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Rural Water Update

INSIGHTS AND DEVELOPMENTS IN THE LAW 2006

Elk City Sues To Block Borrowing Authority For Oklahoma Rural Water Districts

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Elk City filed suit against Beckham County (Oklahoma) Rural Water District #3 in 2006. Elk City claims that loans made by Rural Development (U.S. Department of Agriculture) to Oklahoma Rural Water Districts are void.

Oklahoma Rural Water Districts who are indebted to Rural Development or its predecessor FmHA (or even to an assignee of such loans such as GECC) are entitled to the protection of Title 7, United States Code, § 1926(b). This federal statute precludes/forbids neighboring municipalities from selling water in competition with federally indebted rural water districts. Municipalities who sell water to customers located inside the service area of a federally indebted water district may be held liable for damages and compelled to cease water sales by a court imposed injunction. Other liability that can be imposed against a city or town acting in violation of § 1926(b) includes forfeiture of infrastructure and attorney fees.

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Protecting Your Service Area From Encroachment

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Expanding municipalities in Oklahoma frequently run water lines across the geographical boundaries of rural water districts to serve new customers inside water district territory. This is not surprising since water sales represent a significant amount of revenue for cities and towns. The typical response from water districts is "Not in my Back Yard!" However, does this "invasion" into water district territory violate any law? The answer is all too often: NO. Absent indebtedness on a state or federal loan, water districts are defenseless to accidental or even intentional encroachment into their service area.

In *Rural Water District No. 4, Wagoner County, Oklahoma v. City of Coweta, Oklahoma*, the Oklahoma

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Liability Insurance For Water Districts - How Much Is Enough?

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Oklahoma Rural Water Districts are by statute, agencies of the State of Oklahoma. Districts are entitled to the protection of the Governmental Tort Claims Act (GTCA). The GTCA limits the kinds of claims which can be brought against a water district. Liability of a district is limited under state law to $25,000 for any claim for loss of property and $125,000 for any other allowed claim. (The district is immune from certain kinds of claims.) The maximum limit for multiple claims arising out of a single occurrence or accident is one million dollars. Of course there may be multiple claims in any one policy period, therefore it is a good idea to have a fairly large aggregate limit for multiple claims arising from more than one accident in any one policy period.

If this is the limit of liability, does it make any sense to buy more liability insurance than the maximum liability provided under the statute. That of course depends on the language of the insurance policy. If the policy limits can be eroded by defense costs, the policy may not be adequate for full protection. Policies that have a "wasting" provision (where coverage is reduced by legal defense costs or other expenses) should be avoided.

The Oklahoma Department of Central Services (http://www.dcs.ok.gov/) is required to establish for all state agencies (which would include rural water districts) a comprehensive risk management program which includes: (1) identifying and evaluating risks of loss, (2) administering self insurance programs, and (3) assisting in obtaining insurance for liability.

74 Okla. Stat. § 85.58A (F) provides: "A state agency, whether or not subject to the Central Purchasing Act, that contemplates purchase of property and casualty insurance, shall provide details of the proposed purchase to the Risk Management Administrator for approval or disapproval prior to the purchase." Section 85.58A seems to not only provide benefits of professional advice regarding obtaining insurance, but also a mandatory provision that the Department of Central Services must be consulted before insurance is purchased by a water district.

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Elk City Sues To Block Borrowing …*(continuation)*

Elk City argues in its suit that because § 1926(b) creates a monopoly on water sales for the benefit of the water district, this violates the Oklahoma Constitution. In addition to attempting to declare void all loans made by Rural Development, Elk City seeks to compel Beckham #3 to repay its loans and force the district into receivership.

Elk City's suit is not the first time a municipality has attempted to challenge the borrowing authority of Oklahoma Water Districts. In 1988, the 10th Circuit Court of Appeals (Federal Appeals Court) decided the case of *Creek County Oklahoma Rural Water District No. 2 v. City of Glenpool*. The Court ruled that federal loans did not violate the Oklahoma Constitution. The 10th Circuit held that the State of Oklahoma authorized District No. 2 to borrow money from the federal government, and in so doing accepted the conditions accompanying the loan – which included the protection afforded by § 1926(b). The 10th Circuit expressly held that Glenpool was precluded by § 1926(b) from curtailing District No. 2's service by including the district's territory within the boundaries of Glenpool, and that there was no *state* legislative grant of an exclusive right which might violate the Oklahoma constitution.

The outcome of the Beckham-3 suit is of vital importance to every district in the state since it affects districts which already have a federal loan and those that may want one in the future.

If your water district would like to lend support, financial or otherwise to assist Beckham-3 in this litigation contact the Oklahoma Rural Water Association. (Doyle Harris Davis & Haughey serves as legal counsel for Beckham-3 and Creek-2.)

