

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROSS COUNTY WATER CO.,

Plaintiff,

vs.

CITY OF CHILLICOTHE,

Defendant.

CASE NO. 2:08-CV-735

JUDGE MICHAEL H. WATSON

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

* * * *

Now comes the Plaintiff, Ross County Water Company ("RCWC"), by and through the undersigned counsel pursuant to Fed. R. Civ. P. 56 and moves this Court for an order granting summary judgment to RCWC on all counts asserted in its First Amended Verified Complaint, and for summary judgment against Defendant, City of Chillicothe, on all counts asserted in its Counterclaim. A supporting memorandum is attached hereto and incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

This case presents an often-litigated dispute over water service territory where the outcome is determined by the application of well-settled federal jurisprudence protecting rural water providers from municipal cherry-picking. Here, much like many related cases over the past decade, Chillicothe seeks to curtail RCWC's water service territory by constructing waterlines in an area served by RCWC since the 1970s. This invasion is not only redundant and illogical, but also violates the protection afforded to RCWC under the Consolidated Farm and Rural Development Act of 1961, Title 7 U.S.C. §1926(b).

The issues addressed herein mirror those raised by RCWC's Motion for Preliminary Injunction (Doc. 3). Importantly, this Court previously found that RCWC is entitled to §1926(b) protection against Chillicothe's encroachment. *See* Feb. 10, 2009 Order (Doc. 29). Although the parties conducted extensive discovery depositions over the course of the last three months, the facts supporting the Court's order granting RCWC's Motion for Preliminary Injunction remain the same. In fact, RCWC's First Amended Verified Complaint filed after the Court's grant of the preliminary junction added additional grounds to support RCWC's claim to the disputed area.

II. Summary Judgment Standard

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c): “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

This Court recently articulated principles of summary judgment in *Amos v. PPG Indus.*, 2009 U.S. Dist. LEXIS 63112, ¶5-8 (S.D. Ohio July 14, 2009):

The Court may grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial. (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must-by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Additionally, in responding to a summary judgment motion, the nonmoving party “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” (citation omitted) *** Moreover, “[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact.” (citation omitted). That is, the nonmoving party has an affirmative duty to direct the court’s attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. (citations omitted).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. (citations omitted).

Thus, the central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” (citations omitted).

III. Analysis

**RCWC’S FIRST AMENDED VERIFIED COMPLAINT
COUNTS ONE AND TWO
(Declaratory Judgment and Injunctive Relief)**

RCWC’s claims concern the application of 7 U.S.C. §1926(b) to prevent Chillicothe from curtailing its existing water service territory by constructing a competing water distribution system. Title 7 U.S.C. §1926(b) states in relevant part:

[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.

To invoke the anti-curtailed protection of § 1926(b), RCWC must satisfy a three-prong test: (1) it is an ‘association’ within the meaning of the Act; (2) it has a qualifying outstanding USDA loan; and (3) it has provided or made service available in the disputed area. *See Village of Grafton v. Rural Lorain County Water Auth.*, 419 F.3d 562, 566 (6th Cir. 2005).

A. RCWC is an ‘association’ within the meaning of the Act.

It remains undisputed that RCWC is a non-profit corporation organized under Ohio Revised Code § 1702.01, et seq. to provide potable water service to residents of unincorporated Ross County. See Pl’s Ex. 1 & 2 (PX 1, 2); see also Feb. 10, 2009 Order, pg. 10 (Doc. 29). The Court previously recognized that the express language of § 1926(a) includes “corporations not operated for profit” within the purview of the statute.¹ *Id.* (Doc. 29). Just days ago, the Fifth Circuit continued the long-standing application of § 1926(b) protection to non-profit corporations in *Bluefield Water Ass’n Inc. v. City of Starkville*, 2009 U.S. App. LEXIS 16106 (5th Cir. 2009) (affirming in part the district court’s grant of a preliminary injunction in favor of a Mississippi non-profit water provider pursuant to § 1926(b)); see, also *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 312 (7th Cir. 1989) (applying § 1926(b) protection to a non-profit water association).

B. RCWC is indebted to the United States Department of Agriculture.

It is undisputed that RCWC is currently – and at all times materials – indebted to the USDA through five separate and outstanding loans totally approximately 10.6 million dollars. See August 14, 2008 Tr. pg. 49-52 and Pl’s Ex. 26 – 44 (PX 26-PX 44). Each of these notes were issued under the provisions of the Consolidated Farm and Rural Development Act of 1972, and include express

¹ 7 U.S.C. §1926(a) Criteria; definitions; limitation on allowable uses of Federal funds; inclusion of interest or other income in gross income on sale of insured loan

(1) The Secretary is also authorized to make or insure 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....

contractual obligations by RCWC to provide water service to all persons in Ross County who can feasibly and legally be served. *See, e.g.* Pl's Ex 27, pg. 3, section 5(k) (PX 27).

C. RCWC has provided or made service available to the disputed area.

i. RCWC has pipes in the ground within and adjacent to the disputed area.

In *Village of Grafton*, 419 F.3d 562 the Sixth Circuit reiterated a consistent test used by federal courts to determine whether a rural water association has provided or made service available to a disputed area: (1) the association has pipes in the ground, and (2) the association has the legal right under state law to serve the disputed area. *Id.* at 566.

Here, RCWC is legally entitled to serve the disputed area in accordance with: (1) a 1971 contract between RCWC and Chillicothe, (2) a 1972 blanket easement to RCWC granted by Ross County Commissioners, (3) a 2002 contract between RCWC and Chillicothe, and (4) by virtue of the location of its existing waterlines throughout the disputed area. *See* Pl's Ex. 12, 13 and Ex. B to RCWC's First Amended Verified Complaint (PX 12, PX 13,).

During the course of this litigation, Chillicothe took the position that the 1971 contract is void because the attesting mayor lacked authority to sign the agreement. As discussed more fully below, Chillicothe's defense is moot in light of the 2002 contract and 1972 blanket easement.

To satisfy the "pipes in the ground" test, RCWC must have water lines within, or adjacent, to the disputed area prior to the municipal encroachment. *See*

Village of Grafton, 419 F.3d 562; see, also *Lexington-South Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 237 (6th Cir. 1996) (“whether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served.”). Based upon the location of its lines, RCWC must also be able to provide service to the area within a reasonable time after a request for service is made. *Village of Grafton*, 419 F.3d at 576; see, also *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 713 (10th Cir. 2004) (rural water association need not be able to provide service “today,” if it has adequate facilities adjacent to the area and can provide service within a reasonable time). Finally, RCWC must have sufficient volume and pressure to provide service. Cf. *Bell Arthur Water Corp. v. Greenville Utils. Comm’n*, 173 F.3d 517, 526 (4th Cir. 1999) (finding that six inch waterline was not sufficient where evidence indicated a fourteen-inch line was required).

This Court previously recognized that RCWC began laying waterlines in the disputed area in the 1970s – over 35 years before Chillicothe decided to construct an invading and redundant system. See Feb. 10, 2009 Order, pg. 14 (Doc. 29). Indeed, RCWC’s waterlines are both adjacent to – and within – the disputed area. See August 14, 2008 Tr. pgs. 11 – 27 and Pl. Ex. 9 and 10 (PX 9 and PX 10). Sufficient volume and pressure are not issues either. The pressure in these lines is approximately 150 pounds per square inch, compared to the pressure in Chillicothe’s waterlines serving the nearby hospital at 50 pounds per square inch. See September 4, 2008 Tr. pgs. 86-87. Chillicothe has elicited no evidence to date to

rebut the fact that RCWC has more than sufficient pressure and capacity to serve the disputed area.

Notably, Chillicothe claims that it may lawfully serve not only customers along Hospital Road *south* of Delano Road, but also customers *north* of Delano Road. But Chillicothe never passed legislation authorizing the construction of waterlines north of Delano Road, leaving RCWC's entitlement to serve that portion of the disputed area unquestionably clear and beyond the scope of its claims presented here. Regardless, RCWC has established its entitlement to exclusively serve the entire disputed area, north and south of Delano Road, under the "pipes in the ground" test. *See Village of Grafton*, 419 F.3d 562. Indeed, RCWC has maintained waterlines on the west side of Route 23 since the early 1970s and has made water available to what is now known as the Cloverleaf parcels on the east side of Route 23 for seven years. *See* Pl. Ex. 46, pg. 6 and September 4, 2008 Tr. pg. 30 (PX 46).

- ii. Whether water actually flows to any customers in the disputed area is irrelevant.

Chillicothe also claims that RCWC has no customers in the disputed area, and therefore has no right to federal protection under § 1926(b). This assertion is meritless on both factual and legal grounds. Substantial documents and testimony has been submitted to the Court evidencing that RCWC has served parcels collectively referred to as the Warner property since the 1970s through its six-inch transmission line on the west side of Route 23. *See* September 4, 2008 Tr. pg. 40 and 88, PX 9 PX 10 and PX 11. The Warner property – located in the heart of the

disputed area – encompasses over 72 acres and is bisected by Route 23. In the event service was requested on the eastern portions of the property (east of Route 23), RCWC planned to bore under Route 23 to tap its six-inch waterline just across the road. *See* August 14, 2008 Tr. pg. 25 and September 4, 2008 Tr. pg. 40.

In June 2008, RCWC acted on its long-range plan to construct an eight-inch transmission line along the east side of Route 23 in an effort to reduce the cost of boring under Route 23 (and to keep water rates low) to serve customers from its six-inch waterline on the west side of the highway. *See* August 14, 2008 Tr. pg. 27. Chillicothe construes RCWC’s addition of this line as acting in bad faith in an effort to expand its service territory and prevent Chillicothe from serving the disputed area. But again, Chillicothe simply ignores the undisputed fact the RCWC has had lines within *and* adjacent to this area since the 1970s.

Moreover, the provision of water service to actual customers is not a prerequisite to § 1926(b) protection. An invading municipality asserted a nearly identical claim in *N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm’n*, 803 F. Supp. 15 (E.D. Ky. 1992). There, the court noted,

[T]he Commission contends that because North Shelby has no actual customers within the properties in question, North Shelby has not “provided service,” and therefore is not entitled to the protection of § 1926(b). *Id.* at *20.

Contrary to the Commission’s argument, the fact that North Shelby does not have water lines nor prior customers actually within the Brassfield/Meadows property is not dispositive. *Id.* at *23.

