CLAIMS AGAINST GUTHRIE

Section 1926(b) states:

The service provided or made available through any [indebted rural water] association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). Although this case does not specifically involve the “inclusion of [Logan–1's service] area ... within the boundaries of any municipal corporation or other public body,” “the granting of any private franchise for similar service[s] in [Logan–1's service] area,” or any “event ... requiring [Logan–1] to secure any franchise, license, or permit as a condition to continuing to serve [its] area,” id., this court has applied § 1926(b) broadly to protect an indebted rural water district against competition from municipalities encroaching upon the rural water district by other, “similar means.” Glenpool Util. Serv. Auth. v. Creek Cnty. Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir.1988) (quotation omitted); see also Pittsburg Cnty., 358 F.3d at 714–15; Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow, 191 F.3d 1192, 1197 (10th Cir.1999).

Thus, we have previously applied § 1926(b) in cases like this one, where an indebted rural water district sought protection against encroachment by a neighboring municipality allegedly providing water service to the rural water district's customers or potential customers. See Rural Water Dist. No. 1, 243 F.3d at 1267–69; Sequoyah Cnty., 191 F.3d at 1194, 1197–1201. See generally Adams Cnty. Reg'l Water Dist. v. Vill. of Manchester, 226 F.3d 513, 518 (6th Cir.2000) (“Most of the cases arising under § 1926(b) have involved a municipality's attempt to encroach on a rural water association's area of service. Courts have uniformly understood the section as permitting such encroachment, concluding that § 1926(b) should be given a liberal interpretation that protects rural associations indebted to the [USDA] from municipal encroachment.” (quotation omitted; citing cases)).

[1][2] To be entitled to § 1926(b)'s protection from competition, Logan–1 must establish 1) its continuing indebtedness on loans obtained from the USDA and 2) that it has provided or at least made water service available. See Pittsburg Cnty., 358 F.3d at 713; Sequoyah Cnty., 191 F.3d at 1197. Any “doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the [USDA]-indebted party seeking protection for its territory.” *1063 Pittsburg Cnty., 358 F.3d at 715 (quotation, alteration omitted); see also Sequoyah Cnty., 191 F.3d at 1197. We address each of these requirements in turn. The district court, in addressing this two-pronged inquiry, granted Logan–1 partial summary judgment, making
several legal determinations which Guthrie challenges now on appeal. We review those legal determinations de novo. See Pittsburg Cnty., 358 F.3d at 713.

A. Logan–1 has a continuing indebtedness under loans it obtained from the USDA

[3] On appeal, Guthrie does not dispute that Logan–1 has been continually indebted, since 1976, on loans obtained from the USDA. Instead, Guthrie argues that Logan–1’s indebtedness is invalid. More specifically, Guthrie claims that § 1926(b)’s protection against competition is contrary to the Oklahoma Constitution, which provides that “[t]he Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.” Okla. Const. art. 5, § 51. While the Oklahoma legislature has authorized Logan–1, under Okla. Stat. tit. 82, § 1324.10(A)(4), to enter into loan agreements with the USDA, see Sequoyah Cnty., 191 F.3d at 1194, Guthrie contends that § 1324.10(A)(4) violates Okla. Const. art. 5, § 51 to the extent it authorizes Logan–1 to enter into loans that must, as a matter of federal law, protect the rural water district from competition under 7 U.S.C. § 1926(b).

FN1. In 1987, the USDA sold Logan–1’s first four loans to a private entity, Third–Party Defendant Community Program Loan Trust 1987A (“Trust”), pursuant to Congress’ direction, under the Omnibus Budget Reconciliation Act of 1986 (“OBRA”), Pub.L. No. 99–509, § 1001, 100 Stat. 1874 (1986), to sell some of these loans to private lenders. See Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass’n, 291 F.3d 1262, 1265 (10th Cir.2002); Sequoyah Cnty., 191 F.3d at 1198. Congress later amended OBRA to clarify that § 1926(b)’s protection of the borrowing rural water district from competition continued to apply to these loans: “1926(b) [] shall be applicable to all notes or other obligations sold or intended to be sold under” § 1001 of OBRA. Pub.L. No. 100–233, § 803, 101 Stat. 1568 (1988); see also Moongate Water, 291 F.3d at 1265; Sequoyah Cnty., 191 F.3d at 1198. Although the USDA sold Logan–1’s four loans in August 1987, after Congress enacted OBRA but before its amendment, occurring in January 1988, none of the parties here contend that § 1926(b)’s protections do not continue to apply to the four Logan–1 loans that the USDA sold to the Trust. See Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass’n, 125 F.Supp.2d 1304, 1308–10 (D.N.M.2000) (holding indebted water districts were still protected under § 1926(b) even when its loans were sold under OBRA, but prior to the amendment to OBRA clarifying that the § 1926(b) protection attached to these loans continued), aff’d, Moongate Water, 291 F.3d at 1264, 1265–67. Thus, as to its first four loans now owned by the Trust, Logan–1 “remains indebted on what were originally [USDA] loans.” Moongate Water, 291 F.3d at 1267.

FN2. In pertinent part, Okla. Stat. tit. 82, § 1324.10 provides:

A. Every district incorporated hereunder ... shall have power to:

4. Borrow money and otherwise contract indebtedness for the purposes set forth in this act, and, without limitation of the generality of the foregoing, 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.

