UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ross County Water Company,

Plaintiff,

-v- **Case No. 2:08–cv–735**

City of Chillicothe, **Judge Michael H. Watson**

Defendant.

ORDER

Plaintiff, Ross County Water Company, Inc. ("Plaintiff" or "RCWC"), asserts claims under 7 U.S.C. § 1926(b), alleging, *inter alia*, that Defendant, the City of Chillicothe ("Defendant" or "Chillicothe"), is attempting to curtail Plaintiff's ability to provide water services by installing a competing waterline in Plaintiff's territory. Defendant counterclaims stating, *inter alia*, that under Ohio Constitution Article XVIII §§ 4 & 6 Plaintiff is encroaching on its territory by installing new waterlines.

This matter is before the Court on cross motions for summary judgment (Docs. 39 & 40). Each party has filed a reply. Jurisdiction lies under 7 U.S.C. § 1926(b) of the Consolidated Farm and Rural Development Act of 1961.

For the following reasons, the Court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. Parties

RCWC is a not for profit water company organized in 1970 under Ohio Revised Code § 1702 *et seq*. to provide water to members of the corporation. From its inception, RCWC has provided water to residents and businesses in the unincorporated areas of Ross County, Ohio. To finance the development of this water distribution system, RCWC borrowed several million dollars from the United States of America, Department of Agriculture, Rural Economic and Community Development Service ("RECDS"), formerly the Farmers Home Administration ("FmHA"), pursuant to the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. § 1926. RCWC presently has outstanding loans of over $10 million. *See* Hr'g Tr. 52, Aug. 4, 2008.

The City of Chillicothe is an Ohio municipal corporation governed by the Ohio Constitution and the Ohio Revised Code and with its principal place of business in Chillicothe, Ohio.

B. Disputed Area

The area in dispute ("disputed area") is in Green Township in an unincorporated area of Ross County, approximately two miles north of and thus outside of Chillicothe's municipal boundaries. The disputed area consists of the east side of Hospital Road south of Delano Road to a property known as Classic Brands ("Classic Brands") and the east side of Hospital Road north of Delano Road approximately 1,500 feet.[1] Within the disputed area and the surrounding area lie the following parcels of land:

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[1]Plaintiff's Exhibit 10 (PX 10) consists of a colored map of the area in discussion.

- Classic Brands, located at the southern most point of the disputed area. Originally, this parcel of land was known as the Colomet industrial site ("Colomet"). Chillicothe has and continues to provide water service to Classic Brands; this is not in dispute.
- An abandoned freight company adjacent to and immediately north of Classic Brands.
- A small parcel of land immediately north of the abandoned freight company owned by Dr. Cosenza.
- The Warner property ("Warner property"), bisected by Route 23 and therefore lies on both the west and the east side of Route 23 and Route 23's parallel road, Hospital Road. The Warner property runs from south to north along Hospital Road to Delano Road.
- The Cloverleaf property ("Cloverleaf property") consisting of four parcels along Hospital Road north of Delano Road. Part of the Cloverleaf property is a parcel formerly known as the Tecumseh Home Center ("Tecumseh").

These locations can best be understood by reference to various maps of record. *See, e.g.*, Pl.'s Ex. PX 10A & 60.

C. 1971 Contract

A document has been produced in this case which purports to be a contract between RCWC and Chillicothe titled Water Service Agreement ("contract" or "agreement") and dated June 29, 1971. The contract allocates to Chillicothe the right, duty, and obligation to provide water to the proposed hospital site (now the Adena Regional Medical Center ("Adena")) and Colomet (now Classic Brands) and allocates to

RCWC the right, duty, and obligation to provide water to the remaining areas of unincorporated Ross County until such time as any part of the aforementioned lands become annexed to the city. *See* Pl.'s Ex. 12 (PX 12).

Chillicothe disputes the validity of this document and asserts that a search of the city's records indicates the city council never adopted an ordinance authorizing the mayor to execute such an agreement. *See* Hr'g Tr. 50-51, Sept. 4, 2008. Chillicothe also offers a newspaper article from the *Chillicothe Gazette* reporting the purported recision of the contract between the Mayor and RCWC since the contract did not have council approval.

The Ross County Board of Commissioners, in a document dated February 14, 1972, and titled "Resolution" ("resolution"), granted RCWC an easement to lay its water lines within Ross County in return for saving the county the expense of creating its own water district to serve the rural inhabitants. *See* Pl.'s Ex. 13 (PX 13).

D. 2002 Contract

In 2002, RCWC and Chillicothe entered a contract allocating the water service for an area known as the "Sunrush Area" being annexed by Chillicothe. The 2002 contract allowed RCWC to continue to provide water service to the Sunrush Area in consideration for not asserting its rights under 7 U.S.C. § 1926(b) to prevent the annexation of the Sunrush Area by the City of Chillicothe.