In summary, the undisputed evidence of record establishes North Shelby's entitlement to the protection of 7 U.S.C. § 1926(b). *Id.*

Indeed, Chillicothe's argument is illogical in the context of repeated precedence that a rural water association need only "make service available" to a disputed area. *See Village of Grafton*, 419 F.3d at 576; *see, also Pittsburg County Rural Water Dist. No. 7*, 358 F.3d at 713 (rural water association need not be able to provide service "today," if it has adequate facilities adjacent to the area and can provide service within a reasonable time). Accepting Chillicothe's argument would drastically change twenty years of precedence on this issue.

iii. *Le-Ax* supports RCWC's position.

Throughout this litigation, Chillicothe has insinuated that RCWC is using the protection afforded under § 1926(b) as a sword rather than a shield by recently adding an eight-inch waterline extension along Hospital Road in the disputed area. *See Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 707-08 (6th Cir. 2003); *see, also*, Chillicothe's Answer to First Amended Verified Complaint, ¶ 17 (Doc. 35). Yet by asserting such a proposition, Chillicothe continues to ignore RCWC's long-standing presence within and adjacent to the disputed area since the 1970s. Further, RCWC had planned to construct the eight-inch extension for several years in an effort to reduce the cost of boring under Route 23 (and to keep water rates low) to serve customers from its six-inch waterline on the west side of the highway. *See* August 14, 2008 Tr. pg. 27.

Notwithstanding its decision to add the eight-inch line, RCWC has always

been able to provide service to properties along the east side of Route 23 by simply boring under the highway from its six-inch line. Even Chillicothe admits that this process is simple and more feasible than tearing up a road. *See* September 4, 2008 Tr. pg. 92.

Most importantly, the *Le-Ax* holding is very limited in scope and not applicable to the facts of this case. *Id.* at 709-10. The *Le-Ax* court carefully explained that its decision to limit the water district's territory to the area described in the original court order has no application to general non-profit water associations. *Id.* ("Because of the distinction between offensive and defensive uses can be difficult to delineate, we take care to limit the scope of our holding. This is not a case where a defendant has intruded on a water association's actual or operative service area").

In *Le-Ax*, the water district had boundaries "geographically determined by the state." The Court distinguished its holding from a fact pattern existing in the case at bar: "...Le-Ax's boundaries are clearly defined by state law; we do not consider here a case where the state has not defined the boundaries of its water districts or associations." *Id.*

Distinguishing itself from cases with a fact pattern like the instant case, the court in *Le-Ax* cited *N. Shelby Water Co.*, 803 F. Supp. 15. Specifically, the *Le-Ax* court noted that under Kentucky law there was no definition of the phrase "service area" to delineate North Shelby's territory. Accordingly, the *Le-Ax* court

distinguished the *N. Shelby* case and refused to allow § 1926(b) protection outside the water district's state-defined boundaries.

In *N. Shelby*, the court cited § 1926(b) and its language that, “[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....” *N. Shelby Water Co.*, 803 F. Supp. at, 21. The court then noted that, “[t]here is no operative definition under Kentucky law of the phrase ‘service area’ to delineate North Shelby’s territory. *Id.*

In defining the service area of a water district with no state-defined service area, the court in *N. Shelby* determined that the water district’s service area was any place it had actual distribution lines or made water service “available” to potential customers, explaining:

North Shelby’s “distribution” lines in these areas are lines “from which service connections with customers are taken at frequent intervals.” 807 KAR 5:066(3). To receive water service, a customer must be connected by a service line to a distribution line. *Id.* §§ (4) and (5). As a utility regulated by the PSC, North Shelby is required to make, “reasonable” extensions of its water lines to serve any customer who would apply for service from one of its distribution lines [TR, pp. 168-169]. KRS 278.280(3); *City Bardstown v. Louisville Gas and Electric Co.*, Ky., 383 S.W.2d 918, 920 (1964). The obligation to make a reasonable extension to any requesting customer exists regardless of whether the existing distribution line runs down the same side of the road on which the proposed customer’s property is located, or is on the opposite side of the road [TR, pp. 138-140]. When a service line is installed to connect a customer to a distribution line, North Shelby is required to pay for the first fifty feet of the extension. For any extension exceeding fifty feet, the customer would be required to pay the additional cost, although refunds are made for the customer’s payment if other customers later connect during a certain period of time. [TR, pp. 121-122].

Thus, while North Shelby has never actually “provided” water service to any customer within the subject subdivisions, it has, under Kentucky law, made water service “available” to potential customers within the subdivisions by virtue of the proximity of North Shelby’s distribution lines to Brassfield/the Meadows, and the location of a distribution line within the Partridge Run Estates property.

From the conclusion that North Shelby has made water service “available” to the areas in question within the meaning of § 1926(b), it is undisputed that the Commission’s present and prospective water service provided to the subject subdivisions has “curtailed or limited” that which North Shelby could provide in violation of § 1926(b). The additional net revenue North Shelby would receive if it were to serve the subdivisions, over the remaining term of North Shelby’s loans with the FmHA, is significant. The additional net revenue North Shelby would receive would be available to reduce its per user costs, and would make its loans from the FmHA more secure, which are among the purposes for which § 1926(b) was enacted. *Jennings*, 895 F.2d at 315.

The fact that North Shelby’s water lines, as to Brassfield/the Meadows, are simply adjacent to, but not within, that property does not defeat North Shelby’s entitlement to the protections of § 1926(b) as to that property. Because North Shelby is required under Kentucky law to provide extensions of service to potential customers located reasonably near to its distribution lines, North Shelby is capable of providing water service to the subdivisions within a reasonable time after application for service. *Glenpool*, 861 F.2d at 1213. Contrary to the Commission’s argument, the fact that North Shelby does not have water lines nor prior customers actually within the Brassfield/Meadows property is not dispositive.

Id. at 22 (emphasis added).

Applying the rationale of *N. Shelby*, a similar conclusion presents itself to the fact pattern of the instant case. Pursuant to 7 CFR 1942.17 and RCWC’s Resolution and Loan Security Agreement adopting the regulatory language of § 1942.71, RCWC accepted certain responsibilities upon accepting the benefits of the USDA

loan, namely the commitment to serve all water users who desire service and to whom service is “feasible”. *See* Pl. Ex. 27, pg. 3, section 5(k) (PX 27).

Here, Chillicothe presented no evidence to rebut the fact it is not only feasible to supply water to the disputed area, it can be done almost overnight. RCWC’s service area is thus any area where there are distribution lines and a feasibility to reach customers who desire service. This includes the property disputed in this case.

Such a result furthers the underlying policy of § 1926(b). Having made the financial commitment to place large-volume distribution lines, the USDA loan will be better secured as more development occurs near these lines and more people connect to them. This results in more net revenue and affordable water costs for rural users. *N. Shelby Water Co.*, 803 F. Supp. at 22; *see, also, Lexington-South Elkhorn Water Dist.*, 93 F.3d at 233.

D. Section 1926(b) is not unconstitutional.

Chillicothe has asserted an affirmative defense that § 1926(b) unconstitutionally violates the Tenth and Fourteenth Amendments to United States Constitution and therefore has no effect on the outcome of this dispute. Specifically, Chillicothe claims that Ohio Constitution Article XVIII §§ 4 & 6 and R.C. § 711.09 grant it the right to construct waterlines beyond its corporate limits. *See* Chillicothe’s Answer to First Amended Verified Complaint, ¶ 18 (Doc. 35).

Notably, this very same argument was advanced by the City of Athens in *Le-Ax Water Dist. v. City of Athens*, 174 F. Supp. 2d 696 (S.D. Ohio 2001). There,

Athens argued that § 1926(b) improperly interferes with powers reserved to the State of Ohio, and displaces Ohio's commitment to municipal control of public utilities and annexation. *Id.* at 708.

Judge Algenon Marbley in his trial court decision, found that “[s]ection 1926(b), even when interpreted to grant protection to Le-Ax, does not violate the Tenth Amendment.” *Id.* He further found that the protection afforded to Ohio rural water associations through § 1926(b) is consistent with Congressional intent, and that “Ohio has voluntarily and knowingly accepted the [conditions of § 1926(b)], as evidenced by the Ohio laws that authorize the creation of water districts and the contracting of such water districts with the Department of Agriculture.” *Id.* The Sixth Circuit left Judge Marbley's finding on this issue undisturbed. *Le-Ax Water Dist.*, 346 F.3d 701.

Chillicothe continues to beat the proverbial ‘dead horse’ by continuing to challenge the constitutionality of § 1926(b). Indeed, this issue has been addressed in several seminal § 1926(b) cases, each time favoring the application of § 1926(b) over a competing state statute. *See Village of Grafton*, 419 F.3d at 567 (village's exclusive rights under the Ohio Constitution to provide utility services even *within* its boundaries are limited by § 1926(b)); *see, also City of Madison v. Bear Creek Water Assoc.*, 816 F.2d 1057, 1061 (5th Cir. 1987) (citing *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.”).

E. Injunctive relief is appropriate to redress Chillicothe's unlawful invasion.

Paramount to the relief sought by RCWC is its request for a permanent injunction enjoining Chillicothe from taking any further action to limit or curtail RCWC's service territory. Section 1926(b) jurisprudence consistently applies principles of injunctive relief to protect a rural water association from municipal encroachment. *See e.g. North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 917 (5th Cir. 1996) ("Section 1926(b) does not create or specify a remedy for the enforcement of violations, but an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations.") With respect to demonstrating irreparable harm, the Seventh Circuit noted, "irreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of the legal remedy." *Jennings Water, Inc.*, 895 F.2d at 318. Because 1926(b) prohibits *any* encroachment by a municipality, "injunctive relief is clearly the appropriate remedy to ensure the continued, uninterrupted service by the federally indebted entity." *Id.*

Here, Chillicothe is attempting to encroach upon and curtail RCWC's service territory in contravention of § 1926(b). To protect its territory and to ensure its ability to repay outstanding debts to the United States, RCWC is entitled to an injunction prohibiting Chillicothe from providing water service in the disputed area.