(Footnote omitted.) See Pittsburg Cnty., 258 F.3d at 701 (noting that the Oklahoma legislature enacted Okla. Stat. tit. 82, § 1324.10(A)(4) in response to Congress’ enactment of 7 U.S.C. § 1926(b)).
The Oklahoma Supreme Court accepted our certification of this question, see Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie, 344 Fed.Appx. 462 (10th Cir.2009) (unpublished), and concluded that a rural water district could agree to § 1926(b)'s protection without violating the Oklahoma Constitution. See Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie, 253 P.3d 38, 41 (Okla.2010). In reaching that conclusion, the Oklahoma Supreme Court determined the following: The Oklahoma legislature enacted statutes that permit the creation of rural water districts with designated service areas, but the legislature has not provided these districts with an exclusive franchise to provide water service in those areas. See id. at 45–46 & 46 n. 10. The state legislature also authorized these rural water districts to borrow money and enter into contracts. See id. at 46. And in borrowing money, a district may obtain financing from the USDA, even if such an agreement requires § 1926's protection from competition. See id. at 46–47. That protection, however, is granted, not by the state legislature, but instead by Congress. See id. at 44–48, 52 (relying on Glenpool, 861 F.2d at 1216). Therefore, “article 5, section 51 is neither implicated nor violated as no action by the Oklahoma Legislature has been taken that grants an exclusive right to a water district.” Id. at 48. Moreover, § 1926(b)'s protection “is a qualified not an exclusive right, limited in time and in scope” by “preclud[ing] competitive water services only while a district remains indebted to the USDA [and] to the extent that a competitor's services would curtail or limit the indebted district's ability to provide water services and repay its loans.” Id. at 49. Further, noting that a rural water district can only invoke § 1926(b)'s protection if it has made water service available, the Oklahoma Supreme Court determined that, “[a]t most, section 1926(b) ordains a dual water authority function within a municipal area for a period of time.” Id. at 49–50.

In light of the Oklahoma Supreme Court's resolution of our certified question, we affirm the district court's determination that Logan–1's § 1926(b) protection does not violate the Oklahoma Constitution. Logan–1 has thus established that it has been continuously and validly indebted, since 1976, on loans obtained from the USDA.

B. Whether Logan–1 has provided or made water service available

In order to establish that it has adequately made water service available, Logan–1 must first show that it has the legal right to provide water service. See Sequoyah Cnty., 191 F.3d at 1201 n. 8; see also Moongate Water, 420 F.3d at 1084–85. Here, no one disputes that Logan–1 has a right under Oklahoma law to provide water service within its assigned territory.

Logan–1 must also establish that it has in fact “provided or made [water service] available,” 7 U.S.C. § 1926(b). See Sequoyah Cnty., 191 F.3d at 1201–03. This inquiry “focus[es] primarily on whether [Logan–1] ... has proximate and adequate ‘pipes in the ground’ with which it has served or can serve the disputed customers within a reasonable time.” Id. at 1203; see also Butterfield Park, 291 F.3d at 1267–68; Rural Water Dist. No. 1, 243 F.3d at 1270.

[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 *1065 to provide water service to a given customer.

Sequoyah Cnty., 191 F.3d at 1203 (quotation, citation omitted); see also Pittsburg Cnty., 358 F.3d at 713; Butterfield Park, 291 F.3d at 1268; Rural Water Dist. No. 1, 243 F.3d at 1270. Further, Logan–1 “must have made service available prior to the time an allegedly encroaching association began providing service in order to be eligible for § 1926(b) protection.” Sequoyah Cnty., 191 F.3d at 1202 (quotation, alterations omitted).

The district court determined that, in this case, there were disputed issues of fact remaining as to whether Logan–1 had made services available to the customers at issue before Guthrie began providing those customers with water. The parties do not challenge that determination on appeal. In granting Logan–1 partial summary judgment, however, the district court made several legal determinations as to how it intends to resolve that factual question. Guthrie challenges two of those legal conclusions here.

1. The “made service available” determination

should be decided on a customer-by-customer basis in this case.

[5] Guthrie first challenges the district court's determination that it will decide whether Logan–1 made services available on a customer-by-customer basis, rather than on an area-wide basis. We need not set forth a per se rule here but, instead, conclude that the district court was correct in applying a customer-by-customer basis in this case because Logan–1 specifically alleged that Guthrie violated § 1926(b) by providing water to certain customers located in Logan–1's service area. That is a more narrow claim than if Logan–1 had instead alleged that § 1926(b)'s protection from competition applied to protect entire areas within its designated service area. We, therefore, need not decide here whether Logan–1 could make such an area-wide claim.

Moreover, the manner in which Logan–1 pled its § 1926(b) claim, on a customer-by-customer basis, is consistent with how prior Tenth Circuit cases have addressed the question of whether an indebted rural water district has “made service available” for purposes of § 1926(b). For example, in Sequoyah County, the plaintiff rural water district alleged that a competing municipal water provider violated § 1926(b) by providing water service to specific customers in the rural water district's assigned territory. See 191 F.3d at 1194–95, 1197. This court, in that case, thus addressed the rural water district's § 1926(b) claim on a customer-by-customer basis. See id. at 1203–06; see also Butterfield Park, 291 F.3d at 1263–64 (addressing a dispute under § 1926(b) about which competing water provider had the right to serve a particular customer); cf. Rural Water Dist. No. 1, 243 F.3d at 1267, 1271–72 (addressing whether a rural water district made service available to three specific properties within its service area). Similarly, this court, in Pittsburgh County, remanded a § 1926(b) claim to the district court with instructions to consider whether the rural water district had made service available to each of the specific customers at issue in that case. See 358 F.3d at 713–14; see also id. at 716 (addressing the defendant water district's sales to customers in an area de-annexed from the purportedly protected rural water district); Sequoyah Cnty., 191 F.3d at 1201 n. 6 (noting on remand that the district court would have to consider, among other things, whether the rural water district “demonstrate[d] that it ‘made service available’ to the customers that Defendants allegedly began serving before the repurchase date” of the rural water provider's loans obtained from the USDA). The Eighth Circuit has also applied the "pipes in the ground" test customer by *1066 customer. See Pub. Water Supply Dist. No. 3 of Laclede Cnty. v. City of Lebanon, 605 F.3d 511, 521–23 (8th Cir.2010). Therefore, given the way that Logan–1 alleged and argued its § 1926(b) claims in this case, the district court did not err in concluding that it would decide whether Logan–1 had "made services available" on a customer-by-customer basis.

2. Whether Logan–1 can provide fire protection to the disputed customers is irrelevant to the question of whether Logan–1 made service available to them for purposes of § 1926(b)

[6] Guthrie next argues that the district court, in addressing whether Logan–1 made service available to the disputed customers, must consider that Logan–1 is required by state and federal law to provide its customers with fire protection, but cannot do so. The district court, however, held that Logan–1 was not legally obligated to provide fire protection. We agree.

