

# §1926(b)/Rural Water Associations: Federal Appellate Court Addresses Whether Municipality Could Provide Service



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

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The United States District Court of Appeals for the Tenth Circuit (App. Ct.) addressed in a September 18th Opinion an issue arising out of the application of 7 U.S.C. §1926(b). See *Deer Creek Water Corporation v. City of Oklahoma; Oklahoma City Water Utilities Trust*, No. 21-6164.

The issue addressed was whether Oklahoma City and Oklahoma City Water Utilities Trust (collectively, “City”) were prohibited from providing water service to an area in which an indebted rural water association (“RWA”) was present.

7 U.S.C. §1926(b) provides:

(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 granting 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 serve the area served by the association at the time of the occurrence of such event.

This protection is dependent upon the indebted RWA making water service available to the relevant area.

This statutory provision has been read to mean that Congress intended to:

- Encourage rural water development
- Increase the likelihood of repayment of U.S. Department of Agricultural loans or guaranteed loans
- Protect rural districts from competition

Deer Creek Water Corporation (“Deer Creek”) filed an action against the City in the United States District Court for the Western District of Oklahoma Court (“Court”) invoking §1926(b). It argued that the City was prohibited from providing water service to a proposed development on land owned by Thomas and Gina Boling (collectively, “Developers”).

The Court had granted Developers’ (who intervened in the litigation) Motion for Summary Judgment concluding that Deer Creek had not made such service available. Its ruling was premised on a finding that Deer Creek’s terms of service required the Developers to construct improvements necessary to expand Deer Creek’s existing infrastructure to serve the proposed development. Therefore, the Court concluded

that because Deer Creek itself would not be undertaking the construction, service had not been made available.

The App. Ct. reversed, holding that neither the statute nor case law supports:

. . . stripping a federally indebted rural water association of §1926(b) protection solely because it places a burden of property development (improving and expanding existing water-service infrastructure) on the landowners seeking to develop property.

The App. Ct. notes that the question is whether the water association has in fact made service available.

The test may be described as to whether the RWA has proximate and adequate “pipes in the ground” with which it is served or can serve the disputed customers within a reasonable time. The pipes-in-the-ground test is met by the RWA demonstrating that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made.

Deer Creek was noted to have agreed to provide the water service and demonstrated it had the capacity to do so despite the fact it never agreed to finance or construct the infrastructure. It was determined that nothing in the statute required a RWA to finance or constructed needed infrastructure before being entitled to protection for a municipal encroachment.

The pipes-in-the-ground test also looks at whether the cost of Deer Creek’s service is so excessive it has not made those services available. This does not require that such services be competitive. However, 1926(b) does not authorize the imposition of any level of costs.

The App. Ct. declined to find what would be considered as excessive in this instance. Instead, it requires on remand that the Court consider whether Deer Creek’s cost of service is so excessive that its service is effectively unavailable.

Finally, the App. Ct. addressed the City’s argument that in the absence of the expressed consent of the Oklahoma Legislature that 1926(b) violates the 10th Amendment. This argument was rejected because a nonprofit corporation like Deer Creek is not quasi-municipal and therefore does not need the State of Oklahoma’s permission before incurring federal debt in any accompanying obligations.

The case is remanded to the Court to reconsider whether Deer Creek has made service available. This is stated to turn on whether the City or the Developers can establish that the cost of Deer Creek’s service is so excessive that its service is effectively unavailable.

A copy of the Opinion can be downloaded [here](#).