

Rural Water Issues Advisory [12/30/2019]

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Special Single New Year's Issue Edition: Another Successful Year of Defending 7 U.S.C. § 1926

Over Three Decades of Defending Your Service Area from Unfair Curtailment

In 1987, Jim Herring, a self-described Mississippi “*country lawyer*” and former judge, was the attorney for a rural water district in Mississippi experiencing hostile encroachment of its service area from a neighboring municipality. In 1985, the municipality instituted eminent domain proceedings to condemn a portion of the rural water district's facilities (i.e. certain customers, a water plant, wells, and mains). Attorney Herring formulated his protection of the district's service area on a provision in the federal code, 7 U.S.C. § 1926, which is authorized in the Farm Bill ostensibly to protect the federal government's loans to a rural water district. Herring was successful in the district court, but had to defend his case in the U.S. Fifth Circuit Court of Appeals. Thanks to Herring's masterful presentation of the facts and the law, and the erudite discernment of Federal Appeals Judge Edith Jones, the ruling resulted in a broad interpretation of protection under the law for indebted water utility districts, municipalities, non-profits, etc. that has become the seminal precedent that all threatened water utilities have relied on for protection for over three decades. In the case, *The City of Madison, MS v. The Bear Creek Water Association, MS*, Judge Jones interpreted the law to not only protect the indebted water utility's service area so it can repay its loan, but also to protect the future growth areas proximate to the service area in order to decrease the cost per user of the water service and allow for further expansion of *rural water* service to underserved areas.

“This [Congressional] history indicates two congressional purposes behind § 1926: 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns.”

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc. 816 F.2d 1057 (5th Cir.1987)

Numerous subsequent cases in federal district and appellate courts have affirmed “Bear Creek” to protect water utility service areas from unfair competition. Some districts have lost in court where they did not meet the prerequisites of having the protection (namely not making water service reasonably available to growth areas). Other cases have marginally expanded or eroded the protections (in only some circuits) but not to the point where Bear Creek's jurisprudence is not accepted as precedent. We don't know if Jim Herring knew the importance of the case back in 1987, but it is possible to find the answer; Jim is still the lawyer for the Mississippi Rural Water Association.

Since the passage of §1926(b), the law has been under continual attack in Congress by utilities that desire unfair capture of their neighbor's service area. Their typical strategy is to use a local territorial controversy to convince their local senator or congressman to make changes under §1926(b) in order to erode its protection. In each of these cases where the local community was not able to convince its representatives of the merit of §1926(b), NRWA has been successful in marshaling the strength of our association to convince the majority of representatives or senators to resist changing the law and potentially jeopardizing the entire mission to extend drinking water service to everyone (especially the neediest of consumers).

In 2013, during Congressional reauthorization of the U.S. Farm Bill (the authorizing statute of all USDA programs including §1926(b)), a local dispute in Iowa resulted in proposed changes to §1926(b) during consideration of the legislation ([video](#) of Committee on Agriculture hearing on May 15, 2013).

Often these debates are the most intensive advocacy campaigns we undertake. And typically, it is other rural water members not involved in the particular controversy who use their good relationships with their senators and representatives in positions of power to come to the aid of their brethren in the rural water movement.

In Washington, NRWA continually offers assistance and education to any Member of Congress or Administration official. We are always eager to assist in any helpful way including explanation and education of the current §1926(b) authorities and limitations, or clearing-up misunderstandings in local disputes before considering changes to the law.

The future success of NRWA's §1926(b) advocacy is dependent on your participation in "your" association as captured by former NRWA President Anderton's (GA) axiom, "*By organizing together with a common agenda, we can accomplish what none of us could achieve on our own... and only by organizing together with a common purpose can we realize the power of an association.*"

[postscript] *Most of the membership of NRWA and state associations is comprised of municipalities. And NRWA would only support protection that works fairly for both the cities and rural water districts. The §1926(b) law requires the predatory system to work out an arrangement of mutual interest to both water utilities as well as for the customers. The alternative would be to allow larger utilities to unilaterally move into the low cost/high revenue portion of the federally indebted utility and jeopardize the viability and future growth of the rural utility.*

National Rural Water Association

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The National Rural Water Association is the country's largest public drinking water and sanitation supply organization with over 30,000 members. Safe drinking water and sanitation are generally recognized as the most essential public health, public welfare, and civic necessities.

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