Guthrie asserts that 7 C.F.R. § 1780.57 mandates that Logan–1 provide fire protection. But that regulation provides only that "[w]ater facilities" financed by the USDA “should have sufficient capacity to provide reasonable fire protection to the extent practicable.” 7 C.F.R. § 1780.57(d) (emphasis added). See Rural Water Dist. No. 4 v. City of Eudora, 604 F.Supp.2d 1298, 1329 (D.Kan.2009) (rejecting similar argument), clarified on reconsideration, 2009 WL 1360182 (D.Kan.2009).

7 C.F.R. § 1780.57 also provides more generally that "[f]acilities financed by the [USDA] will be designed and constructed in accordance with sound engineering practices, and must meet the requirements of Federal, State and local agencies." Relying on this regulation, Guthrie further contends that Oklahoma law requires Logan–1 to provide fire protection. But in support of that argument, Guthrie cites to two Oklahoma administrative regulations, one addressing "[w]ater main design for all systems providing fire protection." Okla. Admin. Code 252:626–19–3 (emphasis added), and the other addressing "[w]ater main design for systems providing domestic water only,” which “applies only to water systems without full fire protection capabilities,” id. 252:626–19–4 (emphasis added). Because these regulations
clearly anticipate that some water systems will provide fire protection, while others will not, the district court correctly rejected Guthrie's argument that Oklahoma law, as set forth in these regulations, requires Logan–1 to provide fire protection.

Despite correctly concluding that neither federal nor state law requires Logan–1 to provide fire protection to its customers, the district court nevertheless held that, in light of 7 C.F.R. § 1780.57(d)’s language—“[w]ater facilities” financed by the USDA “should have sufficient capacity to provide reasonable fire protection to the extent practicable”—the court could consider, as one factor in deciding whether Logan–1 has made service available, if it was practicable for Logan–1 to provide “reasonable fire protection.” See Sequoyah Cnty., 191 F.3d at 1203–05 (considering evidence regarding rural water district's physical capacity to provide disputed customers with both potable water and with fire protection). We disagree with the district court's conclusion. Logan–1’s ability to provide fire protection is simply not relevant to the specific question of whether Logan–1 has adequate pipes in the ground to “make service available” for purposes of the § 1926(b) protection from competition.\footnote{See Rural Water Dist. No. 1 v. City of Ellsworth, 995 F.Supp. 1164, 1167 n. 2 (D.Kan.1997) (indicating that rural water district's ability to provide fire protection “has no effect on its rights under § 1926(b)”); N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F.Supp. 15, 23 (E.D.Ky.1992) (holding “fire protection is irrelevant to whether a water district has made service available”); Rural Water Dist. No. 1 v. City of Ellsworth, 995 F.Supp. 1164, 1167 n. 2 (D.Kan.1997) (indicating that rural water district's ability to provide fire protection “has no effect on its rights under § 1926(b)”); Rural Water Dist. No. 1 v. Owasso Utils. Auth., 530 F.Supp. 818, 823 (N.D.Okl.1979) (noting § 1926(b) “was not enacted for the purposes of fire protection-it was enacted to provide means of securing a safe and adequate supply of running household water” (quotation omitted)); cf. Rural Water Dist. No. 1, 243 F.3d at 1272 (noting that City's plan to run water pipes into site of planned development only for fire protection did not encroach on rural water district's service rights as to that site); Sequoyah Cnty., 191 F.3d at 1204 n. 10 (noting “that the United States District Court for the Northern District of [Iowa] recently held that, because § 1926(b) was not enacted to supply fire protection, a water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b)” (citing Rural Water Sys. No. 1 v. City of Sioux Ctr., 29 F.Supp.2d 975, 992–94 (N.D.Iowa 1998), aff'd in part, rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.2000))).}

This court has recognized that, even though a water district has pipes in the ground to provide water service upon request, “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, 243 F.3d at 1271. But none of the parties on appeal raise an issue regarding the cost of Logan–1’s provision of water service and so we have no occasion to address that question here.

\footnote{See Le–Ax Water Dist. v. City of Athens, 346 F.3d 701, 706 (6th Cir.2003) (discussing both Sixth and Eighth Circuit cases).}

C. Conclusion as to Logan–1’s claims asserted against Guthrie

To summarize,\footnote{To summarize, to invoke § 1926(b)'s protection from competition, Logan–1 must establish 1) its continued indebtedness under loans obtained from the USDA, and 2) that it has made service available. Based upon the Oklahoma Supreme Court's decision in response to our certified question, we hold that Logan–1 has established its continued indebtedness. As to the question of whether Logan–1 has made service available, we conclude that determination must, in this case, be made on a customer-by-customer basis. We further conclude that whether Logan–1 can provide fire protection to the customers in dispute is irrelevant to the question of whether Logan–1 has made water service available to them for purposes of 7 U.S.C. § 1926(b).} to invoke § 1926(b)'s protection from competition, Logan–1 must establish 1) its continued indebtedness under loans obtained from the USDA, and 2) that it has made service available. Based upon the Oklahoma Supreme Court's decision in response to our certified question, we hold that Logan–1 has established its continued indebtedness. As to the question of whether Logan–1 has made service available, we conclude that determination must, in this case, be made on a customer-by-customer basis. We further conclude that whether Logan–1 can provide fire protection to the customers in dispute is irrelevant to the question of whether Logan–1 has made water service available to them for purposes of 7 U.S.C. § 1926(b).\footnote{We decline to address the issue raised by Logan–1, as an appellee, challenging the}
district court's determination that the applicable two-year statute of limitations will limit Logan–1’s recovery of damages for any § 1926(b) violation, because Logan–1 did not file a cross-appeal raising this question. See Lombardi v. Small Bus. Admin., 889 F.2d 959, 962 (10th Cir. 1989).

