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United States Court of Appeals
Tenth Circuit

October 21, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GARRETT DEVELOPMENT, LLC, an Oklahoma limited liability company,

Plaintiff - Appellee,

v.

DEER CREEK WATER CORPORATION, an Oklahoma not for profit corporation,

Defendant - Appellant.

No. 21-6105
(D.C. No. 5:18-CV-00298-D)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **BALDOCK**, and **McHUGH**, Circuit Judges.

This case involves a dispute over the conditions imposed by a rural water association, Deer Creek Water Corporation ("Deer Creek"), on a private developer, Garrett Development, LLC ("Garrett"). Congress has protected rural water

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

associations indebted to the Department of Agriculture ("USDA")[1] from encroachments on their service areas by municipalities, so long as the water association makes services available to customers within the service area. 7 U.S.C. § 1926(b). Garrett owns property within Deer Creek's service area, but it filed this lawsuit seeking a declaration that Deer Creek's service area was not protected by 7 U.S.C. § 1926(b) because Deer Creek has imposed such onerous conditions on the provision of water service that service is effectively unavailable.

After a three-day bench trial, the district court concluded Deer Creek's conditions for service to Garrett were unreasonable, excessive, and confiscatory. The district court therefore granted judgment in favor of Garrett and declared that Garrett may obtain water from any provider, including the municipality of Oklahoma City, Oklahoma. Deer Creek filed a timely appeal. For the reasons stated below, we affirm.

I. BACKGROUND

To provide context for the factual and procedural history of this dispute, we begin with an overview of 7 U.S.C. § 1926(b). With the benefit of that background,

[1] Prior to 1994, the loans relevant to 7 U.S.C. § 1926(b) were operated by the Farmers Home Administration (FmHA). *See Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 701 n.1 (10th Cir. 2004). The USDA now operates the loan and guarantee program through the Rural Utility Services. *Id.*; United States Dept. of Agriculture, Rural Development Water & Waste Disposal Loan & Grant Program, https://www.rd.usda.gov/programs-services/water-environmental-programs/water-waste-disposal-loan-grant-program (last visited October 12, 2022). For the sake of consistency, we refer to the creditor entity of Deer Creek's loans as the USDA throughout this order.

we set forth the factual and procedural history of this dispute. Then, we proceed to the analysis of the issues before us on appeal.

A. Statutory and Legal Background

In passing the Agricultural Act of 1961, Pub. L. No. 87–128, 75 Stat. 294, Congress sought to preserve and to protect rural farm life. Title III of the Act—the Consolidated Farm and Rural Development Act—is concerned largely with issues of agricultural credit. Codified at 7 U.S.C. §§ 1921–2009cc-18, "the Consolidated Farm and Rural Development Act, . . . authorize[s] the Secretary of Agriculture to make or insure loans to nonprofit water service associations for 'the conservation, development, use, and control of water.'" *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1194 (10th Cir. 1999) (quoting 7 U.S.C. § 1926(a)). Section 1926 of the Act applies to "associations, including corporations not operated for profit . . . and public and quasi-public agencies to provide for the . . . control of water . . . primarily serving farmers, ranchers, farm tenants, farm laborers, rural business, and other rural residents." 7 U.S.C. § 1926(a). For the recipients of these federal loans, § 1926(b) protects associations meeting this definition from competition by way of municipal encroachment:

> 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(b).

By enacting this section, "Congress intended to protect rural water [associations] from competition to encourage rural water development and to provide greater security for and thereby increase the likelihood of repayment of [USDA] loans." *Rural Water Dist. No. 1, Ellsworth Cnty v. City of Wilson*, 243 F.3d 1263, 1269 (10th Cir. 2001) (citing *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 523 (4th Cir. 1999)). Consistent with the purpose of this section, we have "broadly" construed § 1926(b) "to protect rural water [associations] from competition with other water service providers." *Id.* (citing *Adams County Reg. Water Dist. v. Vill. of Manchester*, 226 F.3d 513, 518 (6th Cir. 2000); *Bell Arthur*, 173 F.3d at 520, 526; *Lexington–South Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 235 (6th Cir. 1996)). This construction furthers "'a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means.'" *Id.* (quoting *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987)).

To receive the protection provided by § 1926(b), rural water associations have the burden to establish two requirements. *Rural Water Dist. No. 4, Douglas Cnty. v. City of Eudora*, 659 F.3d 969, 976, 980 (10th Cir. 2011). The association must "(1) have a continuing indebtedness to the [USDA] and (2) have provided or made available service to the disputed area." *Ellsworth*, 243 F.3d at 1269. To satisfy the

second prong, "the focus is primarily on whether the water association has in fact made service available, i.e., on whether the association has proximate and adequate 'pipes in the ground' with which it has served or can serve the disputed customers within a reasonable time." *Id.* at 1270 (internal quotation marks and emphasis omitted). To meet this test, the rural water association must demonstrate 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." *Id.*

However, even where a rural water association meets the "pipes in the ground" test, "the cost of [its] services may be so excessive that it has not made those services 'available' under § 1926(b)." *Id.* at 1271. The reasonableness of a water association's costs for service is based on the totality of the circumstances, and we have identified four non-exclusive factors to guide this determination. *Id.* (citing *Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist. No. 6*, 537 P.2d 210, 217 (Kan. 1975)). These four *Ellsworth* factors consider:

> (1) whether the challenged practice allows the [association] to yield more than a fair profit; (2) whether the practice establishes a rate that is disproportionate to the services rendered; (3) whether other, similarly situated [associations] do not follow the practice; (4) whether the practice establishes an arbitrary classification between various users.

Id. The burden to show unavailability of water service based on the cost of service is on the party challenging the protected service area. *Douglas*, 659 F.3d at 981. With this statutory framework in mind, we turn to the facts of this case.

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