RCWC’S FIRST AMENDED VERIFIED COMPLAINT
COUNT FOUR
(Breach of 1971 Contract)

On or about June 29, 1971, RCWC and Chillicothe entered into a contract to “establish non-competitive water service,” by granting RCWC the right to serve all areas of unincorporated Ross County, excluding a hospital (Adena Medical Center) and the Colomet industrial site. *See* Pl. Ex. 12 (PX12). Although RCWC relied upon the terms of the contract, and obtained a blanket easement from Ross County to construct lines in the county’s rights-of-way, Chillicothe only recently claims that its mayor lacked the authority to sign the agreement. Notably, RCWC and Chillicothe have abided by the terms of this agreement for over 35 years, until just recently when Chillicothe unilaterally acted to invade RCWC’s service territory.

During the course of discovery, Chillicothe produced an undated and unauthenticated newspaper article discussing the apparent lack of authority by the mayor to sign the agreement. Despite the evidentiary hurdles associated with the article, it provides no indication that Chillicothe took any official steps to either rescind or ratify the mayor’s attestation. Rather, it simply illustrates the tumultuous history between Chillicothe and RCWC, particularly regarding water service.

Although not binding here, the Alabama Supreme Court upheld a decision in favor of a rural water provider where a municipality had assured the water provider that it would not serve a particular property, and then did so anyway. *See City of*

Wetumpka v. Central Elmore Water Auth., 703 So. 2d 907 (Ala. 1997). Interestingly, the Court held,

When an officer of a public agency makes an agreement or gives an assurance upon which another relies to his detriment, that public agency is estopped from denying the existence of the agreement or the truth of the assurance.

In reliance on this assurance from Dr. Dunn, and based on his apparent authority to speak for the Water Board, Central Elmore delayed its plans to lay the water line to the Crutchfield property, even though it already had had the pipe delivered to the site and had only to begin digging in order to have the line installed. The City did not delay, but installed its line before the agreed meeting date. The trial court did not err in holding that the City is estopped from denying that it was bound by Dr. Dunn's assurance.

It is clear by the testimony and other evidence presented that the City and the Water Board breached the Water Purchase Agreement and the oral agreement to discontinue laying the water line to the Crutchfield property.

In conclusion, we hold that the trial court was authorized to find that the City had permitted Central Elmore to be formed and to service part of Elmore County and that the City and the Water Board cannot now encroach on Central Elmore's territory without its permission.

Id. at 915-916.

The *Wetumpka* court's balance of equity's is in line with this Court's previous finding that, "it would be unjust to allow Chillicothe to dispute the validity of a contract it has operated in accordance with for over 35 years or deny RCWC Section 1926(b) protection." See Feb. 10, 2009 Order, pg. 15 (Doc. 29). There is no dispute that Chillicothe began construction of a competing waterline, thereby breaching the

terms of the 1971 agreement. Accordingly, RCWC is entitled to summary judgment on Count 3 of its First Amended Verified Complaint.

**RCWC'S FIRST AMENDED VERIFIED COMPLAINT
COUNT FIVE
(Breach of 2002 Contract)**

On or about July 23, 2002, RCWC and Chillicothe entered into another agreement resulting from Chillicothe's desire to annex property (Sunrush) within RCWC's service area. See RCWC's First Amended Verified Complaint, Ex. B (Doc. 33) In the course of negotiating this agreement, Chillicothe agreed:

[RCWC] shall have the sole and exclusive right to provide potable water services to any improvements already constructed or to be constructed within the Sunrush Area. Further, **[RCWC] shall have the sole and exclusive right to any other areas to which [RCWC] currently provides water services.** The City covenants and agrees that it shall not attempt to provide water services in any said area nor shall it interfere with the provision of such services by [RCWC] to such areas. In furtherance thereof, the City covenants and agrees that it shall attempt to exercise no jurisdiction over the facilities of [RCWC], or over any other matter pertaining to the construction, reconstruction, use, extension, maintenance, operation, location (including the use of road rights-of-way), relocation, cost, materials, specifications for construction, operations, rules and regulations, fees, charges and surcharges, or any other matter related to such facilities within the said areas. (emphasis added)

Id.

In Ohio, courts presume that parties to a contract intentionally choose words that will effectuate the terms of the agreement. *See, e.g. Shifrin v. Forest City Enterprises, Inc.* (1992), 64 Ohio St. 3d 635, 638 (“Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement”). When the terms of a contract are clear and unambiguous,

courts will not disturb the intent of the parties by judicially crafting a new agreement. *Id.* Indeed, extrinsic evidence regarding the terms of an agreement is only admissible when the contract is ambiguous or the terms of suggest some special meaning. *Id.*

To determine whether a contract is ambiguous, the Court must use the following test: “Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.” *Id.* (citing *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St. 2d 241, syllabus ¶ 2). The 2002 contract between RCWC and Chillicothe states in no uncertain or ambiguous terms that RCWC “shall have the sole and exclusive right to any other areas to which [RCWC] currently provides water services.” *See* Plaintiff’s First Amended Verified Complaint, Ex. B, pg. 3 (Doc. 33) (emphasis added).

The Court previously found based upon the record testimony that “lines already existed in and were immediately adjacent to the disputed area since the 1970’s – new lines were installed to upgrade the system and to continue to serve an area already served by RCWC. *See* Feb. 10, 2009 Order, pg. 13 (Doc. 29). Interestingly, Chillicothe also acknowledged in the 2002 agreement that RCWC is entitled to § 1926(b) protection. *Id.* pg. 4. Based upon the deposition testimony of two witnesses affiliated with Chillicothe, RCWC anticipates that Chillicothe will attempt to use parol evidence to vary the express terms of the 2002 agreement. But

there can be no doubt that the language in the agreement dictates only one outcome – RCWC is entitled to serve the disputed area.

Importantly, the 2002 agreement contains an integration clause stating:

This Agreement incorporates all prior negotiations and understandings of the parties. There are no covenants, promises, agreements, letters, conditions or understandings, either oral or written, between them relating to the subject matter of this Agreement other than those set forth herein, and all such matters are merged with and incorporated herein.

Id. pg. 7.

In *Galmish v. Cicchini* (2000), 90 Ohio St. 3d 22, 27, the Ohio Supreme Court reiterated the long-standing application of the parol evidence rule:

The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the ‘integration’), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations.

Thus any parol evidence in the form of deposition testimony or affidavits attesting to one party’s perception of the agreement is irrelevant and inadmissible. *Shifrin*, 64 Ohio St. 3d at 638 (“If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity”).

Chillicothe clearly breached the terms of the 2002 agreement by initiating the construction of its own waterlines in an area exclusively granted to RCWC by the agreement. Indeed, Chillicothe admits that it began mobilizing materials to the disputed area on July 28, 2008 for the purpose of constructing a waterline extension. *See* Chillicothe's Answer to First Amended Verified Complaint, ¶ 1 (Doc. 35). Accordingly, RCWC is entitled to summary judgment on Count Five of its First Amended Verified Complaint.

**RCWC'S FIRST AMENDED VERIFIED COMPLAINT
COUNT THREE
(§ 1983 and §1988 Claim for Attorneys' Fees)**

Title 42 U.S.C. § 1983 creates a private cause of action for the deprivation of any right conferred upon RCWC by the laws of the United States – including 7 U.S.C. § 1926(b). *See Wayne v. Village of Sebring*, 36 F.3d 517, 528 (6th Cir. 1994) (recognizing a § 1983 claim for violations of § 1926(b)); *see, also, Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263 (10th Cir. 2001) (actions for violations of 7 U.S.C. § 1926(b) are properly brought under 42 U.S.C. § 1983). Further, a prevailing water provider can recover attorneys' fees, costs, and expenses under 42 U.S.C. § 1988. *See Rural Water Sys. # 1 v. City of Sioux Ctr.*, 202 F.3d 1035, 1038 (8th Cir. 2000) (upholding award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988 in a 7 U.S.C. § 1926(b) dispute).

To recover under §§ 1983 and 1988, the deprivation of a federal right must take place under color of state law. In *Rural Water Dist. No. 1*, 243 F.3d 1263, the Tenth Circuit considered the factors prerequisite to a determination that violation

of 7 U.S.C. § 1926(b) falls within the purview of 42 U.S.C. § 1983, concluding that § 1983 is an appropriate vehicle to challenge municipal encroachment. *Id.* at 1275. Further, the court noted that a prevailing party is entitled to attorneys' fees under 42 U.S.C. § 1988. *Id.*

Here, RCWC is entitled to summary judgment on each of the claims set forth in its First Amended Verified Complaint, thereby becoming the prevailing party for purposes of § 1988. Accordingly, RCWC is entitled to recover its attorneys' fees, costs, and expenses associated with the protection of its service territory from Chillicothe's meritless invasion.

**CHILLICOTHE'S COUNTERCLAIM
COUNTS ONE AND TWO
(Declaratory Judgment and Injunctive Relief)**

Boldly, in Counts One and Two of its Counterclaim, Chillicothe attempts to turn the tables to claim an exclusive right to serve the disputed area based upon its misguided interpretation of Ohio Constitution Article XVIII §§ 4 & 6, Ohio Revised Code § 711.09, and the Tenth and Fourteenth Amendments to the United States Constitution. *See* Chillicothe's Answer and Counterclaim, ¶13 (Doc. 22). Further, Chillicothe claims that 7 U.S.C. § 1926(b) is not applicable to RCWC, and is unconstitutional when applied here. As discussed in detail above, Chillicothe's claims are unsupported by long-standing § 1926(b) jurisprudence.

RCWC will not belabor the Court with reiterations of binding authorities cited above, and contradicting Chillicothe's position. But, the audacity of Chillicothe in the form of its legal position bears additional comment. For example,

Chillicothe has insinuated on a number of occasions – and most recently in its Motion for Summary Judgment – that RCWC has acted with unclean hands in the defense of its service territory. *See Chillicothe’s Motion for Summary Judgment*, pg. 5-6 (Doc. 39) Specifically, Chillicothe claims that it was surprised by RCWC’s initiation of litigation, and even goes so far as to allege that RCWC intentionally filed its complaint knowing that Chillicothe’s counsel was ill in the Philippines. *See Id.* (Doc.39). Not only did RCWC attempt on numerous occasions to resolve its dispute prior to litigation, it had no idea that Chillicothe would later retain special counsel once the complaint had been filed. *See Sept. 4, 2008 Hr. Tr.*, pgs. 27-28.