FN6. Nothing in our opinion addresses whether the federal government can, or should, consider the fire protection offered or made available by a rural water district in determining whether to make a loan to a rural district under § 1926. Nor do we address a situation where fire protection was explicitly included in a contract between the USDA and a rural water district. The loan agreements at issue here between Logan–1 and the USDA did not require Logan–1 to offer fire protection.

*1068 III. GUTHRIE’S COUNTERCLAIM AND THIRD–PARTY COMPLAINT

Guthrie also challenges the district court's decision to dismiss, for procedural reasons, Guthrie's third-party complaint against the USDA and Guthrie's counterclaims asserted against Logan–1.

A. Dismissal of Guthrie's third-party complaint against the USDA

In its third-party complaint against the USDA, Guthrie sought declaratory and injunctive relief under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–706. These claims are based generally on two theories: 1) Logan–1 did not have authority, under Oklahoma law, to agree to the § 1926(b) protection from competition because the protection was contrary to Okla. Const. art. 5, § 51. 2) But if Logan–1 did have state-law authority to agree to the § 1926(b) protection, then the USDA is now obligated to invoke the graduation clause in the 2003 loan agreement which, according to Guthrie, requires Logan–1 to repay that loan immediately.

FN7. Each of the loans Logan–1 obtained from the USDA contained graduation clauses which were not identical but provided something to the effect that

[i]f at any time it shall appear to the Government that Borrower may be able to obtain a loan from a responsible cooperative or private credit source at reasonable rates and terms for loans for similar purposes and periods of time, Borrower will, at the Government's request, apply for and accept such loan in sufficient amount to repay the Government.

(Aplt.App. at 745.) Guthrie's graduation-clause theory of recovery is limited to the 2003 loan agreement because the USDA transferred its first four loans with Logan–1 to the Trust. Before doing so, the USDA eliminated any right the Trust might have to invoke the graduation clauses in those agreements and the USDA waived its own right to invoke these clauses:

The Trust shall not have the right to compel any Borrower to prepay a Loan solely by reason of such Borrower's ability to refinance its unpaid indebtedness under the Loan at reasonable rates and terms, and the Government hereby waives, relinquishes and agrees not to exercise any such right it may have under any of the instruments, contracts or agreements herein described or under any Federal law or regulations.

(Id. at 1121–22 (quotation, alteration omitted.).) In its amended third-party complaint, Guthrie originally named both the Trust and the USDA as defendants. Guthrie also challenged the USDA's authority to waive the graduation clauses in these loan agreements. But the district court held that the relevant six-year statute of limitations barred any challenge Guthrie asserted to the USDA's transfer of the first four loans to the Trust, which occurred in 1987. See 28 U.S.C. § 2401(a) (providing generally that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues"). And the district court later granted Guthrie's motion to dismiss the Trust from this litigation. On appeal, the parties do not challenge either of these decisions. Therefore, as to Guthrie's theo-
of recovery based upon the graduation clauses in the loan agreements, the four loans that the USDA sold to the Trust in 1987 are no longer at issue and we address here only Guthrie's third-party claims based upon the graduation clause contained in the USDA's 2003 loan agreement with Logan–1.

The district court dismissed these claims on sovereign immunity grounds and for lack of standing. This court will review these decisions de novo. See Norman Apartments, Ltd. v. U.S. Dep't of Housing & Urban Dev., 554 F.3d 1290, 1296 (10th Cir.2009) (sovereign immunity); Day v. Bond, 500 F.3d 1127, 1132 (10th Cir.2007) (standing).

1. Guthrie's claims based upon the Oklahoma constitution

[2] Ordinarily, this court must resolve jurisdictional issues, such as sovereign immunity and standing, “before addressing *1069 the merits of the claim, even if the [jurisdictional] question[s] [are] difficult and we could easily decide the merits.” Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs., 569 F.3d 1244, 1259 (10th Cir.2009); see also id. at 1259–60; Carolina Cas. Ins. Co. v. Pinnacol Assurance, 425 F.3d 921, 923–24, 927–28 (10th Cir.2005). But the Supreme Court, in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 98–100, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), recognized an exception to the general rule—that jurisdiction must be established before turning to the merits.... Occasionally a court may rule that a party loses on the merits without first establishing jurisdiction because the merits have already been decided in the court's resolution of a claim over which it did have jurisdiction. In that circumstance, resolution of the merits is “ 'foreordained,' ” so the court is not producing an advisory opinion. Rather, it is merely parroting a prior decision. Such parroting is not an improper aggrandizement of power by the court. The court is not overreaching to decide an issue; after all, the issue has already been decided.

Starkey, 569 F.3d at 1260 (citation omitted).

[8][9] That exception applies here to Guthrie's claims asserted against the USDA based upon the asserted conflict between § 1926(b) and the Oklahoma Constitution. The Oklahoma Supreme Court, in resolving our certified question raised by Logan–1's § 1926(b) claims against Guthrie, over which we clearly have jurisdiction, rejected the merits of that argument. The Oklahoma Supreme Court's decision also resolves the merits of Guthrie's third-party claims based on the same theory. We therefore need not address whether the United States has waived its sovereign immunity as to these claims, nor do we need to decide whether Guthrie has standing to assert them. Instead, we affirm the district court's dismissal of Guthrie's claims against the USDA which are based upon the alleged § 1926(b)/Oklahoma Constitution conflict, but we do so based on these claims' merit, or more precisely on their lack of merit. FN8 We, therefore, remand these claims to the district court with instructions to dismiss them with prejudice. FN8.

FN8. These claims include Guthrie's claims seeking the following declarations: that Okla. Stat. tit. 82, § 1324.10 “is unconstitutional under the Oklahoma Constitution to the extent that it provides the Plaintiff with the authority to enter into loan agreements with the USDA that carry with them exclusive rights to serve a particular territory, its service area-an area broader than its existing customers”; “that complying with state law is a contractual condition precedent upon which § 1926(b) funding is based[,] and that under Oklahoma law,” Logan–1 “is without the authority to enter into an agreement that grants exclusive rights to an entity[,] and that by applying the appropriate contractual analysis required by the Spending Clause cases,” Logan–1 “has failed to meet a condition precedent for § 1926(b) funding”; “that the loan agreements upon which [Logan–1] bases its claims are void for reasons that they are based upon misrepresentations by [Logan–1] to the USDA regarding [Logan–1's] state-law authority to borrow funds under a contract that carries with it exclusive rights”; “that the loan agreements ... are void for the reason[ ] that they exceed the authority of [Logan–1] under Oklahoma law,” and that Logan–1 “violated Oklahoma law in entering into its agreements with the USDA.” (Aplt.App. at 1123–24.) These claims further include Guthrie's claim seeking injunctive relief in the form of a “judg-
ment preventing the USDA from entering into any further agreement with [Logan–1] that carries with it exclusive rights under 7 U.S.C. § 1926(b).” (Id. at 1125.)