E. RCWC's Waterlines

RCWC installed a six inch water line ("the six inch line") on the west side of Route 23 in 1975 which runs in a north-south direction and extends as far south as the emergency connection to the City of Chillicothe. RCWC makes water available to the

western portion of the Warner property (i.e., the portion of the Warner property west of Route 23) via the six inch water line.

In 1974, RCWC also constructed a ten inch water line ("the ten inch line") running in an east-west direction parallel to and just north of Delano Road. The ten inch line originally served the Tecumseh property. After the property was sold to Cloverleaf, however, Cloverleaf granted RCWC an easement for an additional sixteen inch line ("the sixteen inch line"). The easement, recorded August 22, 2003, also included permission for a waterline that would run north-south along Hospital Road north of Delano. At that time, that portion of Hospital Road had not been built. *See* Pl.'s Ex. 56 (PX56). In accordance with the easement, the ten inch line was supplemented in 2003 with the sixteen inch line running parallel to it as a back-up system.

Next, in April and June 2008, RCWC constructed an eight inch water line ("the eight inch line") running south from the ten inch line on Delano Road. The eight inch water line runs north-south along Hospital Road to the southernmost boundary of the abandoned freight company (and thus ends immediately north of the abutting Classic Brands property).

Finally, Cloverleaf also granted an additional easement to RCWC on July 16, 2008, for the construction of additional water lines through its property. After RCWC received this final easement from Cloverleaf, it began constructing an eight inch line from Delano Road north along Hospital Road. Pursuant to the Court's August 20, 2008 status quo order (Doc. 11), RCWC stopped the construction and tapping of this line;

however, the Court later permitted RCWC to complete the tapping[2] and construction of this line (Doc. 17). Work on the line has since been completed.

F. Chillicothe's Waterlines

Chillicothe maintains water lines servicing both Adena and Classic Brands. The Classic Brands line ends at the northernmost point of the Classic Brands property. Chillicothe passed ordinances in April 2008 to construct water and sewer lines from Classic Brands to north of Delano Road. After submitting its plans to the Ohio Environmental Protection Agency ("Ohio EPA"), Chillicothe received approval to extend its water line to a point 1,500 feet north of Delano Road. In August 2008, Chillicothe began construction of the northerly extension of the Classic Brands line. The Court ordered Chillicothe to stop work on this line on July 31, 2008 (Doc. 6) in its status quo order. The Court then permitted Chillicothe to complete the laying of the line immediately in front of Classic Brands (*see* Order, Doc. 11) and also allowed Chillicothe to complete the laying of a lateral east-west line on its easement directly north of Classic Brands in order to continue its water service to Adena (*see* Order, Doc. 17).

G. Relief Sought

RCWC seeks a declaration that: (1) it is an association within the meaning of § 1926(b), it is currently indebted to the FmHA, and that at all material times it has provided or made water service available to the disputed area; (2) it is entitled to the protections afforded under § 1926(b); and (3) Chillicothe will unlawfully curtail or limit

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[2] In Plaintiff's Post Hearing Brief in Support of Motion for TRO, Plaintiff states the tap is "well beyond the 1500 feet north along Hospital Road from Delano Road" identified as the disputed area. *See* Pl.'s Post Hr'g Br. in Supp. of Mot. for TRO 6 n.2 (Doc. 24).

RCWC's service by providing water service to the disputed area in violation of § 1926(b). Am. Compl. at ¶ 25(a).

RCWC also requests a permanent injunction enjoining Chillicothe from taking any further action to supply water to the disputed area or taking any further action which will serve to curtail or limit water service provided by RCWC to the disputed area. *Id.* at ¶ 32.

Chillicothe seeks a declaration that: (1) RCWC is not an association within the meaning of 7 U.S.C. § 1926(b); (2) RCWC is not entitled to the rights, privileges, and protections granted under § 1926(b); (3) Chillicothe is entitled to the exclusive rights to provide water to the disputed area; and (4) RCWC shall remove its water lines in the disputed area. Answer and Countercl. (Doc. 12) at ¶ 15.

Chillicothe also requests a permanent injunction enjoining RCWC from taking any further action to supply water to the disputed area or taking any further action which will serve to curtail or limit water service provided by Chillicothe to the disputed area. Answer and Countercl. (Doc. 12) at ¶ 21.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(c), which provides:

> 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.

Fed. R. Civ. P. 56(c).