Drug & Alcohol Testing Policies In Oklahoma

By Holly Bobo
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Is your water district thinking of instituting a drug and alcohol testing program or do you wonder if your current drug and alcohol policy is adequate? If so, there are a few important points regarding drug and alcohol testing in Oklahoma that must be kept in mind when drafting or redrafting a drug and alcohol testing policy in order to avoid some common pitfalls.

1. The policy must be **in writing**. The Standards For Workplace Drug and Alcohol Testing Act, *Okla. Stat. Tit. 40 §552 et. seq.* which governs drug and alcohol testing in Oklahoma make it clear that drug and alcohol testing cannot be implemented under any circumstances, absent a clear and concise **written** drug and alcohol policy.

2. When implementing a drug or alcohol policy for the first time or implementing changes to its policy the employer **must** provide at least 30 days notice (60 day notice is preferable) to its employees prior to implementing the policy or changes to the policy.

3. The employer **must** post a copy of the drug or alcohol testing policy and any changes to the policy in a prominent place accessible to all employees **AND shall** give a copy of the policy and any changes to each employee and to each applicant upon his or her receipt of a conditional offer of employment. (It is recommended, but not required that each employee sign an acknowledgement that he or she has read and understands the drug and alcohol testing policy.)

4. The written drug and alcohol policy **must** contain the following information:

a. A statement of the employer's policy respecting drug and alcohol use by employees;

b. Which applicants and employees are subject to testing;

c. Circumstances under which testing may be requested or required (the six (6) circumstances under which Oklahoma allows drug and alcohol testing are; (1) Applicant testing, (2) Reasonable suspicion testing, (3) Post-accident testing, (4) Random testing, (5) Scheduled periodic testing, and (6) Post-rehabilitation testing;

d. Substances for which the applicant or employee will be tested, including the brand or common name, if any, and the chemical name of any drug or its metabolite to be tested and at what concentrations (such information is obtained from the company which the employer hires to perform its drug testing);

e. Testing methods and collection procedures to be used;

f. Consequences of refusing to undergo testing;

g. Potential adverse personnel action which may be taken as a result of a positive test result;

h. The rights of an applicant and employee to explain, in confidence, the test results;

i. The rights of an applicant and employee to obtain all information and records related to that individual's testing;

j. Confidentiality requirements; and

k. The available appeal procedures, remedies and sanctions.

5. Lastly, no employer may institute a drug and alcohol testing policy unless the employer provides an employee assistance program (EAP). Such EAP means an in-house or contracted program, which at a minimum provides drug and alcohol dependency treatment or rehabilitation. (Such EAP's are usually provided by the employer's health insurance policy).

Buying Water From A Municipality?

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Beginning July 1, 1996, if a municipality selling water to persons or public or private entities outside its corporate limits has not implemented an enterprise accounting system to account for the cost of water supply, treatment and delivery to the point of delivery to the purchaser's water system, it shall be liable to the purchaser for the reasonable expenses of such an accounting exceeding the expense which the purchaser would have incurred using an enterprise accounting system. 11 Okl.St.Ann. § 37-119a

All such water sold and furnished to persons or public or private entities outside the corporate limits of the municipality shall be sold and furnished upon written contracts which shall provide for an annual review of the municipality's costs and contract modification of rates to permit rates to be increased or decreased to the purchasers as appropriate. Any modification shall be nondiscriminatorily allocated between the municipality's customers and the purchaser. Provided, however, that only those costs that are attributable to maintaining the ability of the municipality to provide water service to the purchaser shall be included in purchaser's rates. 11 Okl.St.Ann. § 37-119

When a water purchase contract has been executed, the board of directors for the water district must file a copy of the water purchase contract with the Oklahoma Water Resources Board. 82 Okl.St.Ann. § 1324.8

Using The Public Right of Way For District Water Lines

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Oklahoma Rural Water Districts by statute are entitled to use any street, road, alley or highway which is owned or held by the state, or any political subdivision. 82 Okla. Stat. § 1324.10 (a) (8). Naturally any "political subdivision" would include that held by a county or municipality/town.

The location of water lines or other facilities must be concurred in by the governing or appropriate bodies of the cities, counties or state, which have jurisdiction over the property.

The district plans for locating lines must comply with the written specifications for the location of lines and facilities as set forth by the governing body of the county for property within their jurisdiction. If the governing body of the county does not have written specifications for the location of lines and facilities for property within their jurisdiction, they shall concur with the district plans or provide the district with an alternative plan. 82 Okl.St.Ann. § 1324.10

This statute also provides that the relocation or rearrangement of any public utility's or common carrier's facilities of service required to be made to permit or accommodate installation or maintenance of a district's facilities on, across or under any publicly owned or held real property shall be performed at the sole cost of the district.

Simply put, the County or other political subdivision is required to accommodate for the location of the district's lines in the public right of way.