FN9. The district court dismissed these claims on sovereign immunity and standing grounds, without specifying whether that dismissal was with or without prejudice. But a dismissal on sovereign immunity grounds for lack of standing must be without prejudice. See Governor of Kan. v. Kempthorne, 516 F.3d 833, 846 (10th Cir.2008) (sovereign immunity); Breereton v. Bountiful City Corp., 434 F.3d 1213, 1216 (10th Cir.2006) (standing); see also Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 978 (10th Cir.2010) (noting that, “[g]enerally a dismissal for lack of subject matter jurisdiction is without prejudice”), petition for cert. filed, 79 U.S.L.W. 3629 (U.S. Apr. 15, 2011) (No. 10–1283).

FN10. 5 U.S.C. § 702 provides, in pertinent part, as follows:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.... Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief sought in the case at hand.” Robbins, 438 F.3d at 1080 (quotations omitted).

*1070 2. Guthrie's claims based upon the graduation clause in the 2003 loan agreement

We must still address our jurisdiction to consider Guthrie's third-party claims against the USDA seeking to enforce the graduation clause in the 2003 loan agreement. We conclude that the United States has not waived its sovereign immunity as to these claims.

[10] Generally, the United States, through the APA, has waived its sovereign immunity to “[a]n action in a court of the United States seeking relief other than money damages.” 5 U.S.C. § 702 \[10\], see also Robbins v. U.S. Bureau of Land Mgmt., 438 F.3d 1074, 1080 (10th Cir.2006) (noting that 5 U.S.C. § 702 “waives sovereign immunity in most suits for nonmonetary relief against the United States, its agencies, and its officers” (quotation omitted)). Nevertheless, the APA limits this waiver of sovereign immunity in the last sentence of 5 U.S.C. § 702, which provides that the APA does not “confer[ ] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” See Kempthorne, 516 F.3d at 841 n. 4; Robbins, 438 F.3d at 1080. “Thus, we must read the APA in conjunction with other jurisdictional statutes waiving sovereign immunity in order to determine whether those statutes forbid the relief sought in Robbins, this court considered the interaction of the APA with the federal Tucker and Little Tucker Acts.

The Tucker Act, 28 U.S.C. § 1491, provides that “[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded ... upon any express or implied contract with the United States.” Id. § 1491(a)(1). The Little Tucker Act, 28 U.S.C. § 1346(a)(2), grants federal district courts concurrent jurisdiction over contract claims against the government where plaintiffs seek no more than $10,000 in damages. The Supreme Court has long held that neither the Tucker Act nor the Little Tucker Act authorize relief other than money damages for such contract claims.
In this case, Guthrie's claims seeking the enforcement of the graduation clause in Logan–1’s 2003 loan agreement with the USDA are claims seeking equitable relief in the nature of specific performance. The United States has not waived its sovereign immunity as to such claims. Therefore, sovereign immunity bars these claims and we affirm the district court's dismissal of those claims with prejudice. We further conclude that, because the United States has not waived its sovereign immunity to claims resting, not on the 2003 loan agreement's graduation clause, but instead on USDA regulations addressing loan graduation generally.

3. Conclusion as to Guthrie's third-party claims asserted against the USDA

In summary, we affirm the dismissal of Guthrie's claims against the USDA alleging that Logan–1 had no authority under Oklahoma law to agree to 7 U.S.C. § 1926(b)’s protection from competition. But we do so based on the merits of those claims and so we remand them for the district court to dismiss those claims with prejudice. We further conclude that, because the United States has not waived its sovereign immunity, the district court properly dismissed without prejudice Guthrie's claims against the USDA seeking declaratory and injunctive relief based upon the graduation clause in the 2003 loan agreement.

B. Dismissal of Guthrie's counterclaims against Logan–1

Guthrie asserted counterclaims against Logan–1 based on the same two theories underlying its third-party complaint against the USDA—1) Logan–1’s loan agreements with the USDA were void because Logan–1 lacked authority under state law to agree to the § 1926(b) protection from competition that was part of those loan agreements; and 2) the graduation clause in the 2003 loan agreement should be enforced, requiring Logan–1 to repay its indebtedness to the USDA. After dismissing Guthrie's third-party claims against the USDA based on the Government's sovereign immunity and Guthrie's lack of standing (an issue we need not address), the district court dismissed Guthrie's counterclaims against Logan–1.
under Fed.R.Civ.P. 19, for failure to join an indispensable party—the USDA.

1. Counterclaim based upon the alleged conflict between 7 U.S.C. § 1926(b) and the Oklahoma Constitution

Based upon the Oklahoma Supreme Court's decision rejecting the merits of Guthrie's state constitutional argument, we affirm the district court's dismissal of Guthrie's first counterclaim, not because Guthrie cannot join the USDA, but because, as previously explained, this argument lacks legal merit. In doing so, however, we again remand that claim so that the district court can clarify that this dismissal on the merits is with prejudice.

2. Counterclaim based upon graduation clause in the 2003 loan agreement

In its opening brief on appeal, Guthrie focused exclusively on the district court's decision to dismiss Guthrie's counterclaim premised on the Oklahoma Constitution. Guthrie does not address the dismissal of its counterclaim based on the graduation clause until its reply brief and then only fleetingly. In light of that, we conclude Guthrie has waived any argument challenging the dismissal of its counterclaim based upon the graduation clause in the 2003 loan agreement. FN12 See M.D. Mark, Inc. v. Kerr–McGee Corp., 565 F.3d 753, 768 n. 7 (10th Cir. 2009). We, thus, affirm the district court's dismissal of this counterclaim without prejudice.