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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Petty v. Metropolitan Gov't of Nashville-Davidson County*, 538 F.3d 431, 438-39 (6th Cir. 2008).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing that there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000); *Henderson v. Walled Lake Consol. Schools*, 469 F.3d. 479, 487 (6th Cir. 2006). The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Reeves*, 530 U.S. at 150–51. Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

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.'" *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 234–35 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 251–52).

III. DISCUSSION

Chillicothe advances three arguments to support summary judgment being granted in its favor: (1) RCWC is not entitled to § 1926(b) protection; (2) the doctrine of

unclean hands; and (3) §1926(b) protection violates the Tenth Amendment. RCWC asserts it is entitled to summary judgment in its favor because it satisfies the requirements for § 1926(b) protection.

A. § 1926(b) Protection

RCWC asserts that 7 U.S.C. § 1926(b) ("§ 1926(b)") prevents Chillicothe from curtailing RCWC's existing water service territory and entitles RCWC to a declaratory judgment that it qualifies for § 1926(b) protection and a permanent injunction prohibiting Chillicothe from taking any further action which would serve to curtail or limit water service provided by Plaintiff to the subject territory in violation of 7 U.S.C. § 1926(b). Chillicothe argues RCWC is not entitled to § 1926(b) protection because RCWC has not made service available in the disputed area and is attempting to use § 1926(b) as a sword instead of its intended shield.

Title 7 of the United States Code § 1926, titled "Water and waste facility loans and grants," regulates loans allocated by RECDS to associations for the conservation, development, use, and control of water. 7 U.S.C. § 1926(a). In relevant part, 7 U.S.C. § 1926(a) and (b) reads as follows:

> (a) In general
> (1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, . . . to provide for . . . the conservation, development, use, and control of water,
>
> (b) Curtailment or limitation of service prohibited
> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area

served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(a)–(b).

Congress enacted § 1926(b) to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and [RECDS] loans." *Lexington-South Elkhorn Water Dist. v. City of Wilmore, Kentucky*, 93 F.3d 230, 233 (6th Cir. 1996); *see also City of Madison v. Bear Creek Water Assoc.*, 816 F.2d 1057, 1060 (5th Cir. 1987) (citing S.Rep. No. 87-566, at 67 (1962)). In interpreting the scope of § 1926(b) protection, the provision "should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment." *Lexington-South*, 93 F.3d at 235 (quoting *Wayne v. Village of Sebring*, 36 F.3d 517, 527 (6th Cir. 1994) (citations omitted)). These safeguards help spread fixed costs among users to "prevent rural water costs from becoming prohibitively expensive to any particular user, to develop a system providing fresh and clean water to rural households, and to protect the federal government as insurer of the loan." *Le-Ax Water Dist. v. City of Athens, Ohio*, 346 F.3d 701, 705 (6th Cir. 2003) (citing S.Rep. No. 87-566, at 67 (1962) ("By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water.")); *see also Lexington-South*, 93 F.3d at 233 (stating that the Act "safeguard[s] the financial viability of rural associations and Farmers Home Administration loans" and "encourage[s] rural water development by expanding the number of potential users").

The Sixth Circuit has held that the statute's purpose is defensive. *Le-Ax*, 346 F.3d at 708. It is meant to protect rural water associations from the outside threat of

local governments taking their customers—not as a weapon for water associations to recruit new users outside of their boundaries. *Id.* The statute protects rural water associations from encroachment by a local government when the local government "is attempting to provide water service to a rural water association's users or within its boundary." *Id.* at 709. *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.").

To prevail in a § 1926(b) claim, a party must demonstrate that it is entitled to § 1926(b) protection by establishing: (1) it is an "association" within the meaning of the Act; (2) it has an outstanding FmHA loan obligation; and (3) it has provided or made service available in the disputed area. *Le-Ax*, 346 F.3d at 705 (citation omitted); *Lexington-South*, 93 F.3d at 234.

1. Association within the meaning of § 1926(b)

The first prong of the test requires RCWC to establish it is an association within the meaning of the Act.

It is undisputed that RCWC is a corporation not for profit established under Ohio Revised Code § 1702.01 *et seq*. RCWC notes the express language of § 1926(a) states that associations include "*corporations not operated for profit*, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies." 7 U.S.C. §1926(a) (emphasis added); *Lexington-South*, 93 F.3d at 234.