Moreover – and most disturbing to RCWC – Chillicothe alleges that RCWC intentionally misled this Court by not address upgrades to its own distribution infrastructure *north* of Delano Road during the pendency of the preliminary injunction hearings. Importantly, Chillicothe never even authorized engineering services related to the construction of waterlines along Hospital Road *north* of Delano Road, as indicated by Chillicothe’s proposal for engineering services submitted by its outside engineer and adopted by council. *See Sept. 4, 2008 Hr. Tr.* pgs. 79-80 and Df. Ex. 10 and 11 (DX 10, DX 11). Additionally, Chillicothe never disputed RCWC’s upgrade project north of Delano Road until after litigation had commenced, despite the fact that the construction was openly visible to passerbys. Even then, Chillicothe never sought a restraining order to prohibit RCWC from installing completing upgrades to its existing infrastructure north of Delano Road.

Chillicothe also claims that RCWC falls into an unclassified abyss by virtue

of its non-profit status. According to Chillicothe, only rural water associations organized under Chapter 6119 of the Ohio Revised Code may lawfully be entitled to § 1926(b) protection in the State of Ohio. The plain language of § 1926(b) including “corporations operated not for profit” has been repeatedly used to protect non-profit water providers indebted to the USDA from municipal encroachment. *See Bluefield Water Ass’n Inc.*, 2009 U.S. App. LEXIS 16106 (affirming in part the district court’s grant of a preliminary injunction in favor of a Mississippi non-profit water provider pursuant to § 1926(b)); *see, also Jennings Water, Inc.*, 895 F.2d at 312 (applying § 1926(b) protection to a non-profit water association).

Speaking from both sides, Chillicothe considers this case “on all fours” with *Le-Ax Water Dist.*, 346 F.3d 701, which involved a rural water association organized under Chapter 6119 of the Ohio Revised Code with service boundaries prescribed by statutory processes – not like RCWC. *See Chillicothe’s Motion for Summary Judgment*, pg. 16 (Doc.39).

In *Le-Ax*, the court summarized the facts as follows:

This case presents unique facts. Le-Ax has brought this lawsuit under 7 U.S.C. § 1926(b), claiming that Athens has improperly curtailed or limited Le-Ax’s activities by contracting to provide University Estates with water. Athens, however, is not attempting to serve users within Le-Ax’s boundary. Nor is Athens attempting to steal Le-Ax’s customers that may be outside of Le-Ax’s boundary. Instead, Athens is merely seeking to persuade unserved users to sign up with Athens (rather than Le-Ax) for water service.

This is not a case where a defendant has intruded on a water association’s actual or operative service area *** We also take care to point out that Le-Ax’s boundaries are clearly defined by state law; **we**

do not consider here a case where the state has not defined the boundaries of its water districts or associations.

Id. at 707-710 (emphasis added).

Contrarily, this case is more analogous to *N. Shelby, supra*, where a non-profit water association's service territory is determined by the location of its lines and its ability to make service available to surrounding properties.

Chillicothe also challenges RCWC's legal right to serve the disputed area under state law, claiming that the contracts raised by RCWC provide the sole legal right to serve certain areas, and the contracts are either invalid or inapplicable. While RCWC maintains the validity of the 1971 and 2002 agreements with Chillicothe, the contracts are not dispositive to RCWC's legal right to serve the disputed area. Chillicothe attempts to cloud the analysis of RCWC's legal rights by focusing solely on the contracts, ignoring RCWC's legal status as a non-profit corporation organized under Chapter 1701 of the Ohio Revised Code. Indeed, the record includes evidence that RCWC's Articles of Incorporation accepted and approved by Ohio's Secretary of State indicate only one purpose, to provide:

a complete water supply and distribution system by purchase, development or otherwise, to construct reservoirs or water towers, erect pumping machinery, lay water mains, pipes and hydrants to furnish and sell water to members of the corporation, public bodies and local businesses, fire protection, drinking and general farm and domestic use and collect payment for rental or sale of same and do all things necessary, convenient and incidental thereto.

See Pl. Ex. 1 and 2 (PX 1 and PX 2).

Based upon the foregoing argument, RCWC is entitled to summary judgment against Chillicothe on Counts 1 and 2 of Chillicothe's Counterclaim.

CHILLICOTHE’S COUNTERCLAIM
COUNT 3
(Attorneys’ Fees)

Chillicothe also alleges a claim to recover attorneys’ fees under 42 U.S.C. § 1988. *See* Chillicothe’s Counterclaim, ¶ 24 (Doc. 22). Notably, Chillicothe asserts a blanket entitlement to such fees without pleading a cause of action under 42 U.S.C. § 1983.² Section 1988 clearly states that the recovery of attorney’s fees within the purview of the section is limited to certain claims, including those brought under § 1983, which Chillicothe has not done. Regardless of this pleading defect, Chillicothe is not entitled to attorney’s fees because: (1) RCWC did not violate § 1926(b); R.C. § 711.09, or the Tenth and Fourteen Amendments to the United States Constitution; (2) §1926 (b) does not provide any protection to Chillicothe; and (3) RCWC is not a state actor.

Chillicothe’s claim states, “By initiating a project to construct a water line extension into the subject territory, Plaintiff RCWC is is [sic] clearly in violation of 7 U.S.C. § 1926(b)....” *See* Chillicothe’s Answer and Counterclaim, ¶ 23 (Doc. 22). In short, Chillicothe attempts to turn the tables on RCWC and use § 1926(b) as a sword to oust RCWC from its own service territory. But there is absolutely no

² 42 U.S.C. § 1988(b) states,

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000ccet seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity such officer shall not be held liable for any costs, including attorney’s fees, unless such action was clearly in excess of such officer’s jurisdiction.

evidence in the record to support such a claim, namely that Chillicothe is even indebted to the USDA. Accordingly, any further analysis is not needed, as the claim is wholly without merit.

Further, RCWC's actions to date are consistent with its corporate purpose and its obligation to provide water service to all customers that it can feasibly serve.³ Chillicothe's reading of R.C. § 711.09 as granting municipalities an exclusive right to serve properties within three miles of the city's municipal boundaries is simply wrong. See Indeed, many § 1926(b) cases involve annexations of property that although suddenly within the boundary of a municipality, remains within the exclusive service territory of a rural water association. *See, e.g. Village of Grafton*, 419 F.3d 562. Because Chillicothe's Tenth and Fourteenth Amendment claims are predicated upon some "violation" of R.C. § 711.09, they too fail.

Lastly, even assuming *arguendo* that Chillicothe could prevail on its various claims, RCWC is a *private* entity and therefore not within the purview of 42 U.S.C. §§ 1983 and 1988. This issue was discussed at length by the Tenth Circuit in *Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262 (10th Cir. N.M. 2002). There, Butterfield alleged in its counterclaim that Moongate, a private non-profit water provider, violated § 1926(b) by acting to curtail Butterfield's service territory. *Id.* at 1268. Consequently, Butterfield sought to recover its attorney's fees and expense from Moongate under 42 U.S.C. §§ 1983

³ Pursuant to 7 CFR 1942.17 and RCWC's Resolution and Loan Security Agreement adopting the regulatory language of § 1942.71, RCWC accepted certain responsibilities upon accepting the benefits of the USDA loan, namely the commitment to serve all water users who desire service and to whom service is "feasible". *See* Pl. Ex. 27, pg. 3, section 5(k) (PX 27).

and 1988. *Id.*

The Tenth Circuit engaged in a careful comparison of past cases involving private entities and concluded that Moongate’s actions were insufficient to meet the “close nexus” test required to apply § 1988 to private entities. *Id.* at 1269-70 (“the nexus test must begin with the private entity’s exercising some power...traditionally associated with sovereignty”). Notably, although a private entity, Moongate possessed the power of eminent domain, but did not attempt to condemn any property within the disputed territory. *Id.* at 1270. The *Moongate* court noted, “[h]owever, simple possession of sovereign power does not convert a private entity into a state actor. Indeed, that transmogrification occurs only when the entity *exercises* that power.” *Id.* Ultimately, Moongate’s conduct – although declared a violation of § 1926(b) – was not state action, and Butterfield could not recover attorney’s fees under 42 U.S.C. §§ 1983 and 1988.

Likewise, Chillicothe has presented no evidence that RCWC’s conduct can be considered state action. RCWC lacks powers traditionally associated with sovereignty, including the power of eminent domain. Accordingly, Chillicothe is not entitled to recover its attorney’s fees associated with RCWC’s alleged § 1926(b) violations.

IV. Conclusion

Based upon the foregoing argument, exhibits, and testimony presented in this case, RCWC respectfully requests that this Honorable Court grant RCWC summary judgment in its favor on all claims asserted in its First Amended Verified

Complaint. Further, RCWC requests that this Court grant summary judgment against Chillicothe on all claims asserted in its Counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Motion for Summary Judgment was filed electronically this 31st day of July, 2009. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or via electronic mail.

/s/ Dennis M. O'Toole

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROSS COUNTY WATER COMPANY, INC.	:	CASE NO. 2:08-CV-735
Plaintiff	:	JUDGE MICHAEL WATSON
vs.	:	
CITY OF CHILLICOTHE	:	<u>REPLY MEMORANDUM OF</u>
Defendant	:	<u>DEFENDANT CHILLICOTHE TO</u>
	:	<u>PLAINTIFF'S MOTION FOR</u>
	:	<u>SUMMARY JUDGMENT</u>

Now comes the Defendant, City of Chillicothe, and files a Reply Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

s/ Garry E. Hunter _____
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**REPLY MEMORANDUM OF DEFENDANT CITY OF CHILLICOTHE IN
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. Standard for Review

This Court has held the standard for review of cross Motions for Summary Judgment is:

In evaluating cross-motions for summary judgment, courts should "evaluate each motion on its own merits and view all facts and inferences in the light more favorable to the nonmoving party." *Bakery & Confectionery Union & Indus. Int'l Health Benefits & Pension Funds v. New Bakery Co. of Ohio*, 133 F.3d 955, 958 (6th Cir. 1998) (quoting *Wiley v. United States*, 20

F.3d 222, 224 (6th Cir. 1994)). Significantly, a case is not necessarily appropriate for resolution at summary judgment simply because both parties have moved for summary judgment. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 *F.3d 587, 593 (6th Cir. 2001)*. "The filing of cross-motions for summary judgment does not necessarily mean that the parties consent to resolution of the case on the existing record or that the district court is free to treat the case as if it was submitted for final resolution on a stipulated record." *Taft Broad. Co. v. United States*, 929 *F.2d 240, 248 (6th Cir. 1991)* (citing *John v. State of La. (Bd. of Trustees for State Colleges & Univs.)*, 757 *F.2d 698, 705 (5th Cir. 1985)*).