FN12. Even if we were to address the merits of this claim, however, we would affirm the district court's decision.

IV. CONCLUSION

A. The district court's entry of partial summary judgment in favor of Logan–1 on its § 1926(b) claims against Guthrie

To summarize, based upon the Oklahoma Supreme Court's decision in response to our certified questions, we AFFIRM the district court's determination that Logan–1 established its continued indebtedness under loans obtained from the USDA. Based upon the circumstances presented here, we also AFFIRM the district court's conclusion that the "made service available" determination should be made on a customer-by-customer basis. Further, we AFFIRM the district court's decision that Logan–1 is not legally required to provide fire protection. But we REVERSE the district court's determination that whether it is practicable for Logan–1 to provide fire protection is one factor to be considered in deciding whether Logan–1 has made service available. We REMAND Logan–1's § 1926(b) claims asserted against Guthrie for further proceedings consistent with this opinion.

B. The district court's dismissal of Guthrie's claims against the USDA and Logan–1

We also AFFIRM the district court's dismissal of Guthrie's third-party claims for equitable relief asserted against the USDA, based upon the alleged conflict between § 1926(b)'s protection from competition and the Oklahoma Constitution. But we do so, not for lack of jurisdiction, but instead for lack of merit. We, therefore, REMAND these claims so the district court can clarify that the dismissal of these claims is with prejudice. We AFFIRM the district court's dismissal without prejudice of Guthrie's third-party claims for equitable relief against the USDA, based upon the graduation clause contained in the USDA's 2003 loan agreement.

We similarly AFFIRM the dismissal of Guthrie's counterclaim asserted against Logan–1, based upon the alleged § 1926(b)/Oklahoma Constitution conflict, but we do so again based on that claim's lack of merit. We, therefore, REMAND this counterclaim so the district court can also dismiss it with prejudice.

C.A.10 (Okla.), 2011.
Rural Water Sewer and Solid Waste Management, Dist. No. 1, Logan County, Oklahoma v. City of Guthrie
654 F.3d 1058

END OF DOCUMENT
United States Court of Appeals,  
Fifth Circuit.  
CITY OF MADISON, MISSISSIPPI, Plaintiff-Appellant,  
v.  
BEAR CREEK WATER ASSOCIATION, INC.,  
Defendant-Appellees,  
United States of America, through its agency,  
Farmers Home Administration, Intervenor-Appellee.  

No. 86-4552.  

City instituted eminent domain proceedings to  
condemn facilities of water association indebted to  
Farmers Home Administration. Administration inter-  
vened, and action was removed. The United States District Court for the Southern District of  
Mississippi, Henry T. Wingate, J., entered summary  
judgment in favor of water association and Admin-  
istration, and city appealed. The Court of Appeals,  
Edith H. Jones, Circuit Judge, held that: (1) city  
was precluded from condemning water association's  
facilities located within city limits and association's  
certificate of public convenience and necessity during term of association's indebtedness to  
Farmers Home Administration. Consolidated  
Farm and Rural Development Act, § 306(b), 7  

Affirmed.  

West Headnotes  

170B Federal Courts  
170BVIII Courts of Appeals  
170BVIII(K) Scope, Standards, and Extent  
170BVIII(K)1 In General  

170Bk763 Extent of Review Dependent on Nature of Decision Appealed from  
170Bk766 k. Summary judgment.  

Most Cited Cases  
Summary judgments are reviewed by Court of  
Appeals in same manner as federal district court,  
i.e., in terms of whether there is any genuine issue  
of material fact, and whether appellee was entitled  
to judgment as a matter of law.  

[2] States 360 18.69  
360 States  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.69 k. Property and regulations affecting it; eminent domain. Most Cited Cases  
City was precluded from condemning water association's facilities located within city limits and  
association's certificate of public convenience and  
necessity during term of association's indebtedness  
to Farmers Home Administration. Consolidated  
Farm and Rural Development Act, § 306(b), 7  

405 Water Law  
405XII Public Water Supply  
405XII(B) Domestic and Municipal Purposes  
405XII(B)13 Regulation of Supply and Use  
405k2103 Service Areas  
405k2112 k. Statutorily protected service areas. Most Cited Cases  
(Formerly 405k202)  
Under Consolidated Farm and Rural Development  
Act, local government may not encroach upon  
services provided by water association indebted to  
Farmers Home Administration, be that encroach-  
ment in form of competing franchises, new or additional permit requirements, or similar means, such  
as condemnation of association's facilities or certi-  
ficate of public convenience and necessity. Consol-
idated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

[4] Statutes 361 217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative history in general. Most Cited Cases
Legislative history need not be examined where statutory language is unambiguous and yields no absurd results.


405 Water Law
405XII Public Water Supply
405XII(B) Domestic and Municipal Purposes
405XII(B)13 Regulation of Supply and Use
405k2103 Service Areas
405k2111 k. Encroachment and curtailment in general. Most Cited Cases
(Formerly 405k202)
Section of Consolidated Farm and Rural Development Act, prohibiting cities from curtailing services of water associations indebted to Farmers Home Administration by granting competing franchises or annexing areas served by association, serves two congressional purposes: to encourage rural water development by expanding number of potential users of such systems, thereby decreasing per-user cost, and to safeguard viability and financial security of such associations and loans by Farmers Home Administration to such associations by protecting those associations from expansion of nearby cities and towns. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

[6] States 360 4.16(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(2) k. Federal laws invading state powers. Most Cited Cases
(Formerly 360k4.17)
Section of Consolidated Farm and Rural Development Act, proscribing cities from curtailing or limiting services provided by water association indebted to Farmers Home Administration by granting competing franchises or by annexing areas served by association, did not violate Tenth Amendment; statute curtailed city's authority in regard to provision of water service only while association was indebted to Administration and was enacted to protect Administration's subsidy of rural water authorities. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b); U.S.C.A. Const.Amend. 10.