Chillicothe concedes § 1926 covers not-for-profits, but argues the coverage is

only for not-for-profits established in states without rural water district statutes. Defendant states that some states like Ohio have statutes for creating rural water districts, while other states like Texas regulate private water companies through Certificates of Public Convenience and Necessity. Chillicothe avers that § "1926 is intended to protect the delivery of water by public entities or private water companies that have *state defined service areas*." Chillicothe's Mot. for Summ. J. (Doc. 39) at 15 (emphasis added). Defendant reasons that because Ohio's Revised Code § 6119 ("Ohio Rev. Code § 6119") creates a procedure through the Ohio Court of Common Pleas for establishing a water district, only water districts created under Ohio Rev. Code § 6119 are entitled to § 1926 protection. Noting there is no authority for this interpretation of § 1926, Defendant argues this interpretation would put "all protected water providers on the same footing . . . ." *Id.* at 15–16.

As in all cases of statutory interpretation, the starting point for our analysis is the plain language employed by Congress. *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("[W]e give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import."). The express language of the federal statute states that an association includes corporations not operated for profit. 7 U.S.C. § 1926(a)(1) ("The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, . . . to provide for . . . the conservation, development, use, and control of water . . . ."). Defendant would have this Court only allow §1926(b) protection for an association established under the specific section of the Ohio Revised Code regulating Regional Water and Sewer Districts. *See* Ohio Rev. Code § 6119 *et seq*. But § 1926(b) does

not require an association to be created under a state statute such as Ohio Revised Code § 6119[3] to be granted § 1926(b) protection, nor does it require it be established with "state defined service areas."

Furthermore, many jurisdictions recognize the application of § 1926(b) protection to non-profit water suppliers. *See, e.g., Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262 (10th Cir. 2002) (finding non-profit water association satisfied requirements for § 1926(b)); *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989) (nonprofit granted injunctive relief barring any encroachment by competing water system); *North Shelby Water Co. v. Shelbyville Mun. Water and Sewer Comm'n*, 803 F.Supp. 15 (E.D.K.Y. 1992) (rural water non-profit association made water service "available", and thus had dominant right to provide water service to planned residential subdivisions). Lastly, courts reviewing § 1926(b) find this provision "should be given a liberal interpretation that protects rural water associations indebted to the [RECDS] from municipal encroachment." *Village of Grafton v. Rural Lorain County Water Authority*, 419 F.3d 562, 566–67 (6th Cir. 2005) (citations omitted). *See also Lexington-S. Elkhorn*, 93 F.3d at 235; *Wayne*, 36 F.3d at 527. This comports with the interpretation of an association not only including the districts created under Ohio Rev. Code § 6119 but including a "corporation not operated for profit." 7 U.S.C. § 1926(a)(1).

Accordingly, RCWC, as a not for profit corporation established to provide water

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[3]The Court notes that sections of the Ohio Revised Code recognize operators of a water supply or waterworks either established as not for profit corporations organized under Ohio Rev. Code § 1702 or as regional water districts organized under Ohio Rev. Code § 6119. *See, e.g.*, Ohio Rev. Code § 2305.34.

to rural Ross County, qualifies as an association within the meaning of the Act under § 1926(a) thus fulfilling the first prong of the test.

2. Outstanding RECDS loan

The second prong of the test to establish protection under § 1926(b) is that the association, RCWC, must have an outstanding FmHA loan obligation. Testimony was presented establishing RCWC indebtedness to RECDS, formerly FmHA, along with several exhibits of promissory notes, security agreements, and balance statements establishing RCWC's outstanding obligations to RECDS. Furthermore, Chillicothe expressly does not contest that RCWC has a qualifying loan. *See* Chillicothe's Reply Memo. to Mot. for Summ. J. (Doc. 44) at 5. Accordingly, the Court finds that RCWC has qualifying, outstanding RECDS loans fulfilling the second prong of the test.

3. Availability of Services under § 1926(b)

The third and final prong requires RCWC to establish it has provided or made service available in the disputed area. *Le-Ax*, 346 F.3d at 705-06.

In this circuit, a two-part approach is taken to analyze whether service is "provided or made available" in the disputed area. *Grafton*, 419 F.3d at 566. The first requirement is that a water association have "pipes in the ground", meaning it must already have service in existence, or, water lines must be within or adjacent to the property claimed to be protected by § 1926(b). *Lexington-South*, 93 F.3d at 237. The second requirement is that the water district has the legal right under state law to serve the area in question. *See, e.g.*, *Le-Ax*, 346 F.3d at 706-07 (finding a water district had the right pursuant to Ohio Revised Code § 6119 to provide service inside and outside its boundaries); *Lexington-South*, 93 F.3d at 235-36 (stating that Lexington-South had

not obtained the legal right under state law from the Kentucky Public Services Commission to construct facilities or to serve customers within portions of the disputed area).