The standard of review for cross-motions for summary judgment does not differ from the standard applied when a motion is filed only by one party to the litigation. *Taft Broad.*, 929 *F.2d at 248*. Summary judgment is therefore appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*. The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 *U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 *F.3d 1382, 1388-89 (6th Cir. 1993)*. In response, the nonmoving party must present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 *F.3d 335, 339-40 (6th Cir. 1993)*. "Summary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 *U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 *U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (concluding that summary judgment is appropriate when the evidence could not lead the trier of fact to find for the non-moving party). *LE-AX Water Dist. vs. Athens, Ohio*, 174 *F. Supp. 2d 696, 701 (Fed. Dist. Ct. S.D. Ohio, 2001)*.

II. Introduction

Plaintiff's Motion for Summary Judgment mirrors the arguments made in its Motion for Preliminary Injunction, other than a claim based upon the 2002 agreement attached to its First Amended Complaint. Plaintiff stands only upon the facts in existence at the time of the Motion for Preliminary Injunction.

There are a number of new facts that have come to light since the Preliminary Injunction Hearing. There is an October 19, 1971 newspaper article in the Chillicothe Gazette newspaper titled, "Mayor rescinds outside water tap ban" (Affidavit of Thomas E. Day, P.E.), which negates the usefulness of the 1971 agreement as a legal basis for Plaintiff's right to serve water to the disputed area by showing it was never authorized by the Chillicothe City Council. The 1971 Chillicothe Gazette newspaper article states former Mayor Alexander notified RCWC the agreement was not going to be honored because the City Solicitor said it was illegal. *Id.* Case law from Ohio and the United States Sixth Circuit Court of Appeals support the conclusion the 1971 agreement is unenforceable, and therefore, can not be the basis for RCWC's legal right to serve the area in dispute. (*See Defendant's Motion for Summary Judgment pp. 7-15*). Chillicothe has filed an affidavit from Richard Johnson, P.E., P.S., Utilities Director for Chillicothe showing ninety-six (96) properties have been served outside the corporate limits of Chillicothe since 1971. (*Id. pp. 7-8.*)

Plaintiff has introduced by way of an attachment to their amended complaint, the 2002 agreement between Chillicothe and RCWC for the annexation of the Sunrush Subdivision in Scioto Township as a global agreement for water services in all of Ross County. (*Id. pp. 12-15*). The property that is the subject of this law suit is located in Green Township. (*Id. at p. 12*). Plaintiff's argument is a sentence taken out of context which it says supports the argument Chillicothe gave RCWC all of the unincorporated portion of Ross County. Chillicothe produced two affidavits showing this was not the purpose of the agreement and the language in question dealt with the remaining portion of the Sunrush area not being annexed into Chillicothe. (*See affidavits of Matt Allen and Margaret Planton filed with Defendant Chillicothe's Motion for Summary Judgment*). Chillicothe also pointed out there was no consideration from RCWC for this agreement. (*See Defendant Chillicothe's Motion for Summary Judgment page 14*). In addition, the four corners of

the agreement recorded in Official Record 240, page 934, Ross County Recorder's Office shows the document is limited to the legal description attached as Exhibit B thereto. The Affidavit prepared by John B Albers, Attorney at Law, attached to the recorded agreement as a preface, and recorded in Official Record 240, page 934, Ross County Recorder's Office states in #3, "[t]he legal description of the property to which said agreement applies is attached hereto as Exhibit B". The agreement at recorded page 942 states John B Albers as legal counsel for the Ross County Water Company prepared the Agreement. The legal description attached in Exhibit B is for property located in Scioto Township. Finally, the Whereases of the Agreement on recorded page 935 state:

WHEREAS, the City desires to annex certain territories depicted and identified on Exhibit A attached hereto and incorporated herein by reference (hereafter the "Sunrush Area"); and

WHEREAS, the Company desires to continue to provide water services to said Area subsequent to annexation, and the City agrees to such;

These Whereases also show the agreement is limited to the Sunrush Area. By way of further clarifying the intent of the Agreement language, Defendant City of Chillicothe attached two affidavits from Matt Allen, former Chillicothe Development Director and Margaret Planton, former Mayor of Chillicothe to provide oral evidence. Plaintiff argues oral evidence is inadmissible to clarify the meaning of a contract under Ohio law. This is not the case. In *Raphael vs. Flage, 1989 Ohio App. LEXIS 3634 (Ct. App. Lorain Co., 1989)*, the Court held:

The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily throws light upon the meaning of the contract. *Id. at p. 5. cf. Watson v. Lamb, 75 Ohio St. 481 (1907).*

Finally, when you consider the affidavit of Richard Johnson, Utilities Director for Chillicothe filed with Defendant's Motion for Summary Judgment showing Chillicothe has extended water services outside its corporate limits since 2002, only one conclusion can be reached and that is that the 2002 agreement is limited to the Sunrush Area located in Scioto Township.

III. Issue of Whether RCWC is an Association within the Meaning of 7 U.S.C. § 1926 (b)

While there is an issue as to whether RCWC is an association within the meaning of 7 U.S.C. § 1926 (b), Chillicothe has argued this issue in its Motion for Summary Judgment. Chillicothe does not contest RCWC has a loan with the FmHA, now the U.S. Department of Agriculture.

IV. Plaintiff is trying to use 7 U.S.C. § 1926 (b) as a sword instead of a shield

Even if Plaintiff is held to be an association within the meaning of 7 U.S.C. § 1926 (b), there is the issue of whether Plaintiff is trying to use 7 U.S.C. § 1926 (b) as a sword. Defendant, Chillicothe, says Plaintiff, RCWC, is using 7 U.S.C. § 1926 (b) as a sword, citing *LE-AX Water Dist. vs. Athens, Ohio*, 346 F. 3d 701 (U. S. 6th Cir., Ct. App., 2003). Plaintiff, RCWC, maintains it is not using 7 U.S.C. § 1926 (b) as a sword, and cites *N. Shelby Water Co. vs. Shelbyville Mun. Water & Sewer Comm'n*, 803 F. Supp. 15 (U.S. Dist. Ct. Kentucky E. D., 1992); *Lexington-South Elkhorn Water Dist. vs. City of Wilmore*, 93 F. 3d 230 (U.S. 6th Cir., Ct. App., 1996); *Bell Arthur Water Corp. vs. Greenville Utils. Comm'n.*, 173 F. 3d 517 (U.S. 4th Cir., Ct. App., 1999); and *Village of Grafton vs. Rural Lorain County Water Auth.*, 419 F.3d 562 (U.S. Ct. App, 6th Cir., 2005).

A review of these cases shows the only case on point is the *Le-Ax case (supra)*. In *N. Shelby Water Co. (supra)*, the Federal District Court for the Eastern District of Kentucky described the facts as follows:

In 1971, North Shelby obtained a loan of \$ 1,500,000.00¹ from the Farmers Home Administration to finance the construction and installation of

a rural water distribution system. That same year, and as required by applicable Kentucky law, North Shelby obtained from the Public Service Commission of Kentucky ("PSC") a Certificate of Convenience and Necessity ("Certificate"), to construct and operate its proposed water distribution system "in the area as set forth in the application, plans and specifications filed in [the] record" *Emphasis supplied.* 803 F. Supp. at 3.

...

In summary, prior to the proposed development of Brassfield/Meadows Subdivisions, North Shelby had an 8" water main running northward along the west side of Highway 53 and ran a service line underneath Highway 53 to the east to serve the farm house of the farm which eventually became these two subdivisions. As to Partridge Run, North Shelby's water line runs through the property that was later subdivided. However, as to all of the subdivisions in question, North Shelby has not lost any of its earlier customers in these areas by virtue of the later development of the property into subdivisions. By the same token, prior to the development of all of the subdivision property, the Commission did not provide any water service thereto, but the water service it is now providing was connected to water lines the Commission had earlier installed nearby.

It is undisputed that North Shelby has not refused to provide water service to any of the subdivisions. However, one factor apparently affecting the developers' decision to secure Commission water service was the greater water capacity of the Commission's lines, which were deemed necessary for water adequate to serve fire hydrants to be installed in the subdivisions, as required by the regulations of the local Planning and Zoning Commission. There is a dispute in the record as to representations made by North Shelby as to its ability to provide water adequate for fire protection to these subdivisions. Apparently, at the early stages of the subdivisions' development, the developers and certain representatives of North Shelby believed that North Shelby was unable at the time to provide adequate fire protection water. However, North Shelby maintains that with ongoing improvements to its system, as well as additional improvements it is capable of making, it is well able to provide fire protection service to these subdivisions, particularly as they are gradually developed over time.

The parties agree that North Shelby has not actually provided water service to the subdivision properties. However, because its water lines are located either adjacent to or run through the properties, North Shelby contends that it has water service "made available" within the meaning of 7 U.S.C. § 1926(b), entitling North Shelby to the injunctive relief authorized by the statute to prevent the Commission from taking potential customers from North Shelby. On the other hand, the Commission contends that because North Shelby has no actual customers within the properties in question, North Shelby has not "provided service," and therefore is not entitled to the

protection of § 1926(b). *Emphasis Supplied.* 803 F. Supp. at 17-9.

Under Kentucky law, the North Shelby Water Company was required to get a Certificate of Convenience and Necessity “to construct and operate its proposed water distribution system in the area as set forth in the application, plans and specifications filed in the record.” *Id.* at 3. In addition, N. Shelby Water Company had distribution lines within the disputed area, not just adjacent to the disputed area. This is a different situation than is presented in the case before the court here. Plaintiff, RCWC, is not an Ohio Revised Code 6119 Rural Water District under Ohio law with a state defined service area; it is a private unregulated non-profit company, and in addition, Plaintiff, RCWC, did not have any distribution lines within the disputed area at the time it filed this lawsuit.