Liability Insurance *... (continuation)*

In 2005 the District Attorney for Tulsa County was sued by an arrestee for false arrest and civil rights violations among other things. The arrestee claimed that the District Attorney had waived the benefits of the GTCA because the District Attorney's insurance policy had coverage limits in excess of the liability limits established by the GTCA. Prior published court decisions suggested that tort liability limits could indeed be waived if the governmental entity held insurance coverage for an amount greater than the limit established by the GTCA (but only up to the full amount of the insurance coverage).

As liability limits increase, so does the cost of the liability insurance policy. There does not appear to be any sound basis for maintaining liability insurance limits for the protection of state law tort claims in excess of the GTCA limits. Purchasing higher limits could be counter-productive both from a cost stand point as well as potential waiver of the cap limit of the GTCA.

There remains however consideration of federal statutory claims. If the district is sued for a violation of Title 42 United States Code § 1983 (violating the rights held by an individual under a federal law or the U.S. Constitution) the GTCA may not apply. Municipalities (and water districts for that matter) in Oklahoma have been sued for federal law violations of 7 U.S.C. § 1926(b). Liability for such a violation (selling water in violation of federal law) could expose the district for a judgment greater than the GTCA limits. The risk for most districts for a federal violation resulting in damages may be fairly remote but the possibility of such a suit cannot be precluded entirely.

For these reasons, districts should avail themselves of the benefits of the Oklahoma Department of Central Services as well as their insurance professionals and legal counsel in properly evaluating liability insurance needs and their relative cost.

Another source to contact concerning your liability insurance needs is the Oklahoma Rural Water Association Assurance Group. You can contact them at the following address and telephone number: Oklahoma Rural Water Association Assurance Group, c/o Lisa Ross, P.O. Box 95349, Oklahoma City, OK 73143, (800) 375-6792.

Protecting Your Service Area *...(continuation)*

Supreme Court held that any granting of an exclusive right to provide water service within the geographical boundaries of a water district would be contrary to Article V, Section 51 of the Oklahoma Constitution. That section prohibits the legislature from granting exclusive franchises. Despite this seeming prohibition, the Court did recognize that because the district was indebted on a loan made by the Water Resources Board, it would have protection from competition for its existing customers under 82 Okla. Stat. § 1085.36. The Court went on to point out that this statute did not protect potential revenues from potential customers who could be provided services in the future. The Oklahoma Legislature in drafting this law, apparently failed to consider that a lengthy time may pass between funding of the loan, completion of construction and the actual connection to a water customer. During the time between the funding of the loan and the actual connection to a customer, a neighboring municipality is seemingly free to hook-up as many customers as it can without fear that it would violate § 1085.36. This in effect could leave a newly constructed system stranded and without the anticipated customers which were intended to be served when the loan application was made (and without the anticipated revenue from which the district intended to repay its loan).

Water Districts who have federal loans through Rural Development are in a far different and better position. Federal law dictates that if (1) the district is indebted to the federal government and (2) has the ability to make service available within a reasonable period of time, at a cost that is not confiscatory, then existing and potential customers are protected from being taken by a neighboring municipality.

If the district intends to protect its service area from encroachment, a federal loan is the only practical method to do so. The value of this protection should be considered when calculating the cost of a loan from Rural Development versus some other lending source (such as an OWRB loan, bond issue or private lender).

The Power to Regulate

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Oklahoma Rural Water Districts have the statutory power to "fix, regulate and collect rates, fees, rents or other charges for water, gas and any other facilities, supplies, equipment or services furnished by the district." This power is not unlimited. 82 Okla. Stat. § 1324.10(A)(10) also says, that the "rates shall be just, reasonable and nondiscriminatory".

Although water districts formed pursuant to Title 82 must be operated without profit, their rates, fees, rents and other charges "shall be sufficient at all times": (1) To pay all operating and maintenance expenses necessary or desirable for the prudent conduct of its affairs and the principal of and interest on the obligations issued or assumed by the district in the performance of the purposes for which it was organized; and (2) for the creation of adequate reserves for the retirement of indebtedness, maintenance and other purposes necessary and expedient to meeting all obligations of the district. 82 Okla. Stat. § 1324.11.

Water Districts also have the express power, by statute, to "do and perform all acts and things, and to have and exercise any and all powers as may be necessary, convenient or appropriate to effectuate the purposes for which the district is created". 82 Okla. Stat. § 1324.10(A)(11)

What is "reasonable", "non-discriminatory", "prudent" and "necessary, convenient or appropriate", is of course subject to debate. What may be a fair charge in the mind of the Board of Directors of the District, may be confiscatory and an unlawful taking by members of the district. An effective means of evaluating a district's rate structure is to examine what other similarly situated districts and municipalities charge for the same services.

HAVE ANY IDEAS?

If you have a topic you would like the Firm to research and publish in the next Rural Water Update, please contact us.

DOYLE HARRIS DAVIS & HAUGHEY emphasizes as its principal practice area, legal representation of Rural Water Districts in both the State of Oklahoma as well as districts located in other states. The firm provides direct representation and acts as co-counsel to existing legal counsel for water districts.