a. Pipes in the Ground

Chillicothe asserts two arguments in support of its motion for summary judgment that RCWC does not have "pipes in the ground." First, Chillicothe claims RCWC was not within or adjacent to the area to provide service. Second, Chillicothe argues since RCWC is not established under Ohio Rev. Code § 6119 as having a "state defined service area, its service area is defined by existing customers who receive water services." RCWC responds that they not only had pipes adjacent to, but within the disputed area and that actual customers is not dispositive of whether it has made service available.

i. Service within or adjacent to the disputed area

Chillicothe asserts RCWC began expanding into the disputed area after Chillicothe's plans to provide water for the disputed area were disclosed during a city council meeting on March 24, 2008. Defendant maintains that RCWC did not have lines in the disputed area for which it seeks § 1926(b) protection prior to the time Chillicothe began constructing its allegedly encroaching lines for service. RCWC, however, counters that substantial water lines have existed surrounding the disputed area that could quickly be tapped to provide service for any new customers.

A key factor in determining whether an association made service available is determined by "pipes in the ground," meaning the existence of facilities on, or in the proximity of, the location to be served. *Lexington-South*, 93 F.3d at 237. The Sixth

Circuit has "plainly stated that '[i]f 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.'" *Le-Ax*, 346 F.3d at 706 (citing *Lexington-South*, 93 F.3d at 237) (emphasis added by *Le-Ax* court). Furthermore, the association must show that it has "adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." *Le-Ax*, 346 F.3d at 706 (citing *Sequoyah County Rural Water Dist. No. Seven v. Town of Muldrow*, 191 F.3d 1192, 1203 (10th Cir. 1999)).

The disputed area south of Delano Road is bounded on the west by the six inch line which lies adjacent to and immediately west of Route 23 and runs north-south. The six inch line has been in existence since 1975 and the line terminates at the emergency hook-up supplied by RCWC for the City of Chillicothe (which the Court notes has been accessed before by the City of Chillicothe in an emergency). The six inch line services, among others, the Warner property.

Through the middle of the disputed area, the ten inch line and the sixteen inch line both run west-east along Delano Road. The ten inch line and the sixteen inch line were installed in 1974 and 2003, respectively. Chillicothe alleges that the eight inch line dropped south off the ten inch line along Delano Road and installed by RCWC in June 2008 proves RCWC did not have lines in the disputed area. The Court disagrees.

The eight inch line installed in 2008 is parallel to the six inch line installed in 1975, yet while the six inch line is immediately west of Route 23, the new eight inch line is immediately east of Route 23. Notably, however, the Warner property lies both west

and east of Route 23. The Warner property has been served by the six inch line on the west side of Route 23 by RCWC since 1975. At the hearings, testimony was offered establishing RCWC's longstanding plans to serve the properties on the east side of Route 23 (including the only portion of the Warner property falling on the east side of Route 23) by boring under the highway from the six-inch line on the west side of Route 23. *See* Hr'g Tr. 25, Aug. 4, 2008.

The Court does not find the business decision to run the eight inch line south off the ten inch line instead of bore under the highway from the six inch line dispositive of whether RCWC lacks lines in the disputed area. Testimony was presented that RCWC's long range plan was to bore under Route 23. With the expected growth in the area, however, RCWC decided it was more efficient to run the new eight inch line down from the ten inch line instead of repeatedly boring under Route 23. *See* Hr'g Tr. 25-27, Aug. 4, 2008. The fact that new lines have been laid in the disputed area is not dispositive of the question whether other pipes were already in the ground. Lines already existed in and were immediately adjacent to the disputed area since the 1970s; new lines were installed to upgrade the system and to continue to serve an area already served by RCWC. The Court believes that if the Warner property were not traversed by Route 23 and instead existed as one contiguous 72 acre property, it would not even be disputed that RCWC has served this property as the lines lying on the Warner property on the west side of Route 23 have been there since 1975.

The Court will not restrict the water association in such a way as to prevent it from making rational business decisions in an effort to remain protected from encroachment under § 1926(b). To do so would not be prudent nor consistent with the

water association's history of providing water to underserved rural areas in Ross County. Nor would it be consistent with congressional intent to protect such water associations from encroachment and allow them to keep water rates low by realizing economies of scale by spreading costs. *Le-Ax*, 346 F.3d at 705 ("[E]conomies of scale is an integral part of [§ 1926(b)]"). It is not rational to require the costly and repeated boring under a highway if a new line can be dropped instead.

As to the disputed area north of Delano road, the undisputable facts show that the Cloverleaf property had "pipes in the ground" on its southernmost border since 1974. Notwithstanding the new north-south twelve inch line installed on the Cloverleaf property in 2008, the ten inch line serving Cloverleaf existed since 1974 and the sixteen inch line on the Cloverleaf property existed since 2003.