In *Lexington-South Elkhorn Water District (supra)*, the Sixth Circuit Court of Appeals affirmed a judgment against Lexington-South Elkhorn Water District holding:

In sum, an association's ability to serve is predicated on the existence of facilities within or adjacent to a disputed property. By its clear terms, Section 1926(b) does not provide an automatic, exclusive right to serve, but rather provides protection only if certain conditions are met. Among those conditions are that an association has at least made service available. In this case, Lexington-South Elkhorn has not established its authorization to serve the disputed properties or its ability to provide the service. Not having facilities available, and not having requested authority from the Public Service Commission to construct facilities, Lexington-South Elkhorn's availability of service is merely speculative. *Emphasis supplied.* 93 F. 3d at 238.

The Sixth Circuit Court of Appeals found Kentucky law requires

a water district to obtain a Certificate of Convenience and Necessity from the Kentucky Public Service Commission to construct and operate a water distribution system in a particular area. *Ky. Rev. Stat. Ann. § 278.020(1)* (stating that "no person, partnership, public or private corporation, or combination thereof shall begin the construction of any plant,

equipment, property or facility for furnishing to the public any of the services enumerated in *KRS 278.010* . . . until such person has obtained from the Public Service Commission a certificate that public convenience and necessity require such construction"). Once a water district is authorized to provide service, it is required to make reasonable extensions of its water lines to serve customers who apply for service. *Ky. Rev. Stat. Ann. § 278.280(3)*. When a service line is installed, a water district is required to provide the first fifty feet of the extension to connect a customer to a distribution line. 807 KAR 5:066(11) (stating also that a utility may be required to construct extensions greater than fifty feet if an extension under fifty feet is unreasonable under the circumstances). Thus, a key factor in determining whether a water district has made water service available is the proximity of the water district's distribution lines to areas in dispute.

Lexington-South Elkhorn admits that it has not obtained a Certificate of Public Convenience and Necessity from the Kentucky Public Service Commission to construct facilities or to serve customers within portions of the disputed areas. . . . *Id. at 235-6*.

The Lexington-South Elkhorn case does not support Plaintiff RCWC's position. Rather, it states the position that a rural water company can not utilize 7 U.S.C. § 1926 (b) if the disputed area is outside its state defined service area.

The Fourth Circuit Court of Appeals held in *Bell Arthur (supra)*:

On cross motions for summary judgment filed by all parties, the district court granted the Greenville defendants' motions against Bell Arthur and denied Bell Arthur's motion. In doing so, the court ruled that Bell Arthur was not entitled to protection under § 1926(b) because (1) "any protection afforded to [Bell Arthur] pursuant to § 1926(b) was extinguished when Bell Arthur paid off its FmHA loans in 198[9]," 972 F. Supp. at 959; (2) Bell Arthur's federal loan in 1993 for the Otter Creek project did not confer § 1926(b) protection for the Ironwood area because the Otter Creek obligations were not directly related to the service proposed for Ironwood, 972 F. Supp. at 960-61; and (3) Bell Arthur was not, as required for statutory protection, providing water service or making water service available to Ironwood in that it was "not capable of providing the requisite service within a reasonable time after application was made for the service," 972 F. Supp. at 963 (internal quotations omitted).

We hold that Bell Arthur's inadequate six-inch pipe in the ground coupled with only a general, unfulfilled intent to provide the necessary 14-inch pipe sometime in the future does not amount to "service provided or made available." 7 U.S.C. § 1926(b). Accordingly, we conclude that Bell Arthur was not entitled to protection under § 1926(b) against the City of Greenville's annexation of Ironwood or the Greenville Utility Commission's provision of water to Ironwood. The judgment of the district court is *AFFIRMED*. 173 F 3d at 522.

Bell Arthur Water Corporation lost this case because it was not capable of providing water to the service area it claimed. The issue in the present case is not whether Plaintiff RCWC is capable of providing water to the disputed area, but rather whether the disputed area is within the state defined service area for Plaintiff RCWC.

In *Grafton (Supra)*, the Rural Lorain County Water Authority was an Ohio Revised Code Chapter 6119 Rural Water Association with a state defined service area. *Id. at 564*. The Village of Grafton began purchasing water from the Rural Lorain County Water Authority in 1994. *Id.* Grafton annexed property within the service area of the Rural Lorain County Water Authority and then filed a complaint for injunctive and declaratory judgment against the Rural Lorain County Water Authority asserting Rural Lorain County Water Authority was not protected by 7 U.S.C. § 1926 (b). The Sixth Circuit Court of Appeals held Rural Lorain County Water Authority was protected by 7 U.S.C. § 1926 (b) because the disputed area was within its state defined service area pursuant to Ohio Revised Code Chapter 6119. In the present case, Plaintiff, RCWC, is not an Ohio Revised Code Chapter 6119 Water District with a state defined service area. The Sixth Circuit Court did re-affirm the *Le-Ax* doctrine that "when a rural water district's boundaries are geographically determined by the state, a rural water district cannot use § 1926 (b) to obtain new customers outside the geographic area". *Id. at 566*.

The *Le-Ax Case (supra)* is the only case that has a fact pattern similar to the present case.

The Sixth Circuit Court of Appeals states the facts of the *Le-Ax* case as follows:

The Le-Ax Water District is a rural water district that was created by a judicial order upon a petition filed in the Athens County Court of Common Pleas in 1980, pursuant to *Ohio Rev. Code Ann. § 6119.01*. Joint Appendix ("J.A.") at 71-72. As a water district, Le-Ax is an independent political subdivision of the State of Ohio, governed by *Ohio Rev. Code Ann. § 6119.01*. Le-Ax's territory was described in the petition approved by that court.

Le-Ax, as a rural water district, assumed the debt that its predecessor owed to the United States Department of Agriculture ("USDA"). As a result, Le-Ax has been indebted to the USDA since its inception. Le-Ax subsequently incurred another debt to the USDA when it sold revenue bonds to the Rural Economic and Community Development Service ("RECDS"), which was formerly known as the Farmers Home Administration ("FmHA"). Bonds were issued on February 26, 1997, in the principal amount of \$ 6,844,000 (at 4.5% interest), that will expire on February 1, 2037. J.A. at 309. The loans were not made in order to help Le-Ax finance the University Estates project and apparently have no connection in any way to the University Estates transaction.

University Estates owns 825 acres of property, all of which is outside the boundaries of both Le-Ax and Athens. University Estates plans to develop this property into a golf course and approximately 800 homes. The property is close to the boundaries of both Le-Ax and Athens; it borders Athens on Athens's northern side, and is, at its closest point, 1400 feet (roughly one third of a mile) from Le-Ax's boundary. J.A. at 230 (Aff. of Steven Mullaney). Le-Ax has taken no formal steps to change its boundaries to include University Estates's property, such as by filing a petition in state court under *Ohio Rev. Code Ann. § 6119.051*. In contrast, Athens has begun the process of changing its boundaries to include University Estates. On October 16, 2000, Athens's City Council authorized a development agreement with University Estates, pursuant to which Athens would annex University Estates and provide it with water. J.A. at 117-22 (Ordinance and Development Agreement).

Standing in Athens's way, however, is this lawsuit -- for Le-Ax also wishes to supply University Estates with water and claims that 7 *U.S.C. § 1926(b)* vests Le-Ax with the right to serve University Estates. Although Le-Ax does not currently supply University Estates with water (the property as of yet has no access to water from any supplier) and does not currently have lines extending into University Estates's territory, Le-Ax claims that it could supply University Estates with water almost immediately. Le-Ax refers to an eight-inch water main that it owns, which is immediately adjacent to the

University Estates site. Supplemented by two nearby storage tanks, the eight-inch transmission line, Le-Ax claims, can provide water to University Estates at a rate far exceeding the estimates of University Estates's expected usage. A pressure-reducing valve, a tap in, and a pumping station will be necessary to connect the eight-inch main to University Estates. However, there was un rebutted testimony that the valve is an apparently minor and inexpensive addition and the tap-ins and the pumping station (as part of the water apparatus internal to the site) are to be provided by the developer of the property, not the water supplier. *346 F. 3d at 703.*

In *Le-Ax (supra)*, the Sixth Circuit Court of Appeal held *Le-Ax* had a legal right to serve the area even though it was outside its state defined service area, because it was an Ohio Revised Code Chapter 6119 Rural Water District permitted by Ohio Revised Code §6110.01 (A) to “supply water to users within and without the district.” *Id. at 707.* The Sixth Circuit Court of Appeals also held, “[i]n *Lesington-S. Elkhorn*, we plainly stated that “if an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926 (b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926 (b) protection.”” *Emphasis supplied. Id. at 706.* The Court found *Le-Ax* did have the right to service the disputed area even though it was outside its service area because state law provided *Le-AX* this right pursuant to being an Ohio Revised Code Chapter 6119 Rural Water District. In the present case, Plaintiff, RCWC, does not have the right to provide water service outside its service area since it is not an Ohio Revised Code Chapter 6119 Rural Water District. Since Plaintiff, RCWC, is a private non-profit corporation, its service area is defined by its member/customers. *See Ohio Revised Code Section 1702.04 which requires the Articles of Incorporation of a non-profit corporation to state, “the names of any persons or the designation of any group of persons who are to be the initial members”, and Ohio Revised Code Section 1702.13 which states, “the corporation shall maintain a record of its*

members, the date of admission to membership, and, if members are classified, the class to which the member belongs”.

According to the dicta of the *Lexington case (supra)* quoted above, Plaintiff, RCWC, can not fulfill the member/customer requirement for the disputed area by adding a member/customer after the lawsuit is filed. Plaintiff, RCWC, therefore, must be denied 7 U.S.C. §1926 (b) protection since the disputed area was not within their state defined service area at the time the lawsuit was filed.

Even if this court determines the disputed area is within the service area of Plaintiff, RCWC, at the time the lawsuit was filed, *Le-Ax* would dictate that 7 U.S.C. §1926 (b) protection is not available since Plaintiff, RCWC, is attempting to use §1926 (b) as a sword instead of a shield. The Sixth Circuit Court of Appeals held in *Le-Ax* that

Le-Ax cannot properly invoke the protections of 7 U.S.C. § 1926(b). Central to our conclusion is the fact that *Le-Ax* is not seeking to use the statute to protect its users or territory from municipal incursion in this case. It instead is seeking to use the statute to foist an incursion of its own on users outside of its boundary that it has never served or made agreements to serve. To grant *Le-Ax* what is essentially monopoly status over property that it has never served (or contracted to serve), and that is outside of its boundary, we believe, would be wholly inconsistent with the statute's text and legislative history, as well as our case law. Ultimately, we agree with Athens that § 1926(b) can be used only as a shield to defend against invasion rather than as a sword to wage one.

This case presents unique facts. *Le-Ax* has brought this lawsuit under 7 U.S.C. § 1926(b), claiming that Athens has improperly curtailed or limited *Le-Ax*'s activities by contracting to provide University Estates with water. Athens, however, is not attempting to serve users within *Le-Ax*'s boundary. Nor is Athens attempting to steal *Le-Ax*'s customers that may be outside of *Le-Ax*'s boundary. Instead, Athens is merely seeking to persuade unserved users to sign up with Athens (rather than *Le-Ax*) for water service. Believing Athens's action to be outside of the statute's intended prohibition, we hold today that a claim under § 1926(b) has not been established under these circumstances. When a rural water district's boundaries are geographically

determined by the state, we hold that a rural water district cannot use § 1926(b) as a sword to force new customers who are outside that geographic area to receive water service through the rural water district. *346 F. 3d 707-8*.

Plaintiff, RCWC is doing exactly what was done in the *Le-Ax case*. Plaintiff, RCWC, monitored Defendant Chillicothe's city council meetings and decided to build an extension of their water line into the disputed area after Chillicothe adopted legislation to extend its water line into this area. *(RCWC has indicated it currently has no customers on either the Hospital Drive line extensions South of Delano Road, or North of Delano Road. (Tr. 8.14.08 pp. 23-4; Tr. 9.4.08 p. 21). William Neal stated the first time he became aware Chillicothe was going to extend its water lines on Hospital Drive South and North of Delano Road was by watching the Chillicothe City Council Meeting on March 24, 2008. (Tr. 9.4.08, p. 16). RCWC submitted plans to extend its water line on Hospital Drive North of Delano Road to the Ohio EPA on May 15, 2008; the plans were approved by the Ohio EPA on June 5, 2008. (Tr. 9.4.08, p. 19). Construction began by RCWC on or about July 24, 2008, and continued until August 14, 2008. (Tr. 9.4.08, p. 19). RCWC filed its lawsuit on July 29, 2008, and obtained a stop work order against Chillicothe on July 31, 2008; never informing the Court it was continuing construction. (See Complaint, Court Order herein, & Tr. 8.14.08 pp. 84-5).)* The area is outside the state defined service area for Plaintiff, RCWC, but unlike *Le-Ax*, Plaintiff does not have the ability to provide service outside its service since it is a private non-profit corporation. *Le-Ax* was an Ohio Revised Code Chapter 6119 rural water district which had statutory authorization to provide water service outside its state defined service area. Therefore, the facts of this case are even more grievous than those of the *Le-Ax case*. Plaintiff, RCWC is utilizing 7 U.S.C. § 1926 (b) as a sword instead of a shield and therefore, must be denied the protection of 7 U.S.C. §1926 (b).

V. The Granting of Plaintiff's Motion for Summary Judgment requires a judicial determination RCWC has a legal right to serve the disputed area by operation of 7 U.S.C. § 1926 (b), which contradicts all previous case law that left this determination to state law. This violates the Tenth Amendment to the United States Constitution.

The Tenth Amendment to the United States Constitution provides, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”. The original purpose of the Tenth Amendment was to protect the enumerated powers of the Constitution, and also reserve to the states all rights that were not enumerated in the Constitution. *25 Cap. U.L. Rev. 339, 349-350 (1996)*. During the first 150 years of the United States, the Tenth Amendment provided meaningful limits on Federal Powers. *Id. at 362*. The more recent history is checkered with a number of 5/4 decisions by the United States Supreme Court. *See National League of Cities vs. Usery, 426 U.S. 833 (1976); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); U.S. vs. Lopez, 514 U.S. 549 (1995); U.S. Term Limits vs. Thornton, 514 U.S. 779 (1995)*. One thing that is constant throughout the case history is that Tenth Amendment challenges are to Congressional legislative intrusions into states rights, not judicial intrusions into states rights.

While it is true the Federal District Court for the Southern District of Ohio considered and rejected a Tenth Amendment challenge in the *Le-Ax Case (supra)*, and the 6th Circuit Court of Appeals declined to overrule the rejection of the Tenth Amendment argument in that case, the Tenth Amendment challenge in the present case is not on the same basis. The 6th Circuit Court of Appeals acknowledged in the *Le-Ax (supra)* that there is a conflict among jurisdictions on whether only a legal right to serve water to the dispute area is required for 7 U.S.C. § 1926 (b) protection, or a legal right and legal duty to serve water to the disputed area is required for 7 U.S.C. § 1926 (b) protection. *346 F. 3d at 706*. The 6th Circuit Court of Appeal is a jurisdiction that requires only a legal right to

serve the area. *Id. at 707*. All jurisdictions agree, state law is used to determine if a legal right or legal duty exists to serve water to the disputed area since 7 U.S.C. § 1926 (b) is silent on this issue. *Id. at 705-6*. In *Le-Ax (supra)*, the 6th Circuit looked at Ohio law and found that since Le-Ax was an Ohio Revised Code Chapter 6119 Rural Water District, it has the right “to supply water to users within and without the district”. In the present case Plaintiff, RCWC, is a non-profit corporation and does not have the right under Ohio law to serve water users outside its service area of member/customers. *See Ohio Revised Code 1702.04 and 1702.13*. The testimony at the Preliminary Injunction hearing makes it clear Plaintiff, RCWC, had no member/customers in the disputed area at the time the lawsuit was filed:

Mr. Corcoran also testified that Clinton Kight and/or Jerry Drummond of RCWC asked him to sign a RCWC water service agreement on or about July 16, 2008. (*Id.*). Mr. Corcoran stated this property is undeveloped land which he has for sale, and that while he signed the RCWC water service agreement, it is his understanding that as long as he has no usage, he will not have to pay a water service fee to RCWC. (TR. 9.4.08, p. 105-6). Mr. Corcoran stated he has no plans to develop this land. (Tr. 9.4.08, p. 105).

The By-laws of the Ross County Water Company, Inc. provide that a person only becomes a member “upon the payment of such connection fee as may be held for each property served”. (*Plaintiff's Exhibit 2, Preliminary Injunction hearing*). Mr. Corcoran’s testimony establishes that he is not a member of the Ross County Water Company because he has not paid a water connection fee and has no water service. Therefore, since under Ohio law Plaintiff, RCWC, is seeking to use 7 U.S.C. § 1926 (b) to protect an area outside its state defined service area and Ohio law does not provide Plaintiff, RCWC, a legal right to service water to customers outside its service area, the application of 7 U.S.C. § 1926 (b) to the facts of this case is a Tenth Amendment violation by not providing deference to the power reserved to Ohio to determine whether a water company has a

legal right to serve the area in question under 7 U.S.C. §1926 (b).

VI. It is Premature to Consider Competing Claims for Attorney Fees.

Plaintiff makes a brief argument in favor of being awarded attorney fees in its motion for summary judgment. While it is true the prevailing party in a 1926 (b) action can make a claim for attorney fees under 42 U.S.C. §§ 1983 and 1988, such a claim does not arise until after the court's decision establishes that the non-prevailing party acted under color of state law which deprived the prevailing party of a right, privilege, or immunity secured by the Constitution and laws. *See 42 U.S.C. §§ 1983 and 1988*. This right to make a claim for attorney fees under 42 U.S.C. §§ 1983 and 1988 extends to a prevailing municipality. *Rural Water District No. 1 vs. Wilson, 243 F. 3d 1263, 1274 (U.S. Ct. App. 10th Dist., 2001)*. It is not required that the Counterclaim mention § 1983 as long as there is a request for attorney fees and the facts support a § 1983 action. *Id. at 1273*. *See also, Haley v. Patake, 106 F. 3d 478, 481 (U.S. Ct. App., 2nd Cir., 1997); Thorstenn vs. Barnard, 883 F. 2d 217, 218 (U.S. Ct. App., 3rd Cir., 1989)*.

In determining whether to allow attorney fees, and the extent to allow attorney fees, the Court must consider:

. . . a court must first determine whether the petitioning plaintiff was the prevailing party. *Id. at 433*. The next step is to determine what fee is "reasonable." *Id.* A starting point is to calculate "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* (This is known as the "lodestar" calculation.) The court should then exclude excessive, redundant, or otherwise unnecessary hours. *Id. at 434*. Next, the resulting sum should be adjusted to reflect the "result [**37] obtained." This involves two questions: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id. Wayne vs. Sebring, 36 F. 3d 517, 531 (U.S. Ct. App. 6th Cir., 1994)*.

It is premature to consider requests for attorney fees. This matter should be briefed separately after a final determination of this matter on the merits.

VII. Conclusion

It has been established that Plaintiff, RCWC, as a private non-profit corporation under Ohio law, only has the legal right to provide water service to member/customers. At the time this lawsuit was filed and currently, Plaintiff, RCWC, has no member/customers in the disputed area. The 1971 agreement is null and void since it was not authorized by Ohio law and never became effective. Even if it is considered a valid contract, this agreement cannot provide Plaintiff, RCWC, with the right to serve the disputed area. Chillicothe has no authority under Ohio law to provide Plaintiff, RCWC, a private non-profit corporation with a legal right to supply water outside its corporate limits. This right is either granted by a state statute or the result of an individual becoming a member/customer of Plaintiff, RCWC. There is no Ohio statute granting this right to Plaintiff, and Plaintiff did not have at the time the lawsuit was filed, and currently does not have, a member/customer for the disputed area.

The 2002 agreement also does not provide Plaintiff, RCWC, with a legal right to serve the disputed area. This agreement is limited to the Sunrush area in Scioto Township where Plaintiff, RCWC, was providing water as of 2002. The property in dispute in this lawsuit is located in Green Township. While the four corners of the 2002 agreement make it clear this agreement is limited to the Sunrush area, Defendant, City of Chillicothe, has filed affidavits explaining the intent of the contract, and showing Defendant, City of Chillicothe, has supplied water outside its corporate limits since 2002.