[7] States 360 4.16(1)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(1) k. In general. Most Cited Cases
(Formerly 360k4.16)
Tenth Amendment is not offended by limited restriction imposed by federal government to protect its subsidized loans, particularly when benefits of those loans accrue to a municipality. U.S.C.A. Const.Amend. 10.

*1058 E. Stephen Williams, Stephen W. Rimmer, Michael T. Parker, Jackson, Miss., for plaintiff-appellant.

Leslie J. England, Rapid City, S.D., for amicus Rapid City.

James H. Herring, Canton, Miss., Michael T. Parker, Jackson, Miss., for amicus Miss. Mun. Assoc.

James P. Coleman, Ackerman, Miss., for amicus curiae Miss. Rural Water Assoc.


Appeal from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, GEE, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The City of Madison, Mississippi (“Madison”), appeals from the district court's grant of summary judgment in favor of Bear Creek Water Association, Inc. (“Bear Creek”), and the Farmers Home Administration (“FmHA”). Because we agree with the district court that 7 U.S.C. § 1926(b) precludes municipal condemnation of a water association's facilities during the term of its indebtedness to FmHA, we affirm.

II. DISCUSSION

[1] We review summary judgments in the same manner as the district court, in terms of whether there is any genuine issue of material fact and whether appellee was entitled to judgment as a matter of law. McCrea v. Hankins, 720 F.2d 863 (5th Cir.1983).

A. 7 U.S.C. § 1926(b)

Regarding water associations indebted to FmHA, 7 U.S.C. § 1926(b) provides:

The service provided or made available through any such association shall not be curtailed or limited by the inclusion of the area 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 said loan; nor shall the happening of such

FN1. Bear Creek's current indebtedness to FmHA is approximately $1.4 million, and Bear Creek has recently qualified for an additional $1 million in FmHA loans for system expansion and improvements.

However, during this time the City of Madison has grown substantially, and its boundaries now include a part of the area served by Bear Creek. In 1985, the city instituted eminent domain proceedings to condemn Bear Creek's facilities located within city limits as well as Bear Creek's certificate to operate in that area. This area includes approximately 40% of Bear Creek's customers, and 60% of Bear Creek's water supply facilities, including its water plant, wells, and feeder mains. FmHA subsequently intervened and the case was removed to federal court pursuant to 28 U.S.C. §§ 1444 and 2410.

In July 1986, the district court granted Bear Creek's motion for summary judgment on the ground that because Bear Creek was indebted to FmHA, 7 U.S.C. § 1926(b) applied and precluded the city's condemnation action. The city now appeals.

FN1.
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.

The district court held that this provision prohibits cities such as Madison from curtailing the services of funded water associations, be it through annexation, franchise, or condemnation. Madison argues that because the statute does not expressly prohibit condemnation, § 1926(b) only protects such associations from competition from municipalities, and thus does not preclude such entities from exercising their right of eminent domain.

[2][3] We disagree. The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b). See Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F.Supp. 1367 (N.D.Miss.1986) (holding municipal condemnation of water association's facilities and certificate violative of § 1926(b)).

Madison contends that this construction of the statute is untenable because it leads to the “plainly absurd” result that FmHA-financed water authority could avoid condemnation even if it owed only $1.00 on its government loan. However, it was Congress, and not this Court, that literally prescribed interference by competing facilities with the rural water authority “during the term of said loan.” The city's logic also assumes § 1926(b) must somehow be construed to effectuate the local condemnation power. Pursuing such logic, we might decide that so long as the condemnation does not “unduly interfere” with the water authority's payment obligations to FmHA, or with its ability to service rural water users, the condemnation may proceed. Such a result, however, would have a perverse impact upon both the rural water authority and the would-be condemnor. In each case, the contending parties could raise and seek adjudication of the fact issue concerning the extent of interference that would result from condemnation. A condemnation case impinging on a rural water authority could easily involve both state and federal court litigation, high legal fees and considerable delay, to the ultimate detriment of the municipality, the rural water authority, and the consumers of water service. A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.

[4][5] Madison, however, argues that our interpretation of § 1926(b) is contrary to the legislative history of that provision. While we need not resort to legislative history where, as here, the statutory language is unambiguous and yields no absurd results, see Steere Tank Lines, Inc. v. I.C.C., 724 F.2d 472, 477 (5th Cir.1984), we note that our interpretation of § 1926(b) *1060 comports with the purposes found in its legislative history:

By interpretation, loans cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. 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 decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new
provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.Code Cong. & Admin.News 2243, 2309. This history indicates two congressional purposes behind § 1926: 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns.

The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires 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. See Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc., 618 F.2d 601 (9th Cir.1980) (similarly rejecting utility's attempt to condemn property owned by cooperative financed by the Rural Electrical Administration).

Our interpretation of § 1926(b) is also inferentially supported by FmHA regulations regarding the transfer of water facilities subject to FmHA liens. These regulations require that any transfer must be approved by FmHA to insure that services will not be curtailed and that repayment of the FmHA loans is not jeopardized. 7 C.F.R. 1951.209, 1951.214 (1986). The regulations also suggest an alternate means by which the city might acquire the facilities it desires, in the context of a consensual sale.

FN2. Appellants' reliance on the unreported case of View-Caps Water Supply Corp. v. City of Abilene, No. CA-1-83-119-W (N.D.Tex.1985) is misplaced. In that case, where the district court allowed the City of Abilene to serve customers in an area originally certified to the water association, FmHA had apparently approved a contract between the parties which provided for the city's acquisition of the water facilities in the event of annexation. In the case at bar, there is no such contract and there has been no FmHA approval.