In sum, the Court finds RCWC has made service available within or adjacent to the disputed area.

ii. Service area defined by existing customers

Chillicothe argues that because RCWC does not have a "state defined service area, its service area is defined by existing customers who receive water services." Def.'s Mot. for Summ. J. (Doc. 39) at 16. It states that the twelve inch line laid down by RCWC running north-south parallel along Hospital Road and north of Delano Road to property owned by Cloverleaf is not supplying any service. Chillicothe reasons since there are no customers on this line, it is an expansion outside RCWC's current service area. Chillicothe avers *Le-Ax* provides guidance on this point.

In *Le-Ax*, the Le-Ax Water District was a rural water district pursuant to Ohio Rev. Code § 6119 and indebted with loans to the FmHA. Le-Ax's territory was defined

in the petition approved pursuant to § 6119 by the Athens County Court of Common Pleas. The property in dispute was outside, but nearby, the boundaries of both the Le-Ax Water District and the City of Athens. The court found that Le-Ax had satisfied the two-prong test of making service available in the disputed area and possessing a legal right to serve the disputed area. Nevertheless, the court found Le-Ax was using § 1926(b) as a sword to "foist an incursion of its own on users outside of its boundary" rather than a "shield to defend against invasion." *Le-Ax*, 346 F.3d at 707. The court reasoned Athens was not attempting to serve users within Le-Ax's boundary nor attempting to steal Le-Ax's customers outside of Le-Ax's boundary. Instead, Athens was "merely seeking to persuade unserved users to sign up with Athens (rather than Le-Ax) for water service." *Id.* at 708. Accordingly, the court held that "[w]hen a rural water district's boundaries are geographically determined by the state, . . . 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." *Id.*

The *Le-Ax* court specifically limited the scope of its ruling to cases where the boundaries of the water district are clearly defined by state law and did not consider a "case where the state has not defined boundaries of its water districts or associations." It further noted that "[b]ecause Ohio in this case has prescribed the boundaries of the Le-Ax water district, we do not consider here the ramifications of an unbounded water district for purposes of § 1926(b)." *Id.* at n.2.

Accordingly, *Le-Ax* is distinguishable from the case *sub judice* in that RCWC is established as a non profit and thus is without geographical boundaries established under Ohio Rev. Code § 6119's procedure. Chillicothe would have the Court read the

Le-Ax court's opinion as defining the existing users—not its geographical boundaries—as the scope of its service area. But the *Le-Ax* court focused on Le-Ax's geographical boundaries—not its existing customers—as defining the scope of its area, as it follows that Le-Ax's existing customers were within its geographical boundaries. Nonetheless, the *Le-Ax* decision offers some guidance on the ramifications of an unbounded water district for purposes of § 1926(b). The *Le-Ax* court recognized that some states, including Kentucky in the Sixth Circuit, do "not create boundaries for their water districts; as a result, the boundaries of a water district or association cannot [be] defined by state law but only by practice." *Id.* at n.2 (citing *North Shelby*, 803 F. Supp. at 22).

In *North Shelby*, the nonprofit water company North Shelby had no service area defined under Kentucky law. North Shelby argued because its water lines were located either adjacent to or ran through the disputed properties, it had "made available" water service within the meaning of § 1926(b). *Id.* at 20. The defendant Commission argued because North Shelby had no actual customers within the properties in question, North Shelby has not "provided service" and thus was not entitled to § 1926(b) protection. *Id.* The *North Shelby* district court resolved that the "proper focus should be on the actual distribution lines, . . . and determine if, at such locations in relation to the subject . . . properties, North Shelby has made service 'available' prior to the time that the Commission started to provide water service to these properties." The lack of "prior customers within the . . . property is not dispositive." *North Shelby*, 803 F. Supp. at 22. The court found North Shelby was "required to make 'reasonable' extensions of its water lines to serve any customer who would apply for service from one of its

distribution lines. . . . [Thus t]he 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." *Id.*

In this case, the undisputable facts show that the Cloverleaf property had "pipes in the ground" on its southernmost border since 1974 and the lack of prior customers within the properties is not dispositive. The ten inch line serving Cloverleaf existed since 1974 and the sixteen inch line on the Cloverleaf property existed since 2003, regardless of the new north-south twelve inch line installed on the Cloverleaf property in 2008.

Similarly, regarding the Warner property, the undisputed facts establish RCWC has taps and has served this parcel through the six inch line on the west side of Route 23 since 1975. The fact that service has not been requested on the only portion of the Warner property laying on the east side of Route 23 does not negate that RCWC has made service available to the Warner property.