Without a state defined service area for the disputed area, and without a legal right to serve the area in dispute, Plaintiff, RCWC, cannot invoke 7 U.S.C. § 1926 (b). In addition, Plaintiff,

RCWC, is using § 1926 (b) as a sword rather than a shield. Plaintiff, RCWC, only became interested in serving the disputed area after it learned in March, 2008, that Defendant's City Council authorized the extension into this area. Plaintiff, RCWC, got EPA approval in May, 2008, and filed this lawsuit in July, 2008 to stop Defendant, City of Chillicothe, from continuing construction of a water line into the disputed area. Plaintiff, RCWC, got a temporary restraining order against Defendant, City of Chillicothe, while it continued to construct its line into the disputed area. The disputed area is undeveloped, therefore, Plaintiff, RCWC, cannot have any member/customers in the area. This is a blatant attempt to use 7 U.S.C. § 1926 (b) as a sword rather than a shield.

Summary judgment must be granted Defendant, City of Chillicothe finding Plaintiff, RCWC, is not entitled to the protection of 7 U.S.C. § 1926 (b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Reply Memorandum of Defendant City of Chillicothe to Plaintiff's Motion for Summary Judgment was filed electronically this 24th day of August, 2009. Notice of this filing is sent to all parties through the Court's electronic filing system via electronic mail.

s/ Garry E. Hunter

Garry E. Hunter

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROSS COUNTY WATER CO.,

Plaintiff,

vs.

CITY OF CHILLICOTHE,

Defendant.

CASE NO. 2:08-CV-735

JUDGE MICHAEL H. WATSON

**PLAINTIFF'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

* * * *

I. Introduction

Chillicothe's opposition to RCWC's motion for summary judgment espouses a philosophical theory that if adopted, would turn the entire history of rural water financing upside down. Without any precedent, Chillicothe argues that non-profit water associations in Ohio have no "legal right" to serve areas after spending millions of dollars to construct sophisticated distribution systems. And consequently, § 1926(b) provides no protection to the substantial investments made by both the association and the United States government.

II. Argument

A. RCWC's Legal Right to Serve to the Disputed Area

Throughout this litigation, Chillicothe has placed great emphasis upon RCWC's legal right¹ to serve the disputed area, claiming that such a right is derived only from RCWC's bylaws and membership. Indeed, Chillicothe assumes that unless a water association in Ohio is organized under R.C. § 6119, *et seq.*, it has no such right, and is merely an "unregulated" utility. (Chillicothe's Reply Memorandum, pg. 7 (Doc. 44)). But RCWC is regulated by over 100 statutes enforced by the Ohio Environmental Protection Agency. *See* R.C. § 3745.01, *et seq.*; *see, also* OAC 3745-7, *et seq.*; OAC 3745-9, *et seq.*; OAC 3745-34, *et seq.*; OAC 3745-81, *et seq.*; OAC 3745-82, *et seq.*; OAC 3745-83, *et seq.*; OAC 3745-84, *et seq.*; OAC 3745-85, *et seq.*; OAC 3745-86, *et seq.*; OAC 3745-87, *et seq.*; OAC 3745-88, *et seq.*; OAC 3745-89, *et seq.*; OAC 3745-91, *et seq.*; OAC 3745-92, *et seq.*; OAC 3745-95, *et seq.*; OAC 3745-96 *et seq.*

Many of these authorities provide regulatory guidance to both RCWC and Chillicothe alike. In fact, Chillicothe concedes that RCWC cannot construct its infrastructure without obtaining approval from the Ohio EPA. Clearly, the Director of the Ohio EPA would not approve RCWC's plans for construction if RCWC had no legal right to construct lines in the first place. Similarly, in other areas within the Sixth Circuit, non-profit water associations must obtain a Certificate of Public

¹ The Sixth Circuit adopted the following test:

This court determines whether an association has made water service available through a two-part test. First, the court considers the "pipes in the ground" requirement. Second, the court considers whether the association has "the legal right" under state law to serve the area in question.

Village of Grafton v. Rural Lorain County Water Auth., 419 F.3d 562, 566 (6th Cir. 2005) (internal citations omitted).

Convenience and Necessity prior to constructing a water distribution system. *See N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n*, 803 F. Supp. 15 (E.D. Ky. 1992).

Indeed, *N. Shelby* provides clear guidance for the application of § 1926(b) to protect a non-profit association from municipal encroachment. Chillicothe attempts to distinguish *N. Shelby* by claiming that unlike RCWC, “N. Shelby Water Company had distribution lines within the disputed area, not just adjacent to the disputed area.” (Chillicothe’s Reply Memorandum, pg. 7 (Doc. 44)). Not only is Chillicothe’s statement factually erroneous, but it is also contrary to the well-established test to determine § 1926(b) protection. This Court previously found:

RCWC has had water lines since the 1970's both immediately west and immediately north (the six and ten inch lines) of the disputed area, essentially creating a border around the southern portion of the disputed area. In fact, the Plaintiff's water distribution lines that make service available to the disputed area were already in place, and have been for over 35 years - long before the City of Chillicothe became interested in serving the needs of folks in the disputed area. RCWC fulfills the first requirement that a water association have pipes in the ground.

Court Order, pg. 13 (Doc. 29); *see, also Lexington-South*, 93 F.3d at 237 (finding “water lines must either be within *or* adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.”) (emphasis added).

Chillicothe’s attempt to distinguish *N. Shelby* is as futile as its attempt to apply *Le-Ax Water Dist. v. Athens*, 346 F.3d 701 (6th Cir. 2003) here. Indeed, each

of Chillicothe's arguments has been previously tested by municipal encroachers to no avail. Reading well-beyond the Sixth Circuit's holding, Chillicothe claims *Le-Ax* stands for the proposition that "service area" can only be determined by identifying some "state defined" area. (Chillicothe's Reply, pg. 13 (Doc. 44)). As a non-profit water association, RCWC has no such "state defined" area.² And *Le-Ax* anticipated this scenario by expressly limiting its holding: "We also take care to point out that *Le-Ax*'s boundaries are clearly defined by state law; we do not consider here a case where the state has not defined the boundaries of its water districts or associations." *Le-Ax* at 710.

As the *N. Shelby* court noted, much of the discussion regarding service territory is unnecessary:

Although the parties devoted a great deal of time and effort to disputing whether or not North Shelby had a "service area" or had reliably established any "boundaries" to delineate its territories, any factual findings in this regard are unnecessary. Rather, it is concluded that the proper focus should be upon the location of North Shelby's

² Much like Ohio, Iowa has several statutes under which a rural water association may organize. See *Rural Water Sys. # 1 v. City of Sioux Ctr.*, 202 F.3d 1035, 1037-1038 (8th Cir. Iowa 2000)(emphasis added):

Under Iowa law, rural water providers can choose to be organized in a variety of ways. A water vendor can be: (1) a cooperative association under chapter 499; (2) a nonprofit corporation under chapter 504A; (3) a benefitted water district under chapter 357; or (4) a rural water district under chapter 357A. Each chapter furnishes both the organizational and governing rules for the entity. RWS # 1 chose to organize under chapter 504A as a nonprofit corporation. *** **Additionally, there is no separately defined entity which is a 504A rural water "district" because an entity organized under chapter 504A is simply a nonprofit corporation.**

There, the Eighth Circuit upheld the application of § 1926(b) to the non-profit water association, noting "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." *Id.* at 1038.

actual distribution lines (as Ms. Goodman called it, "the actual pipe in the ground" - TR, p. 165), and determine if, at such locations in relation to the subject subdivision properties, North Shelby has actually made service "available" prior to the time that the Commission started to provide water service to these properties.

N. Shelby, 803 F. Supp. at 21.

Nonetheless, Chillicothe presses on, claiming that RCWC's service area is solely a function of its current customers. Again, the notion that customers are required as a prerequisite to § 1926(b) protection has been tested and failed. *See N. Shelby*, 803 F. Supp. at 22 ("Thus, while North Shelby has never actually "provided" water service to any customer within the subject subdivisions, it has, under Kentucky law, made water service "available" to potential customers within the subdivisions by virtue of the proximity of North Shelby's distribution lines to Brassfield/the Meadows, and the location of a distribution line within the Partridge Run Estates property.").

B. Chillicothe's Constitutional Challenge.

Chillicothe has made little effort to develop its constitutional challenge of § 1926(b) into any meaningful argument to overturn the Supremacy Clause. Rather it bootstraps only a Tenth Amendment challenge into its "service area" analysis claiming that Ohio law provides no legal right to RCWC to provide water service. As discussed above, Ohio statutory law is replete with authority under which RCWC provides water service.

Tenth Amendment challenges have been addressed in several seminal § 1926(b) cases, each time favoring the application of § 1926(b) over a competing state

statute. *See Village of Grafton*, 419 F.3d at 567 (village’s exclusive rights under the Ohio Constitution to provide utility services even *within* its boundaries are limited by § 1926(b)); *see, also City of Madison v. Bear Creek Water Assoc.*, 816 F.2d 1057, 1061 (5th Cir. 1987) (citing *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.”).

Chillicothe cites *no* decision declaring § 1926(b) an unconstitutional infringement upon states’ rights. But the tenuous claim is constantly thrown at the wall by municipalities in § 1926(b) disputes almost as a general matter of practice. *See City of Madison v. Bear Creek Water Assoc.*, 816 F.2d 1057,1061 (holding with respect to a Tenth Amendment challenge, “section 1926(b) does not, however, permanently curtail the city's authority, because it applies only while the federal debt is outstanding); *see, also Johnson County Rural Water Supply Corp. v. City of Burleson*, 1998 U.S. Dist. LEXIS 4782 (N.D. Tex. Apr. 1, 1998) (“the Tenth Amendment is not offended by the limited restriction imposed by the federal government to protect its subsidized loans, particularly in cases where the subsidies inure to the benefit of the municipalities through increased property values and farm prosperity in and around the municipalities”).

III. Conclusion

“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 encroachment.” *North Alamo Water Supply Corporation v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996)

Based upon the foregoing argument, exhibits, and testimony presented in this case, RCWC respectfully requests that this Honorable Court deny Chillicothe’s Motion for Summary Judgment, and enter an order granting RCWC summary judgment in its favor on all claims asserted in its First Amended Verified Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Brief in Opposition to Defendant’s Motion for Summary Judgment was filed electronically this 4th day of September, 2009. Notice of this filing will be sent to all parties by operation of the Court’s electronic filing system or via electronic mail.

/s/ Dennis M. O’Toole