B. Tenth Amendment

[6] The city urges that if § 1926(b) limits the city's sovereign condemnation power, it violates the Tenth Amendment to the Constitution. We are not unsympathetic to enforcing the legitimate Tenth Amendment-based claims of state authorities against federal government infringement. Our natural ardor to preserve that critical division of power between the federal and state governments, a bulwark of protecting our individual liberties, is necessarily dampened, however, by the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Inasmuch*1061 as Garcia upheld the application of the Fair Labor Standards Act against a city entity as a valid execution of congressional power under the commerce clause, it may or may not be directly controlling in this case. The City of Madison would not prevail even under a broader vision of the Tenth Amendment than the Court propounded in Garcia, however, for we perceive no significant limitation on the city's powers by virtue of a statute enacted to protect FmHA's subsidy of rural water authorities. FmHA's charac-
terization of § 1926(b) as resting on Congress's undoubtedly broad powers under the spending clause seems more appropriate to this case than any commerce clause-based argument. Constitution Art. I, Section 8, clause 1. See Helvering v. Davis, 301 U.S. 619, 645, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1936) (“When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.”)

The issue is not, as the city would have it, whether under the Tenth Amendment its condemnation power is integral to its sovereignty, but rather whether the provision of water service is essential to its sovereignty. Let us assume that it is. See Brush v. Commissioner, 300 U.S. 352, 370-73, 57 S.Ct. 495, 500-02, 81 L.Ed. 691 (1937). Section 1926(b) limits the city's provision of such service not only by condemnation but also by preventing the city from granting a competing franchise, building its own competitive facility or otherwise curtailing the service of the federally funded rural water authority. Section 1926(b) does not, however, permanently curtail the city's authority, because it applies only while the federal debt is outstanding. Additionally, the city may and does regulate growth within that part of Madison served by Bear Creek so as to assure minimum standards of water service such as adequate fire hydrants. The city can and has in the past collaborated with Bear Creek to collect municipal bills for sewer service. It may also, pursuant to FmHA regulations, agree to purchase facilities from Bear Creek. The limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function. At most, Section 1926(b) ordains a dual water authority function within a municipal area for a period of time.

[7] Equally important, it is likely that FmHA's subsidy to the rural water authority enhanced real estate values and farm prosperity in and around the city and has provided an indirect benefit to the city's overall economic conditions in exchange for the limits on its water service authority. The overall effect of this statute is therefore not so much to infringe the city's sovereign power as to foster a cooperative effort between local and federal authorities. The Tenth Amendment is surely not offended by a limited restriction imposed by the federal government to protect its subsidized loans, particularly when the benefits of those loans accrue to the municipality.

III. CONCLUSION
Because § 1926(b) forbids, as a matter of law, municipal condemnation of an FmHA-indebted water association's assets, there was no genuine issue of material fact before the district court. Summary judgment was therefore correctly granted.

AFFIRMED.

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.
816 F.2d 1057

END OF DOCUMENT
Steven M. Harris, a Tulsa, Oklahoma lawyer, received his Juris Doctorate degree from the University of Tulsa in 1975. Mr. Harris’ law practice is focused on representing federally indebted Rural Water Districts/Associations/Water Supply Corporations in Federal actions to protect them from encroachment from neighboring municipalities. Mr. Harris has 22 years experience representing over seventy (70) Rural Water Districts in Oklahoma, Arkansas, Missouri, New Mexico, North Dakota, Kansas, Ohio, Colorado and Texas. The success of Mr. Harris and his staff of experienced lawyers has produced judicial decisions at the federal appellate level that have benefitted Rural Water nationally. He has lectured frequently on issues relevant to Rural Water. He has also authored numerous published articles on Rural Water issues.

AREAS OF EXPERTISE:

- Enforcement Actions involving 7 U.S.C., sec. 1926(b)
- Commercial Contract/Business Torts Litigation
- Business Interference Litigation
- Patent Litigation (emphasis in software patents)
- Copyright Litigation
- Insurance Coverage Litigation
- General Civil Trial and Appellate Practice

ADMITTED TO PRACTICE:

- Oklahoma Supreme Court May 2, 1975
- United States Federal Court of Appeals - 10th Circuit May 20, 1975
- United States Supreme Court March 17, 1980
- United States District Court Northern District of Oklahoma September 19, 1980
- United States District Court Western District of Oklahoma October 18, 1989
- United States Court of Claims September 24, 1990
- United States Federal Court of Appeals - 9th Circuit June 5, 1992
- United States Court of Appeals for the Federal Circuit January 17, 2001
- United States Federal Court of Appeals - 8th Circuit April 23, 2004
- United States District Court Eastern District of Oklahoma September 2004

PRESENTER AT RURAL WATER CONFERENCES/CONVENTIONS

- Kansas Rural Water Association Annual Conference, 2007
- National Rural Water Association Annual Conference, 2008
- Arkansas Rural Water Association Annual Conference, 2008
- New Mexico Water Association Annual Conference, 2009
- Colorado Rural Water Association Annual Conference, 2009
- Oklahoma Rural Water Association Annual Conference, 2009 & 2011
- Missouri Rural Water Association Annual Conference, 2011
- Texas Rural Water Association Annual Convention, 2012

EDUCATION:

- B.A., University of Kansas
- J.D., University of Tulsa

COURTS MR. HARRIS HAS BEEN ADMITTED TO PRACTICE PRO HAC VICE

- 1995 Seventh Judicial District of Idaho
- 1996 Western District of Texas
- 1998 Northern District of Texas
- 1998 Eastern District of Michigan
- 1998 Bay County Circuit Court, Michigan
- 1999 Northern District of California
- 2000 Western District of Washington
- 2000 Eastern District of Arkansas
- 2001 Southern District of Texas
- 2001 Northern District of California
- 2002 Southern District of California
- 2002 Northern District of Georgia
- 2002 District of New Mexico
- 2002 Eastern District of Louisiana
- 2003 Central District of California
- 2003 Western District of Missouri
- 2004 District of Minnesota
- 2004 Circuit Court of Clay County, State of Missouri
- 2007 Western District of Missouri
- 2007 District of Kansas
- 2008 Circuit Court of Laclede County, State of Missouri

ARTICLES ON 7 U.S.C. 1926(B)

- Protecting Your Service Area From Municipal Competition/Encroachment, 2002
  Chapter 1 - The Four Elements of 7 U.S.C § 1926(b)
  Chapter 2 - Making Service Available. How Much Is Enough?
- Clandestine Arrangements, 2005
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