Thus, despite the fact that RCWC does not "already have service in existence, [RCWC has] water lines . . . *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.'" *Le-Ax*, 346 F.3d at 706 (citing *Lexington-South*, 93 F.3d at 237) (emphasis added by *Le-Ax* court). Furthermore, RCWC has "adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." *Le-Ax*, 346 F.3d at 706 (citing *Sequoyah County*, 191 F.3d at 1203).

Furthermore, under the Loan Resolution Security Agreements between RCWC and the FmHa, in return for accepting the benefits of the loans, RCWC is required to "provide adequate service to all persons within the service area who can feasibly and legally be served . . . ." *See, e.g.,* Pl.'s Ex. 42. As in *North Shelby*, while RCWC has never actually "provided" water service to any customer on the Cloverleaf or east Warner properties, it has made water service "available" to potential customers within these parcels by virtue of the actual presence of water lines on the Cloverleaf property and the proximity of water lines to the east Warner property. Because RCWC is required to "provide adequate service to all persons within the service area who can feasibly" be served, RCWC has "made services available" entitling it to § 1926(b) protection "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." *North Shelby*, 803 F.Supp at 21.

Accordingly, RCWC fulfills the first requirement that a water association have pipes in the ground.[4]

b. Legal right to serve disputed area.

The second requirement is that the water district has the legal right under state law to serve the area in question.

RCWC asserts it is legally entitled to serve the disputed area because of the 1971 contract, the 1972 blanket easement, the 2002 contract, and by virtue of its existing pipes in the ground. Chillicothe argues RCWC is an "unregulated non-profit"

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[4]The sufficiency of the water pressure and volume RCWC's lines has not been disputed by Chillicothe in this case.

company and "does not have the right under Ohio law to serve water users outside its service area of member/customers." Def.'s Reply Mem. to Pl.'s Mot. for Summ. J. (Doc. 44) at 15. As to the 1971 contract, Chillicothe asserts the 1971 contract was never authorized by the Chillicothe City Council and presents a *Chillicothe Gazette* newspaper article dated October 19, 1971 entitled, "Mayor rescinds outside water tap ban" as proof the 1971 contract was rescinded. Chillicothe reasons that since the mayor lacked authority to enter such a contract, estoppel cannot apply to municipal corporations like Chillicothe where the requisite authority to execute a contract was not followed.

In the preliminary injunction order the Court found on the limited evidence that the legal right of RCWC to serve the disputed area derives from the 1971 contractual right conferred on it by Chillicothe to serve the entire unincorporated area of Ross County and that the parties had been operating in accordance with this agreement for over 35 years. The Court however finds determination of the issues regarding the 1971 and 2002 contracts to be unnecessary for resolution of the relief requested. Notwithstanding these contracts, RCWC's legal right to serve the disputed area stems from its regulation by entities within the State of Ohio. As in other states within the Sixth Circuit where a nonprofit must obtain a Certificate of Public Convenience and Necessity before constructing a water distribution system, RCWC also must comply with such procedures. *See Lexington-South*, 93 F.3d at 235-36 (stating that Lexington-South had not obtained the legal right under state law from the Kentucky Public Services Commission to construct facilities or to serve customers within portions of the disputed area); *North Shelby*, 803 F. Supp. at 21 (North Shelby is regulated utility

required to obtain certificate of convenience and necessity that a need and demand for water services exist and authorizes construction and operation of a water distribution system in a specific geographic location). Although RCWC's bylaws and membership define the corporation, RCWC is regulated by the Ohio Environmental Protection Agency among others. It is undisputed by the parties that RCWC must obtain approval from the Ohio EPA prior to the construction of infrastructure.

The Court also notes RCWC provides water service throughout the unincorporated areas of Ross County and its infrastructure is expansively laid throughout the unincorporated area of Ross County. *See* Pl.'s Ex. 60 (PX60). In furtherance of this objective, after forming the RCWC and obtaining FmHA loans, RCWC obtained a blanket easement granted to RCWC by the Ross County Board of Commissioners. This easement was to lay pipes in unincorporated Ross County in furtherance of the objective to provide unserved rural inhabitants with water and in consideration of eliminating the need for the Board of Commissioners to create a water district which "would require this county to go into bonded indebtedness . . . ." Pl.'s Ex. 13.

For the aforementioned reasons, the Court finds RCWC has "pipes in the ground" and has the legal right to serve the disputed area. *See, e.g., Le-Ax*, 346 F.3d at 706-07.

4. Conclusion regarding § 1926(b) protection

RCWC has demonstrated that it is entitled to § 1926(b) protection by establishing: (1) it is an "association" within the meaning of the Act; (2) it has an outstanding FmHA loan obligation; and (3) it has provided or made service available in

the disputed area. *Le-Ax*, 346 F.3d at 705 (citation omitted); *Lexington-South*, 93 F.3d at 234. Accordingly, the statute protects RCWC from encroachment by Chillicothe as it "is attempting to provide water service to a rural water association's users or within its boundary." *Le-Ax*, 346 F.3d at 709. *See also Lexington-South*, 93 F.3d at 237. RCWC is using § 1926(b) as a shield against encroachment, not a sword.

