Clandestine ARRANGEMENTS

"This case is apparently an attempt to circumvent the federal statute, which is designed to protect rural water districts..."

Harold L. Lowenstein, Appellate Judge
Missouri Court of Appeals, January 21, 2005
Robertson Properties v. Public Water Supply District #8 of Clay County, Missouri

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THE FEDERAL STATUTE Judge Lowenstein referred to above is Title 7, United States Code, Section 1926(b). The United States Congress intended Section 1926(b) to *forbid* municipalities from selling water within the territory/service area of a federally indebted rural water district or association. Judge Lowenstein recognized in the Robertson case that all too often, municipalities engage in "clandestine arrangements" with real estate developers in an attempt to evade the federal prohibition mandated by Section 1926(b).

In 1999, Robertson Properties purchased land in Clay County, Missouri, on which it intended to build 145 homes. A portion of this land was situated inside the service area of Public Water Supply District #8 (PWSD-8). Rather than contacting PWSD-8 for water service, Robertson made "arrangements" with the city of Kearney, Missouri to obtain water service for the entire development – including the land inside PWSD-8's territory. When PWSD-8 objected, pointing out that water service by Kearney inside PWSD-8's territory would be a violation of 1926(b), Robertson filed suit seeking to remove land from PWSD-8's jurisdiction.

Judge Lowenstein (writing on behalf of the three judge appellate panel in the Robertson case) found that federal law "prohibits a municipal annexation that would 'pry' existing customers away from a public water district." The Missouri Court of Appeals also held that the water district was further entitled to Section 1926(b) protection for areas in which it does not currently have customers, "...by demonstrating an ability to provide service ... within a reasonable time after a request for service has been made."

In other words, Section 1926(b) protection extends to existing customers *and* into areas where future customers may later be situated. The water district need only show that it could have provided service – within a reasonable period of time – after a request for service was made. In making such a showing, the Appellate Court in Missouri (citing federal precedent) stated that the service area of a federally indebted rural water district is "sacrosanct" and thus "any doubts" as to whether the district is entitled to protection *must be resolved in favor of the district.*

Frequently, a developer never makes a request for service from the water district. Rather it proceeds to apply for water service with the neighboring city, ignoring the water district. Cities also regularly ignore the water district and welcome the developer with open arms. Working together, a deal is struck – without any disclosure to the water district. Such "clandestine arrangements" (words used by Judge Lowenstein in his published opinion) between developer and city to circumvent 1926(b) are forbidden by federal law. The Missouri Court also concluded that state and local laws which might otherwise be used to allow service by the municipality are "preempted" or trumped by federal law.

Remarkably, *on the same day* the Robertson decision was announced, the Missouri Court of Appeals decided a second case also involving PWSD-8 – the *Horn v PWSD-8* case. James M. Smart, Jr., Missouri Appellate Judge (writing for a separate three judge panel) found evidence of a conspiratorial-type relationship between landowners, the developer and a municipality to evade federal law. Judge Smart wrote in his opinion, "...the trial court must address whether the city, the developer, and the Horns *are working together* to accomplish the very thing *prohibited by Section 1926(b)* – the curtailment of service by the water district and the annexation of the land to the city of Kearney...."

The Missouri Appellate Courts' discovery of such "clandestine arrangements" between landowners, developers and cities used to elude federal law comes as no surprise to those water districts who have been compelled to file suit to protect their service area. They know that cities knowingly and intentionally construct water service lines inside water district territory with the specific purpose of luring customers to buy water from the city.

However, cities rarely stop at merely "luring" existing and future water customers from a rural water district. In the Robertson case, the city of Kearney announced that it would enforce an additional sewer connection fee against any homeowner who purchased water from PWSD-8 rather than from Kearney. (Homeowners who purchased water from Kearney would not be assessed this sewer connection fee.) In the Horn case, Kearney refused to provide sewer service unless the developer connected the entire

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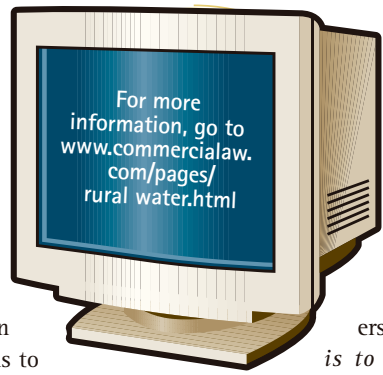
1. **municipalities, landowners and developers must not engage in conspiratorial or clandestine arrangements to violate federal law**
2. **when they do, water districts must act swiftly to stop it.**

development to the city's water service system. Does this sound like coercive conduct by the city? It gets worse! Kearney also agreed to pay the legal fees to encourage Robertson Properties and the Horns to file suit against PWSD-8. When PWSD-8 was required to respond by defending these suits – and filing federal suits of its own to protect itself – Kearney claimed PWSD-8 was wasting the resources of the water district on lawyers! Whether there will be a public outcry that Kearney has been using public funds to promote the unlawful circumvention of federal law and the rights of rural resident members of PWSD-8 remains to be seen.



Kearney's draconian tactics are not new. In the early 1990s, the city of Tulsa, Oklahoma publicly threatened to terminate the water supply to Creek County (Oklahoma) Rural Water District #2 ("Creek-2") as a means to attempt to coerce the water district to surrender territory to Tulsa. (The attempt failed and Tulsa eventually paid Creek-2 $500,000 in settlement.) The city of McAlester, Oklahoma has used the same tactic (even as late as 2004) against Pittsburg County (Oklahoma) Rural Water District #7 ("Pitt-7") in an effort to force the water district to dismiss its 1926(b) suit against McAlester. Pitt-7 has stood firm and resolute against a withering attack mounted by McAlester.

What motivates so many municipal governments to knowingly and intentionally violate federal law? The simple answer is: money and power. Municipalities want to take (steal) from water districts revenue the federal government reserved to rural residents. Cities want the power to grant or terminate water service as a means to extract concessions from landowners and to force collection for other city services which the city cannot so easily terminate (such as sewer, trash, police and fire services). In other words, if the homeowner refuses to pay for sewer or trash service, their water service is cut off.

Judge Lowenstein stated, based on his research into the legislative history of 1926(b), that: "The purpose of securing the district's territory from competitive suppliers, such as municipalities, *is to protect and encourage rural water developments ...*" When municipalities engage in illegal conduct by invading water district territory, they are "discouraging" rural water development and taking money out of the pockets of rural residents. Judge Lowenstein had words of advice for water districts as well. He stated that water districts must be dissuaded from "dawdling" when "it is apparent that another entity is putting water lines in its territory."

The advice from the Missouri Court of Appeals is straightforward: (1) municipalities, landowners and developers must not engage in conspiratorial or clandestine arrangements to violate federal law, and (2) when they do, water districts must act swiftly to stop it. ❍

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