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." *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 917 (5th Cir. 1996). *See also City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987) (enjoining a city from annexing subdivisions within a utility's certificated area after finding violation of § 1926(b)). In *Jennings Water, Inc. v. City of North Vernon, Ind.*, the court found "the federal statute, section 1926(b), absolutely bars any encroachment by a competing water system on a rural water system indebted to the FmHA. Injunctive relief is clearly the appropriate remedy to ensure the continued, uninterrupted service by the federally indebted entity." 895 F.2d 311, 318 n.6 (7th Cir. 1989).

Accordingly, the Court **ENJOINS** the City of Chillicothe from taking any further action to supply water to the disputed area or taking any further action which will serve to curtail or limit water service provided by RCWC to the disputed area.

B. Unclean Hands

Chillicothe asserts RCWC violated the doctrine of unclean hands by laying water lines after this Court issued an order precluding Chillicothe from constructing lines in the disputed area and deliberately misled this Court. Chillicothe further avers RCWC filed

the lawsuit when Chillicothe's legal counsel was recovering from a serious illness in the Philippines. RCWC adamantly opposes the suggestion it misled the Court or deliberately filed a lawsuit with knowledge of defense counsel's compromised health.

The unclean hands doctrine derives from the equitable maxim that "he who comes into equity must come with clean hands." This maxim "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior" of the opposing party. *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). "[U]nclean hands are not to be lightly inferred. They must be established by clear, unequivocal and convincing evidence." *Kearney & Trecker Corp. v. Cincinnati Milacron, Inc.*, 562 F.2d 365, 371 (6th Cir. 1977).

Chillicothe's allegations of unclean hands are largely unsupported. Conversely, RCWC points to the evidence offered at the preliminary injunction hearing that RCWC attempted settlement negotiations several months before the filing of the lawsuit and before Chillicothe moved materials and equipment to the disputed area to demonstrate its good faith efforts to resolve this case. Consequently, without any clear, unequivocal and convincing evidence that RCWC behaved improperly, the Court finds the doctrine of unclean hands does not operate here to deny RCWC relief.

C. Tenth Amendment

Chillicothe alleges that recognition of a right of RCWC's to serve customers "outside its service area" would violate the Tenth Amendment of the United States Constitution. Chillicothe offers limited analysis of its Tenth Amendment claim.

Having held that RCWC is not serving customers "outside its service area" and

instead that Chillicothe is attempting to provide service within RCWC's § 1926(b) protected area, the Court finds Chillicothe's argument has no merit.

Furthermore, in *Le-Ax*, the district court offered a well-reasoned decision finding § 1926(b) does not violate the Tenth Amendment. During the appeal of the *Le-Ax* district court's decision, the Sixth Circuit left the district court's decision untouched. *Le-Ax*, 174 F. Supp. 2d at 707–08, *rev'd on other grounds Le-Ax*, 346 F.3d at 701.

Accordingly, as Defendant offers no cogent argument regarding how § 1926(b) violates the Tenth Amendment, the Court declines to find as such. *U.S. v. Cole*, 359 F.3d 420, 428 n.13 (6th Cir. 2004). *See also, e.g., McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed augmentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.") (quoting *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 293-94 (1st Cir.1995)).

D. 1971 and 2002 Contracts

In light of the relief granted under the declaratory judgment, the determination of the supplemental breach of contract claims are hereby determined to be **MOOT**. The breach of contract claims are hereby **DISMISSED WITHOUT PREJUDICE**.

E. Attorneys Fees

Plaintiff RCWC shall file a motion for costs and attorney's fees within the time specified in Fed. R. Civ. P. 54(d).

IV. CONCLUSION

Based on the foregoing analysis, the Court hereby **GRANTS** Summary Judgment to Plaintiff. The Court hereby **GRANTS** a Declaratory Judgement to Plaintiff on the basis that the City of Chillicothe will unlawfully curtail or limit RCWC's service by providing water service to the disputed area in violation of § 1926(b), and **ENJOINS** the City of Chillicothe from taking any further action to supply water to the disputed area or taking any further action which will serve to curtail or limit water service provided by RCWC to the disputed area.

Lastly, the Clerk shall enter judgment in favor of Plaintiff and against Defendant and terminate the case from the Court's docket. The Clerk is instructed to **REMOVE** Documents 39 and 40 from the pending motions list.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT