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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEER CREEK WATER CORPORATION,

Plaintiff Counter Defendant - Appellant/Cross-Appellee,

v.

CITY OF OKLAHOMA CITY; OKLAHOMA CITY WATER UTILITIES TRUST,

Defendants Counterclaimants - Appellees/Cross-Appellants,

and

THOMAS WAYNE BOLING; GINA BETH BOLING,

Intervenor Plaintiffs - Appellees/Cross-Appellees.

No. 21-6155

DEER CREEK WATER CORPORATION,

Plaintiff Counter Defendant - Appellee,

and

THOMAS WAYNE BOLING; GINA BETH BOLING,

Intervenor Plaintiffs - Appellees,

v.

CITY OF OKLAHOMA CITY; OKLAHOMA CITY WATER UTILITIES TRUST,

Defendant Counterclaimants - Appellants.

No. 21-6164

Appeals from the United States District Court for the Western District of Oklahoma (D.C. No. 5:19-CV-01116-SLP)

Andrew W. Lester of Spencer Fane LLP (George S. Freedman of Spencer Fane LLP and Carrie L. Vaughn of Trimble Law Group, PLLC, with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff/Counter-Defendant - Appellant/Cross-Appellee.

Scott A. Butcher (L. Mark Walker with him on the brief) of Crowe & Dunlevy, Oklahoma City, Oklahoma, for Intervenor Plaintiffs - Appellees Thomas Wayne Boling and Gina Beth Boling.

Richard N. Mann, Assistant Municipal Counselor (Kenneth Jordan, Municipal Counselor, and Sherri Katz and Craig B. Keith, Assistant Municipal Counselors, with him on the briefs) for Defendants - Appellees/Cross-Appellants City of Oklahoma City and Oklahoma City Water Utilities Trust.

Before **BACHARACH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Deer Creek Water Corporation filed this action against Oklahoma City and Oklahoma City Water Utilities Trust (together, the City) seeking a declaratory judgment that the City may not provide water service to a proposed development on

land owned by Thomas and Gina Boling (together, the developers), who later intervened in the action. In support, Deer Creek invoked 7 U.S.C. § 1926(b), a statute that generally prohibits municipalities from encroaching on areas served by federally indebted rural water associations, so long as the rural water association has made water service available to the area. The district court granted the developers' motion for summary judgment after concluding that Deer Creek had not made such service available, and Deer Creek appeals.

Although we reject Deer Creek's arguments related to subject-matter jurisdiction, we agree that the district court erred on the merits. The district court found it dispositive that Deer Creek's terms of service required the developers to construct the improvements necessary to expand Deer Creek's existing infrastructure to serve the proposed development, reasoning that because Deer Creek itself would not be doing the construction, it had not made service available. But nothing in the statute or in caselaw 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 landowner seeking to develop property. The district court therefore erred in placing determinative weight on Deer Creek's requirement that the developers construct the needed improvements, and we reverse and remand for further proceedings on whether Deer Creek made service available.

Additionally, the City filed a cross-appeal challenging the district court's order denying its separate motion for summary judgment. The City contends that allowing

Deer Creek to claim the protection of § 1926(b) violates the Tenth Amendment because Oklahoma has only consented to allow rural water districts—and not nonprofit corporations that provide water service, like Deer Creek—to incur federal debt under § 1926(a) and be subject to the resulting protections of § 1926(b). But whether viewed as a true cross-appeal or an alternative basis for affirming, this argument fails because, unlike rural water districts, nonprofit corporations like Deer Creek are not quasi-municipal bodies and therefore do not need Oklahoma's permission before incurring federal debt and any accompanying obligations.

Background

Deer Creek is a nonprofit corporation indebted to the United States Department of Agriculture (USDA) for loans issued under 7 U.S.C. § 1926(a). In this action, Deer Creek invokes its federal indebtedness to assert a protected right under § 1926(b) to provide water service to 100 acres of property owned by the developers.

Although the City annexed the developers' property in 2011, Deer Creek has historically provided water service to this property through a two-inch water line located on the property. Deer Creek also has four meters on the property, one residential and three for pasture or farming purposes; three of these meters (including the residential one) currently receive water from Deer Creek.

The developers plan to build a residential and commercial development on their property that will require water service. Although the precise details of the development plan have varied over time, it is undisputed that Deer Creek's existing two-inch water line is insufficient to serve the planned development. Deer Creek has

a 12-inch water main located about a half mile from the property via a direct route, and connecting to it will require approximately 1.3 miles of upgraded water main, along with other improvements that Deer Creek's engineer estimated would cost $961,743.83. Deer Creek's proposal for water service requires the developers to construct and pay for these improvements.

The City's water line, on the other hand, is located across the street from the developers' property. In anticipation of their planned development, and without contacting Deer Creek, the developers requested water service from the City and paid approximately $35,000 for the improvements needed to connect to the City's line. After those improvements were complete, the developers connected to the City's water line.

Upon discovering that the developers had done so, Deer Creek filed this action, seeking a permanent injunction prohibiting the City from providing water to the proposed development and a declaratory judgment that it was entitled to protection from municipal encroachment into its service area under § 1926(b). The City counterclaimed for the opposite declaration. And the developers intervened (without opposition), seeking the same declaratory relief as the City.

Deer Creek and the developers each sought preliminary injunctions: Deer Creek asked for an order preventing the City from providing water to the development, and the developers asked that the City be allowed to do so.[1] During a

[1] The district court had denied Deer Creek's request for a temporary restraining order against the City.

hearing on Deer Creek's motion, the parties reached an agreement under which Deer Creek would withdraw its motion and the City would provide water for certain specific construction purposes and leave its lines "charged for fire suppression only"; Deer Creek would "provide all other construction water." App. vol. 7, 248. The district court later denied the developers' preliminary-injunction motion, ruling that they failed to show irreparable harm under the applicable heightened legal standard. As a result of its ruling, the district court noted, the parties' agreement would remain in effect, meaning that "water w[ould] be available for construction purposes on the property, but not for eventual consumptive use until . . . the resolution of this lawsuit." App. vol. 6, 12.

All parties moved for summary judgment. The district court denied the City's motion, rejecting the argument that allowing Deer Creek to claim the protection of § 1926(b) violated the Tenth Amendment.[2] But the district court nevertheless found in the City's favor when it granted the developers' motion for summary judgment (and denied Deer Creek's motion). In this latter ruling, the district court concluded that Deer Creek was not entitled to protection from municipal encroachment because it had not made service available to the developers' planned development. The

[2] The district court also rejected the City's argument that Deer Creek was not entitled to the protection of § 1926(b) because it lacked a defined service area. In particular, the district court determined that although Oklahoma law requires rural water districts to have defined service areas, it does not require the same for nonprofit water associations; nor does § 1926(b) contain any defined-service-area requirement. We do not address this issue because the City does not renew its defined-service-area argument on appeal.

district court accordingly entered judgment for the City and the developers, noting that the developers were "free to obtain water from any other provider, including [the City], without violating § 1926(b)." App. vol. 7, 156.

Deer Creek appeals, challenging the district court's order granting summary judgment to the developers. And the City cross-appeals, challenging the district court's order denying its summary-judgment motion.

Analysis

I. Jurisdiction

Deer Creek advances two arguments attacking the district court's subject-matter jurisdiction: that the developers lack standing and that the district court issued an advisory opinion. We take each point in turn, and our review is de novo. *See Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 811 (10th Cir. 2021).

A. Standing

Deer Creek first argues that the developers lack standing to assert claims under § 1926(b). Standing doctrine derives from Article III of the United States Constitution, which limits federal jurisdiction to "[c]ases" and "[c]ontroveries." U.S. Const. art. III, § 2. To establish Article III standing, the developers "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Although Deer Creek contends that the developers lack Article III standing, it fails to brief these three essential elements. Nevertheless, because Article III standing is a jurisdictional requirement, we must briefly review those elements to ensure that it exists. *See Felix v. City of Bloomfield*, 841 F.3d 848, 854 (10th Cir. 2016). We have no trouble determining that it does. The developers have an injury traceable to Deer Creek because they allege that they cannot obtain a feasible water supply due to Deer Creek's claim of a protected right to provide water service to their property. *See Garrett Dev., LLC v. Deer Creek Water Corp.*, No. 21-6105, 2022 WL 12184048, at *10 (10th Cir. Oct. 21, 2022) (unpublished) (finding that alleged inability to develop property because of Deer Creek's claimed § 1926(b) protection satisfied injury-in-fact and traceability requirements for Article III standing).[3] And this "alleged injury is redressable by a favorable decision because if Deer Creek" lacks a protected right to provide water service, then the developers "could obtain water service from a different provider." *Id.*

Although the developers satisfy the elements of injury, traceability, and redressability under Article III, Deer Creek argues that they lack standing because their claims are outside the zone of interests protected by § 1926(b). Deer Creek contends that the zone-of-interests inquiry is "[o]ne category of standing analysis." Deer Creek Br. 42. Although traditionally viewed as such, whether a plaintiff's claims fall within the statutory zone of interests "isn't actually a matter of standing at

[3] We find this unpublished decision persuasive. *See* 10th Cir. R. 32.1(A).

all." *In re Peeples*, 880 F.3d 1207, 1213 (10th Cir. 2018). Instead, the zone-of-interests test "merely asks whether a particular federal cause of action 'encompasses a particular plaintiff's claim.'" *Id.* (quoting *Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014)). That merits inquiry "does not implicate subject-matter jurisdiction." *Lexmark*, 572 U.S. at 128 n.4 (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002)). Thus, "[b]ecause the zone-of-interests inquiry is not jurisdictional, it can be waived." *Garrett*, 2022 WL 12184048, at *11.

And here, Deer Creek never argued below that the developers' claims failed for being outside the zone of interests protected by § 1926(b). Indeed, Deer Creek never moved to dismiss this case for any reason; at most, it asserted perfunctorily in its answer to the developers' cross-complaint that they "lack standing." App. vol. 1, 238. We accordingly decline to consider Deer Creek's zone-of-interests argument, which Deer Creek forfeited by failing to raise below and then waived on appeal by failing to advance a plain-error argument. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011); *Garrett*, 2022 WL 12184048, at *12–13 (declining to consider zone-of-interests challenge because Deer Creek failed to raise it in district court).

B. Advisory Opinion

Deer Creek also asserts that the district court erred in granting relief to the developers because in so doing, it issued an advisory opinion based on a hypothetical. *See Norvell v. Sangre de Cristo Dev. Co.*, 519 F.2d 370, 375 (10th Cir.

1975) ("It is fundamental that federal courts do not render advisory opinions and that they are limited to deciding issues in actual cases and controversies."). According to Deer Creek, the developers never applied for water service, so it never had an opportunity to make service available—rendering the district court's opinion, premised on Deer Creek's failure to make service available, merely advisory. This argument fails because the underlying factual premise is incorrect: The developers did apply for water service. As the district court noted, it was undisputed that the developers "submitted an application to Deer Creek to ascertain the terms of its water service to the [d]evelopment." App. vol. 7, 141. The developers attached that application to their summary-judgment motion.

To be sure, the developers submitted their application during this litigation, so the letter enclosing the application includes various reservations of rights. And in turn, the response from Deer Creek's engineer was "not intended to be a typical service letter." App. vol. 4, 136. But the application letter expresses the parties' agreement "that submission of an application was the most practical means for the parties to mutually discover relevant facts relating to [Deer Creek's] ability to serve the [d]evelopment" and that the "application should not expire during the pendency of the litigation." App. vol. 3, 150. Indeed, Deer Creek even admitted below that "despite" the absence of a formal request from the developers, it "has essentially assumed their participation in this lawsuit is such a request and has made service available" via its engineer's report about the infrastructure needed for Deer Creek to provide service. *Id.* at 219. Thus, as the City and the developers argue, the developers

did request service. As a result, the district court's opinion was not based on a hypothetical situation, and we reject Deer Creek's advisory-opinion argument.[4]

In sum, we see no impediment to subject-matter jurisdiction over this case.

II. Merits

"We review the district court's rulings on summary judgment de novo." *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1121 (10th Cir. 2021). "Summary judgment is appropriate if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). "For purposes of summary judgment, '[t]he nonmoving party is entitled to all reasonable inferences from the record.'" *Id.* (alteration in original) (quoting *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013)).

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[4] Because the prohibition on advisory opinions is more typically treated under a legal framework of either mootness or ripeness, the developers framed their response to Deer Creek's advisory-opinion argument in terms of ripeness. Deer Creek, in reply, disclaimed any ripeness argument, stating that it "did not raise ripeness" on appeal. Deer Creek Rep. Br. 19. Following Deer Creek's lead, we do not frame our analysis in terms of ripeness. But we do note that to the extent constitutional ripeness implicates our duty to examine our own jurisdiction, the developers' claims are ripe. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))). Constitutional ripeness asks whether "a threatened injury is sufficiently 'imminent' to establish standing." *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229 (10th Cir. 2021) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1124 (10th Cir. 2012)). And the injury alleged here is sufficiently imminent: The developers allege that water service for their planned development is unavailable due to Deer Creek's claim of a protected right to provide such service, thus prohibiting their development. *See Garrett*, 2022 WL 12184048, at *13 (finding alleged injury of inability to develop property due to Deer Creek's claimed § 1926(b) protection sufficiently imminent for constitutional ripeness).

This case involves § 1926, which is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921–2009cc-18. Subsection (a) provides for "loans to associations, including corporations not operated for profit . . . and public and quasi-public agencies[,] to provide for . . . the conservation, development, use, and control of water . . . primarily serving farmers, ranchers, farm tenants, farm laborers, rural business, and other rural residents."[5] § 1926(a). For associations that receive such loans, subsection (b) provides a measure of protection against municipal entities that may seek to encroach on their areas of service:

> 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.

§ 1926(b).

"By enacting § 1926(b), 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 [federal] loans." *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1269 (10th Cir. 2001);[6] *see also Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517,

[5] Before 1994, the Farmers Home Administration administered loans issued under this statute, but now the USDA operates this program through the Rural Utility Services. *See Pittsburg Cnty. Rural Water Dis. No. 7 v. City of McAlester* (*Pittsburg II*), 358 F.3d 694, 701 n.1 (10th Cir. 2004).

[6] We will refer to this case as *City of Wilson*, but we note it is sometimes called "*Ellsworth*," for the county at issue there. *See, e.g.*, *Garrett*, 2022 WL 12184048, at *2.

526 (4th Cir. 1999) (stating that in enacting § 1926(b), "Congress intended (1) to reduce per[-]user cost resulting from the larger base of users, (2) to provide greater security for the federal loans made under the program, and (3) to provide a safe and adequate supply of water"). "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the []indebted party seeking protection for its territory." *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999).

To receive the protection of § 1926(b), rural water associations "must have . . . a continuing indebtedness to the USDA and have provided or made available service to the disputed area." *Rural Water Dist. No. 4 v. City of Eudora* (*Eudora I*), 659 F.3d 969, 976 (10th Cir. 2011) (footnote omitted). Indebtedness is not at issue here; the district court found that Deer Creek had "outstanding balances on loans from the USDA issued in 1996 and 2013," and the parties do not challenge that determination on appeal. App. vol. 7, 145–46. Instead, the issue is whether Deer Creek has made service available. And even if it has, the City's cross-appeal asks whether allowing Deer Creek to claim § 1926(b) protection violates the Tenth Amendment. We consider each issue in turn.

A. Made Service Available

Deer Creek argues that the district court erred in concluding that it did not make service available. This inquiry focuses "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.'" *Sequoyah*, 191 F.3d at 1203. "[A] water association meets the 'pipes-in-the-ground' test by 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.'" *Id.* (quoting *Bell Arthur*, 173 F.3d at 526). "This is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer." *Id.*

Despite *Sequoyah*'s succinct statement interpreting § 1926(b)'s language about making service available, we later added to the pipes-in-the-ground test in *City of Wilson*, 243 F.3d 1263, a case involving a Kansas rural water district. *See Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262, 1268 (10th Cir. 2002) (noting that *City of Wilson* "added a consideration of costs as relevant to the test whether service is made available"). We held there that even if a 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)." *City of Wilson*, 243 F.3d at 1271. To support expanding *Sequoyah*'s pipes-in-the-ground test for making service available to include an additional excessive-cost test, we invoked § 1926(b)'s purpose of "expanding the number of potential users, resulting in lower costs per user" and cited legislative history similarly reflecting a "concern with costs." *Id.* at 1270. We also relied on a dictionary definition of the statutory word "available" to conclude that "available" service must be "within . . . reach" of rural water users. *Id.* at 1270–71 (quoting 1 Oxford English Dictionary 812 (2d ed. 1989)). We therefore determined that services provided "at a grossly excessive cost"

were effectively unavailable under the statute. *Id.* at 1271. Thus, after *City of Wilson*, the made-service-available inquiry in this circuit has two parts: the pipes-in-the-ground test and the excessive-cost test.[7] Indeed, we "reaffirm[ed] this approach" several years later, noting that it was "a sensible rule as a policy matter" to prevent federally indebted rural water districts from being "free at their whim to price monopolistically." *Pittsburg II*, 358 F.3d at 719.

Here, the district court concluded that Deer Creek failed the pipes-in-the-ground test, so it did not reach the excessive-cost test. We consider each test in turn.

1. Pipes in the Ground

The district court reasoned that because Deer Creek placed the onus on the developers to construct the infrastructure needed for Deer Creek to provide water service, there was "no evidence that Deer Creek ha[d] taken any steps . . . to make the[] necessary infrastructure improvements to serve the [d]evelopment within a reasonable time." App. vol. 7, 152. It therefore concluded that Deer Creek failed to "demonstrate[] that it ha[d] proximate and adequate pipes in the ground with which it

[7] The dissenting judge in *City of Wilson* would have rejected the excessive-cost test. *See* 243 F.3d at 1276 (Briscoe, J., concurring in part and dissenting in part). The dissent emphasized that "[t]he proper test in determining whether [a rural water association] made service available under § 1926(b) is the 'pipes in the ground' test enunciated in *Sequoyah*." *Id.* And because cost played no role in assessing the pipes in the ground, the dissent reasoned that "the cost to the customer of establishing service cannot be considered in determining whether the rural water [association] has made service available for purposes of protecting it against encroachment by a [municipality] under § 1926(b)." *Id.*

ha[d] served or c[ould] serve the . . . [d]evelopment within a reasonable time." *Id.* at 147.

We disagree. A rural water association can satisfy the pipes-in-the-ground test "by 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.'" *Sequoyah*, 191 F.3d at 1203 (quoting *Bell Arthur*, 173 F.3d at 526); *see also id.* (explaining that making service available for purposes of the pipes-in-the-ground test is "primarily" about "the *capability* of providing service," or the water association's "capacity to provide water service to a given customer"). Deer Creek has shown as much here. The developers applied for water service from Deer Creek, and Deer Creek's engineer provided a plan for making service available via its adjacent water main.[8] Deer Creek's engineer also stated, without contradiction in the

[8] Because neither the City nor the developers contend on appeal that any portion of the developers' property is outside Deer Creek's service area, we assume that the entire property falls within it. We note that the City did argue below that Deer Creek's service area lacks clearly defined borders. But it does not reassert this argument on appeal. Nor have the City or the developers ever suggested, as the dissent does here, that only some limited portion of the developers' property was properly within Deer Creek's service area. Therefore, to the extent that the dissent "would hold that Deer Creek's service area includes only the portion of the [developers'] property for which Deer Creek is providing water service" and not "the full 100 acres," it reaches well beyond the parties' arguments below and on appeal. Dissent 6; *see also Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008) (explaining that "we follow the principle of party presentation," under which "we rely on the parties to frame the issues for decision"). What's more, the dissent offers no support for its subdivision approach and fails to explain how treating the developers' property as a whole departs from the typical "customer-by-customer approach in water-district cases." Dissent 5; *see also Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 654 F.3d 1058, 1065 (10th Cir. 2011) (declining to adopt "per se rule" but finding district court correctly applied customer-

record, that these infrastructure improvements could be completed within 90 days. And no party contends that 90 days is not a reasonable length of time. *Cf. Bell Arthur*, 173 F.3d at 525–26 (concluding implicitly that failing to take steps to provide water service for more than one year was not reasonable length of time). Deer Creek therefore satisfies the pipes-in-the-ground test.

In reaching the contrary conclusion, the district court relied primarily on the Fourth Circuit's decision in *Bell Arthur*, 173 F.3d 517. There, a nonprofit corporation agreed in writing to provide water service to a planned development on property that had an existing but inadequate water line from the nonprofit; the nonprofit estimated that the improvements would cost $650,000, and it planned to construct and pay for the improvements itself. *Id.* at 525. But the nonprofit "took no meaningful steps at that time or within a reasonable time thereafter to undertake construction of a new pipeline"—it did not even obtain a loan for the cost of the required infrastructure until over a year after agreeing to provide service. *Id.* at 525–26. The developers then sought and obtained municipal water, and the nonprofit sued to assert its rights under § 1926(b). But the Fourth Circuit ruled that an "inadequate six-inch pipe in the ground coupled with only a general, unfulfilled intent to provide the necessary

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by-customer approach; noting that parties' customer-by-customer arguments were "consistent with how prior Tenth Circuit cases have addressed" this issue). Indeed, the developers appear to be a single Deer Creek customer, and we decline the dissent's invitation to speculate about a hypothetical world in which the developers "gave up on the development and sold all but their home and small acreage served by the existing water meters." Dissent 5 n.3.

14-inch pipe sometime in the future does not amount to 'service provided or made available.'" *Id.* at 526 (quoting § 1926(b)).

The district court determined that this case was like *Bell Arthur* because Deer Creek's water-service plan required *the developers* to construct the necessary improvements, such that Deer Creek would not itself develop the necessary infrastructure and thus did not make service available. The City and the developers argue the same on appeal, as does the dissent. But which party would bear the responsibility for construction was not at issue in *Bell Arthur*; that case faulted the corporation for an inexplicable nine-month delay in providing the agreed-upon improvements, not for placing the burden of construction on the developer. *See id.* at 525–26. And contrary to the dissent's suggestion, *Bell Arthur* did not hold, as a legal matter, that "the water association was the entity responsible to finance and construct the needed water pipes." Dissent 9 n.6. Instead, *Bell Arthur* merely arose in a factual situation in which the water association had initially agreed to finance and construct the pipes and then simply failed to follow through.[9] *See* 173 F.3d at 521.

[9] The dissent states that this factual background in *Bell Arthur* "makes sense" because "Congress didn't enact § 1926 so water associations could tell rural users to collect their pocket change to finance laying pipes or else remain dry and thirsty." Dissent 9 n.6. But the rural users at issue here are neither dry nor thirsty. As customers of Deer Creek, the Bolings have had and will continue to have water service sufficient for their rural home and land. What they lack is sufficient infrastructure to turn their existing property into a commercial and residential development. And to the extent that they seek to do so using the City's water instead of Deer Creek's, at least one circuit has "recognize[d] that § 1926(b) can impose burdens on recipients [of water service], since granting [water associations] an exclusive right to serve certain recipients also prevents recipients from choosing

This case presents distinct circumstances. Deer Creek agreed to provide water service and showed that it had the capacity to do so, but it never agreed to finance or construct the infrastructure. And although there has been a delay in implementing the improvements necessary for Deer Creek's water service to the development, that delay is the result of this litigation, not Deer Creek's inaction after agreeing to take necessary steps.

The dissent additionally invokes *Sequoyah* to support its position that Deer Creek fails the pipes-in-the-ground test, asserting that "*Sequoyah* says *who* must put the pipes in the ground—the water association." Dissent 8. The dissent discerns this purported requirement from *Sequoyah*'s statement that the pipes-in-the-ground test asks "whether *a water association* has the capacity to provide water service to a given customer." *Id.* at 7 (quoting *Sequoyah*, 191 F.3d at 1203). But in our view, the dissent emphasizes the wrong language. *Sequoyah*'s focus is on a water association's "*capacity* to provide water service to a given customer." 191 F.3d at 1203 (emphasis added). Indeed, the focus on capacity is why *Sequoyah* went on to hold that even if a water association's existing pipes were inadequate, it could still satisfy the pipes-in-the-ground test by showing that it could provide adequate service "within a reasonable time." *Id.* Simply put, *Sequoyah* does not say that the water association must actually perform or finance the construction.

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other service providers." *Pub. Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 522 (8th Cir. 2010).

Moving on, none of the district court's other cited cases—which the City also invokes on appeal—support placing determinative weight, for the pipes-in-the-ground test, on the fact that Deer Creek requires the developers to construct the utility infrastructure necessary for its water service. In each, the water associations had not even *tried* to provide water service; whereas here, Deer Creek has presented a plan to provide service within 90 days and seeks to implement it. *See City of Wilson*, 243 F.3d at 1272 (affirming denial of § 1926(b) protection as to one property because water district "had made no effort to extend service to the property[] and had not commissioned an engineering study to determine if service was feasible"); *Santa La Hill, Inc. v. Koch Dev. Corp.*, No. 3:07-cv-00100, 2008 WL 140808, at *5 (S.D. Ind. Jan. 11, 2008) (unpublished) (faulting water district for "not hav[ing] a plan in place to meet the growing needs" of development); *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d 38, 49 (Okla. 2010) (noting in passing that "nothing prevents a municipality from extending water service within [a rural] district if the district has made no attempt to provide water to its customer after a request for service is made"); *In re Detachment of Territory from Pub. Water Supply Dist. No. 8*, 210 S.W.3d 246, 250–51 (Mo. Ct. App. 2006) (finding water district did not make service available because despite master plan that would have provided service, water district gave no timeline and had not obtained required state approvals or begun proposed improvements). Simply put, none of these cases say that a water

association fails the pipes-in-the-ground test solely because its plan for service to new development requires the developer to construct the necessary infrastructure.[10]

In fact, our caselaw suggests the contrary. We have acknowledged that "requiring the customer to foot the bill for basic utility infrastructure is not entirely unheard of, at least in regard to new developments, *nor is it per se unreasonable*." *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester* (*Pittsburg I*), No. 98-7148, 2000 WL 525942, at *4 n.7 (10th Cir. May 2, 2000) (unpublished) (emphasis added). And in *City of Wilson*, when we created the excessive-cost test, we implicitly confirmed that cost plays no role in the pipes-in-the-ground test. *See City of Wilson*, 243 F.3d at 1269–71. There, the rural water association, as a matter of

[10] The district court also relied on *TP Real Estate LLC v. Rural Water, Sewer & Solid Waste Management District No. 1*, No. CIV-09-748, 2010 WL 11508774 (W.D. Okla. Apr. 19, 2010) (unpublished), and the City and the developers do the same on appeal. There, the plaintiffs requested water and sewer service, but the water district's nearest water main was located over seven miles away, and its nearest sewage-treatment plant was over ten miles away. *Id.* at *5–6. Additionally, the water district's proposed plans for water and sewer service were insufficient to serve the proposed development. *Id.* at *3, 6. Based on these two critical facts (neither of which exists in this case), the district court held that the water district had not made service available. *Id.* at *5–6; *see also Sequoyah*, 191 F.3d at 1203 (noting that pipes-in-the-ground test "is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer" using "facilities within or adjacent to the area"). To be sure, *TP Real Estate* suggested in dicta that a water association fails to make service available as a matter of law if it places a construction burden on the developer. *See, e.g.*, *id.* at *5 n.14 (citing *Bell Arthur* in a footnote and noting that water district "made no effort to lay pipeline in the area"); *id.* at *6 ("[D]irecting a landowner to bring an existing system into compliance and then deeding it to the district does not constitute the district's making service available"). But we are not bound to follow such nonbinding authority. And for the reasons explained in this opinion, we reject that view as incompatible with § 1926(b) and our precedent governing the made-service-available inquiry.

policy, did "not pay for any water[-]line extensions necessary to establish new water service" and instead "require[d] that the customer pay all costs necessary to establish water service, including the extension of infrastructure"—just like Deer Creek does.[11] *Id.* at 1269–70. But we did not hold that the rural water association failed the pipes-in-the-ground test; instead, we remanded for application of the excessive-cost test. *Id.* at 1271–72.

The district court distinguished *Pittsburg I* and *City of Wilson* on the basis that requiring the customer to pay for the construction is not the same as requiring the customer to perform the construction. Specifically, the district court stated that it was "concerned with the fact that Deer Creek is requiring the developers *to construct* Deer Creek's water system for Deer Creek" but was "not concerned with . . . the costs shifted to the customer for Deer Creek's construction." App. vol. 7, 154. The City and the developers advance the same concern on appeal. But this seems to us a distinction without a difference, inasmuch as it appears that the real burden is the cost—a contractor will perform the actual manual labor regardless of which entity is responsible for the costs. Here, for instance, the developers alleged in their summary-judgment motion that they "*ha*[*d*] *completed* the infrastructure construction to tap into [the City's] water across the street for $35,322.47." App. vol. 3, 113 (emphasis added). Though this statement suggests the developers performed the construction, they attached as support the receipt from the contractor who performed the labor (a

[11] And, indeed, just as the City does: The developers paid over $35,000 for the improvements needed to connect to the City's water main.

receipt that listed the *developers*' email address as the customer contact). Thus, whether the developers themselves were responsible for the construction *and* the cost (as their motion and the receipt suggest) or merely the cost, the result is the same: The contractor performed the labor, and the developers paid the cost. So, as a practical matter, the district court's distinction between construction and cost does not hold up.

The district court also invoked the purpose behind § 1926(b) to support its focus on Deer Creek's construction requirement—an argument the City echoes on appeal. Reasoning that "the intent of § 1926 is to finance the development of water supply and pipelines in rural communities and reduce the cost per user," the district court noted that Deer Creek was "not using its financing to develop its water system, but rather [wa]s requiring its customer to do so." App. vol. 7, 150. But the plain language of § 1926(b) does not condition its protection on incurring additional debt to finance improvements necessary to make service available; it requires only existing federal indebtedness. For instance, we have specifically rejected the argument that a rural water association's indebtedness incurred for a particular project cannot "be used to obtain protection for other customers served by" the water association. *Sequoyah*, 191 F.3d at 1197 n.5. Other circuits have reached similar conclusions. *See Bell Arthur*, 173 F.3d at 524 ("We can find no statutory support for the . . . position that the scope of § 1926(b) protection is limited to the geographical area being financed by the loan."); *City of Lebanon*, 605 F.3d at 519–20 ("[D]ivorcing the type of service underlying a rural district's qualifying federal loan

from the type of service that § 1926(b) protects would stretch the statute too far."). That is, once a rural water association is federally indebted, it obtains the protection of § 1926(b) for its entire service area, not only for the area served by a particular loan.

In sum, nothing in the statute or in caselaw supports the district court's conclusion that Deer Creek lacked proximate and adequate pipes in the ground simply because it placed the burden of constructing necessary infrastructure on the developers. The dissent concludes otherwise because it "see[s] nothing *supporting* Deer Creek's view that it has 'provided or made available' the needed water service." Dissent 10 (emphasis added) (quoting § 1926(b)). But the dissent has it backwards. Section 1926(b) protection flows from a federal statute, so we start there. And nothing in that statute requires a water association to finance or construct needed infrastructure before being entitled to protection from municipal encroachment—indeed, the dissent does not rely on the statutory language at all. Turning next to our caselaw interpreting and applying § 1926(b), we likewise find no such requirement there. We accordingly conclude that no such requirement exists, and the district court erred in placing determinative weight on the fact that Deer Creek requires the developers to construct the necessary infrastructure. Deer Creek's demonstrated capacity to provide service within a reasonable time satisfies the pipes-in-the-ground test.

2. Excessive Cost

We next turn to the excessive-cost test, which considers whether the cost of Deer Creek's services is "so excessive that it has not made those services 'available' under § 1926(b)." *City of Wilson*, 243 F.3d at 1271 (quoting § 1926(b)); *see also Pittsburg II*, 358 F.3d at 719 (stating that excessive-cost test "condition[s] the right to earn the governmentally sanctioned monopolist status [under § 1926(b)] on the water association's employing prices that, even if high, are not prohibitive"). In *City of Wilson*, we explained that "[a]lthough the costs of services need not be competitive with the costs of services provided by other entities, the protection granted to rural water [associations] by § 1926(b) should not be construed so broadly as to authorize the imposition of *any* level of costs." 243 F.3d at 1271. In other words, the costs cannot "become so high that assessing them upon the user constitutes a practical deprivation of service." *Id.*; *see also Pittsburg II*, 358 F.3d at 719 (reaffirming that rural water association's costs "may be so excessive that it *has not made those services available* under § 1926(b)" (quoting *City of Wilson*, 243 F.3d at 1271)).

As to the specifics of what constitutes an excessive cost, we noted that the rural water district was incorporated in Kansas and accordingly looked to that state's law for guidance; we ultimately remanded for the district court to determine whether the cost was "unreasonable, excessive, and confiscatory" under the totality of the circumstances as guided by relevant factors derived from Kansas caselaw. *City of Wilson*, 243 F.3d at 1271–72 (quoting *Bodine v. Osage Cnty. Rural Water Dist. No. 7*, 949 P.2d 1104, 1110 (Kan. 1997)). And at least one other court has applied

that Kansas-derived standard in a Kansas case. *See Eudora I*, 659 F.3d at 981–82 (explaining contours of *City of Wilson*'s excessive-cost test in case involving Kansas rural water association).

However, here our dispute involves an Oklahoma water association, and it is unclear whether and to what extent *City of Wilson*'s Kansas-derived standard carries over to other states.[12] *Cf. Moongate*, 291 F.3d at 1268 (concluding that record supported district court's finding that costs imposed by New Mexico rural water association were not unreasonable without discussing precise governing legal standard). And *Pittsburg II*, which also arose in Oklahoma, is of little guidance. There, we quoted *City of Wilson*'s Kansas-derived "unreasonable, excessive, and confiscatory" standard when reaffirming the excessive-cost test. *Pittsburg II*, 358 F.3d at 719. But we ultimately declined to "define what it means for a price to be 'so excessive that [the rural water association] has not made the services available.'" *Id.* (quoting *City of Wilson*, 243 F.3d at 1271). Instead, we left that question "for the district court to determine on remand, perhaps with the benefit of expert witness testimony on the subject." *Id.*

We take the same path here, largely because the parties merely cite the Kansas-derived standard without explaining whether and how that standard would

[12] To be sure, we recently affirmed the use of the Kansas-derived standard in an unpublished decision that also involved Deer Creek and arose in Oklahoma. *See Garrett*, 2022 WL 12184048, at *15–18. But we had no occasion to do otherwise because in *Garrett*, Deer Creek "concede[d] the district court articulated the correct standard to evaluate costs pursuant to § 1926(b)." *Id.* at *16.

apply in Oklahoma (in addition to failing to offer much record support for what appears to be a fact-intensive question of whether costs are excessive). The district court should consider on remand "what it means for a price to be 'so excessive that it has not made the services available,' . . . perhaps with the benefit of expert witness testimony on the subject," and in light of the Oklahoma location and our prior decisions on this issue. *Pittsburg II*, 358 F.3d at 719 (quoting *City of Wilson*, 243 F.3d at 1271). After doing so, it should consider whether the developers or the City can show—either on a renewed summary-judgment motion or at trial—that Deer Creek's cost of service is so excessive that its service is effectively unavailable. *See City of Wilson*, 243 F.3d at 1271–72 (remanding to provide city opportunity to show rural water association's costs were excessive); *cf. Garrett*, 2022 WL 12184048, at *6 (noting that district court found pipes-in-the-ground test satisfied at summary judgment but conducted bench trial on disputed factual questions underlying excessive-cost test).

B. Tenth Amendment

The City argues that the district court should have granted its summary-judgment motion because allowing Deer Creek to claim § 1926(b) protection in the absence of the express consent of the Oklahoma legislature violates the Tenth Amendment.[13] The Tenth Amendment provides that "[t]he powers not delegated to

[13] We question whether a cross-appeal was necessary. An appellee may "generally seek affirmance on any ground found in the record"; a cross-appeal is required only "if [the appellee] seeks to enlarge its rights and gain 'more than it obtained by the lower-court judgment.'" *Fedor v. United Healthcare, Inc.*, 976 F.3d

the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people." U.S. Const. amend. X. This amendment "is essentially a tautology": It "confirms that the power of the [f]ederal [g]overnment is subject to limits that may, in a given instance, reserve power to the [s]tates." *New York v. United States*, 505 U.S. 144, 156–57 (1992).

Here, Congress enacted § 1926(b) pursuant to its power under the Constitution's Spending Clause, which provides that "Congress shall have [the p]ower [t]o . . . provide for the . . . general [w]elfare of the United States." U.S. Const. art. I, § 8, cl. 1; *see also Glenpool Util. Servs. Auth. v. Creek Cnty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1215 (10th Cir. 1988) (holding that § 1926(b) "is most appropriately viewed as a congressional enactment resting upon Congress'[s] powers under the [S]pending [C]lause"); *Pittsburg II*, 358 F.3d at 716–17 ("Section 1926 has been repeatedly upheld as a valid exercise of Congress's authority under the Spending Clause."). For legislation passed under the Spending Clause, a state's acceptance of federal funds "entails acceptance of the conditions that accompany them." *Glenpool*, 861 F.2d at 1215. Courts therefore analogize this kind of legislation to a contract, such that "[t]he legitimacy of Congress'[s] power to legislate under the spending power . . . rests on whether the [s]tate voluntarily and knowingly accepts

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1100, 1107 (10th Cir. 2020) (quoting *United States v. Madrid*, 633 F.3d 1222, 1225 (10th Cir. 2011)). But we need not decide that question here. Given that we have determined the district court erred in granting the developers' motion for summary judgment, we must address the City's arguments—even if they are merely alternative bases for affirming—before reversing the district court's judgment.

the terms of the 'contract.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

Under these principles, a rural water district is a "quasi-municipal corporation" that can only obtain federal loans under § 1926(a) and the accompanying protections under § 1926(b) if the state authorizes rural water districts to do so. *Eudora I*, 659 F.3d at 976; *see also Rural Water Dist. No. 4 v. City of Eudora* (*Eudora II*), 720 F.3d 1269, 1275 (10th Cir. 2013) ("[A] rural water district may only obtain § 1926(b) protection if state law authorizes it to do so."). Indeed, "quasi-municipal corporation[s]" are creatures of the state and therefore "possess[] only those powers given to [them] by law." *Eudora I*, 659 F.3d at 976; *see also Eudora II*, 720 F.3d at 1275. As relevant here, "Oklahoma law provides for the creation of rural water districts" and specifically empowers those rural water districts "'to borrow money and accept grants from the United States.'" *Glenpool*, 861 F.2d at 1215–16 (quoting Okla. Stat. tit. 82, § 1324.10(A)(4)); *see also Pittsburg II*, 358 F.3d at 717 (concluding that because "Oklahoma legislature formed the water districts so that the state, through the water districts, could avail itself of the loans made available through § 1926," state likewise "agreed to abide by § 1926(b)'s proscriptions").

The City asserts that Oklahoma's consent to the conditions of § 1926(b) applies only to rural water districts, and not private nonprofit corporations that provide water service, like Deer Creek. But the very distinction that the City highlights—between a rural water district and a nonprofit corporation like Deer Creek—dooms its Tenth Amendment argument. A nonprofit corporation is a private

entity, not a quasi-municipal body with limited powers under the control of the state.[14] And Oklahoma's incorporation statutes grant corporations the power to "[m]ake contracts" and "borrow money" without limitation. *See* Okla. Stat. tit. 18, § 1016. Thus, as the district court concluded, the only consent necessary in this context is Deer Creek's.[15] *See Garrett Dev. LLC v. Deer Creek Water Corp.*, No. CIV-18-298, 2021 WL 111488, at *4–5 (W.D. Okla. Jan. 12, 2021) (unpublished) ("Deer Creek is a private entity, not a quasi-municipal body. It is Deer Creek that must knowingly and voluntarily accept the conditions associated with the federal funds—not the state."), *aff'd on other grounds*, 2022 WL 12184048. To the extent that the City disagrees with this outcome and desires to prohibit rural water associations from receiving federal funds under § 1926(a), its remedy lies with the state legislature.[16] *Cf. Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of*

[14] Contrary to the City's argument, Oklahoma law does not require Deer Creek to form a water district before providing water service. As the district court concluded, although Oklahoma statutes *allow* corporations to form water districts, nothing in those statutes *requires* corporations to do so. *See, e.g.*, Okla. Stat. tit. 82, § 1324.31 ("[A]ny corporation which was formed prior to December 1, 1988, may organize and constitute a district . . . ."); *id.* § 1324.35 ("In the event a corporation provides service within the boundaries of an incorporated city or town on the date of organization as a rural water district, the district may continue to serve in that area as permitted by law.").

[15] Notably, Deer Creek's status as a nonprofit corporation does not affect its eligibility for protection under § 1926(b); the statute applies by its own terms "to associations, including corporations not operated for profit." § 1926(a)(1); *see also Ross Cnty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 398 (6th Cir. 2011) ("[T]he plain language of [§ 1926(a)(1)] clearly indicates that a non[]profit corporation does not need to qualify as a quasi-public agency in order to receive the protections of § 1926(b).").

[16] Indeed, the City notes that Oklahoma recently enacted a statute—prospectively effective in November 2022 and not applicable in this litigation—

Guthrie, 253 P.3d at 50 (noting that state legislature may at any time "amend the Oklahoma [s]tatutes to further limit the rights and duties of rural water districts"). We therefore reject the City's argument that allowing Deer Creek to claim the protection of § 1926(b) violates the Tenth Amendment.

Conclusion

Deer Creek's challenges to the district court's subject-matter jurisdiction fail: The developers have constitutional standing, Deer Creek failed to preserve its zone-of-interests argument, and the district court did not issue an advisory opinion. We also reject the City's Tenth Amendment argument because a nonprofit corporation like Deer Creek is not quasi-municipal and thus does not need Oklahoma's permission before incurring federal debt and any accompanying obligations.

However, we reverse the district court's order granting summary judgment to the developers and remand for further proceedings consistent with this opinion. The district court ruled that Deer Creek failed the pipes-in-the-ground test because it required the developers to construct the improvements necessary to expand Deer Creek's existing infrastructure to serve the proposed development. But nothing in the statute or caselaw makes such considerations dispositive of (or even relevant to) the pipes-in-the-ground portion of the made-service-available inquiry. On the contrary, the summary-judgment record establishes that Deer Creek satisfies the pipes-in-the-

providing that any corporation borrowing federal money and thereby obtaining the protection of § 1926(b) must first have established a water district with a defined protected service area. *See* Okla. Stat. tit. 18, § 1016.1.

ground test: It has proximate and adequate pipes in the ground with which to provide service to the planned development within a reasonable time. That conclusion is insufficient to award summary judgment to Deer Creek, however, because it is only the first step of the made-service-available inquiry. And we decline to reach that second step—the excessive-cost test—for the first time on appeal. We thus remand for the district court to reconsider whether Deer Creek has made service available, an inquiry that will turn, at this point, 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.

21-6155, -6164, *Deer Creek Water Corp., et al. v. City of Oklahoma City, et al.*
PHILLIPS, J., concurring in part and dissenting in part.

I agree with all but Section II.A.1 of the majority's opinion, so I would not reach the cost issue in Section II.A.2 (but agree with its reasoning). I disagree that water associations may use § 1926(b) of the Consolidated Farm and Rural Development Act to require developers to finance and lay water pipes as Deer Creek seeks to do here. Instead, to avail itself of § 1926(b)'s protection, a water association must show that a municipality has annexed the association's service area, and that the municipality either (i) has curtailed or limited the water association's existing service to customers there or (ii) is seeking to curtail or limit the association's service to future customers there despite the association's having timely arranged for financing under § 1926(a) to put the necessary pipes in the ground. Because Deer Creek fails each of these showings, I would affirm.

Decades ago, Congress passed the Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294, "which sought to preserve and protect rural farm life in a number of respects." *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 704 (6th Cir. 2003). The Act achieves its purpose by "afford[ing] farmers the opportunity to achieve parity of income with other economic groups" and by "recogniz[ing] the importance of the family farm as an efficient unit of production and as an economic base for towns and cities in rural areas." § 2, 75 Stat. at 294. Title III of the Act (entitled the Consolidated Farm and Rural

Development Act) served to help rural water users by facilitating loans from the U.S. Department of Agriculture. *Id.* § 301, 75 Stat. at 307. "Loans may be made or insured," said Congress, "for acquiring, enlarging, or improving farms, including farm buildings, land and water development, use and conservation, refinancing existing indebtedness, and for loan closing costs." *Id.* § 303, 75 Stat. at 307.

Section 306(a) of the Act, codified at 7 U.S.C. § 1926(a), furthered Congress's goal of water-infrastructure development "primarily" for "farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents" by authorizing the Secretary of Agriculture to lend to nonprofit associations to develop "soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment."

To safeguard the repayment of these federal loans, Congress protected the indebted nonprofit associations from losing customers to municipal annexation. *See Le-Ax Water Dist.*, 346 F.3d at 705 (noting that Congress enacted § 1926 "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" (citation omitted)); *see also* S. Rep. No. 87-566, at 67 (1961) ("This

provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. 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.").

Congress accomplished this through § 1926(b) of the Act:

> 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.

As seen, § 1926(b) conditions the protection from municipal annexation on two showings by the water association. First, the water association must show that the location of the disputed water service falls within its existing service area. In cases we've reviewed, the water association has usually been a water district created according to state statute, with boundaries defined by county commissioners.[1] Here, however, Deer Creek isn't a water district, but a

[1] Water districts with predefined service areas have pervaded our § 1926(b) jurisprudence. *E.g.*, *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie* (*Logan*), 654 F.3d 1058, 1061 (10th Cir. 2011) (analyzing a nonprofit water district that county commissioners permitted "to provide water service to parts of Logan County, but not within the Guthrie city

(*footnote continued*)

mere water corporation, without legally defined boundaries. For that reason, we face a novel question in our circuit—What is the service area of a nonprofit water corporation? Only if Deer Creek shows that the proposed Country Colonnade development is in Deer Creek's existing service area do we go to the second question of whether Deer Creek has "provided or made available" water service in that area. That, in turn, raises another novel question of whether Deer Creek provides and makes available water service simply by directing the developer to finance and build all water infrastructure for Country Colonnade. In my view, Deer Creek fails on both questions.

I. Service Area

Because Deer Creek is not a water district under Oklahoma law (though it could seek to be[2]), its service area lacks geographically defined boundaries. Instead, its service area is set by the areas in which it has provided and made available water service to its customers. So Deer Creek's service area is that in which it has provided and made available water service, customer by customer.

Even had Deer Creek obtained water-district status, its service area might

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limits"); *Rural Water Dist. No. 4 v. City of Eudora* (*Douglas*), 659 F.3d 969, 973 (10th Cir. 2011) (analyzing a water district's service area in Douglas County).

[2] *See* Okla. Stat. tit. 82, § 1324.31 (West 2023) (noting that a water corporation formed before December 1988 "*may* organize and constitute a district" (emphasis added)); *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1 v. City of Guthrie*, 253 P.3d 38, 44–46 (Okla. 2010) (outlining steps for water districts to obtain legal geographic boundaries).

still be determined on this customer-by-customer basis. In *Logan*, we rejected a water district's attempt to enforce § 1926(b) protection on an "area-wide basis." 654 F.3d at 1065. Instead, based on the parties' arguments, we applied § 1926(b) protection on a "customer-by-customer basis." *Id.* And even if the parties had argued the case differently, we left it as an open question whether the water district's service area would still be based on customers served. We noted that the Eighth Circuit also employed a customer-by-customer approach in water-district cases. *Id.* at 1065–66 (citing *Pub. Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 521–23 (8th Cir. 2010)).

The facts here present an even stronger need for a customer-by-customer approach. Unlike the water district in *Logan*, Deer Creek's service area is not set by state statute, and Deer Creek has no area-wide claim to the developers' (the Bolings') 100-acre lot or to prospective commercial projects on that lot. The majority errs in concluding that Deer Creek's service area covers the entire 100 acres of the Bolings' property (including the site of the planned Country Colonnade development) based on its two-inch pipe serving the Bolings' residence and four water meters. Section 1926(b) protects Deer Creek from municipal incursions to that limited service already provided by Deer Creek.[3]

Without analysis, the majority summarily concludes that Deer Creek's

[3] If the Bolings gave up on the development and sold all but their home and small acreage served by the existing water meters, I am unsure whether the majority would still contend that the rest of the 100 acres would remain part of Deer Creek's service area. The majority doesn't say.

service area includes the Bolings' entire 100-acre property, including that staked out for the Country Colonnade development. Maj. Op. 16 ("The [Bolings'] property is in Deer Creek's service area . . . .").[4] As mentioned, I would hold that Deer Creek's service area includes only the portion of the Bolings' property for which Deer Creek is providing water service. That credits Deer Creek for the area in which the Bolings are its customers.

I agree that § 1926(b) protects Deer Creek from any municipal encroachment on the Bolings' present water service. That is within Deer Creek's service area. But the full 100 acres is not.

II. Provided or Made Available

Even if Deer Creek's service area somehow included the full 100 acres, Deer Creek would still fail on the second required showing. As explained below, it has not "provided or made available" service to the proposed Country Colonnade development.[5]

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[4] By addressing Deer Creek's service area, the dissent isn't raising a new issue, but instead is evaluating whether Deer Creek meets this required element of § 1926(b). We are obliged to resolve whether the statutory elements are met. That depends on the record evidence, not on the parties' briefing decisions. By passively assuming as a legal matter that Deer Creek's service area includes the Bolings' entire 100 acres, the majority invites a service-area rule into this circuit's precedent. I'd be less troubled if the majority remanded that issue.

[5] In its order denying Oklahoma City's motion for summary judgment, the district court "acknowledge[d] that the parties dispute facts regarding the geographic location of Deer Creek's service area." *Deer Creek Water Corp. v. City of Oklahoma City*, No. CIV-19-1116, 2021 WL 5352442, at *5 n.9 (W.D. Okla. Oct. 27, 2021).

In *Sequoyah County Rural Water District No. 7 v. Town of Muldrow* (*Sequoyah*), 191 F.3d 1192 (10th Cir. 1999), we identified exactly who must have "provided or made available" the water service—that is, put the pipes in the ground. We inquired "whether *a water association* has the capacity to provide water service to a given customer." *Id.* at 1203 (emphasis added) (citations omitted). And we left it to the water association to show that it "has *in fact* 'made service available,' i.e., . . . [that it] has proximate and adequate 'pipes in the ground' with which it has served or can serve the disputed customers within a reasonable time." *Id.*

In *Sequoyah*, we welcomed the Fourth Circuit's analysis in *Bell Arthur Water Corp. v. Greenville Utilities Commission*, 173 F.3d 517 (4th Cir. 1999). *See Sequoyah*, 191 F.3d at 1201–03. There, a nonprofit water corporation (Bell Arthur) claimed that it had made service available to a prospective development project, 994 luxury homes and two golf courses, based on its existing six-inch pipeline crossing the development site. *Bell Arthur*, 171 F.3d at 520–21. From this pipe, the water corporation had serviced the developer's construction trailer and eight to twenty other rural households. *Id.* at 525. But the Fourth Circuit rejected Bell Arthur's argument that it had made service available to the development project, concluding that Bell Arthur's six-inch pipeline could not service the water needs of the development project. *Id.* Though noting that Bell Arthur had by then taken out a loan to increase the diameter of its pipeline, the court found this effort untimely. Bell Arthur had applied for the federal loan

more than a year after agreeing to provide service. *Id.* at 525–26. So, in applying § 1926, the court ruled that Bell Arthur hadn't shown the "*capability* of providing service or, at a minimum, providing service within a reasonable time." *Id.* at 526.

Under the holdings in *Sequoyah* and *Bell Arthur*, Deer Creek hasn't "provided or made available" water service to prospective water customers at the planned Country Colonnade development. The record reveals that Deer Creek has neither "in fact" made service available to Country Colonnade nor sought to do so by obtaining a loan under § 1926(a) to put pipes in the ground. In fact, Deer Creek presents a much weaker case than did the losing water corporation in *Bell Arthur*. There, the water corporation at least had a water main across the disputed area and had applied for a federal loan. In contrast, Deer Creek has no pipes at the Country Colonnade site and hasn't even applied for a § 1926(a) loan to put pipes in the ground. And the record shows that Deer Creek is unwilling to apply for a loan.

Though the majority recites *Sequoyah*'s rule early on, it fails to implement it when the time comes. As noted, *Sequoyah* says *who* must put the pipes in the ground—the water association. Nowhere does it even suggest that § 1926(b) protection exists if the water association tries to foist its duty to do

so on the developer. And any sensible reading of § 1926 rejects that idea.[6]

Even so, and despite *Sequoyah*'s explicit language, the majority says that the City hasn't cited cases requiring the water district to secure the financing to lay the 1.3 miles of twelve-inch pipe. Maj. Op. 16–20. Despite the cases putting this responsibility on the water association, the majority treats the question like an open one and rules for Deer Creek.

The majority's reasoning is sparse. It primarily relies on what it describes as a later "implicit" ruling in *Rural Water District No. 1 v. City of Wilson* (*Ellsworth*), 243 F.3d 1263 (10th Cir. 2001), that a water association can require a user to lay the water pipes. But the pipes there were off a main line to two duplexes, not to a large residential development like Country Colonnade. *Id.* at 1267–68. In *Ellsworth*, the water user got the entire benefit of the pipe extension—unlike here, where the Bolings must pay for the water infrastructure for all Deer Creek's future customers availing themselves of the

[6] The majority dismisses *Bell Arthur* because "which party would bear the responsibility for construction was not at issue in *Bell Arthur*." Maj. Op. 18. That makes it sound like the court left a contested issue unresolved. In fact, no one even suggested that the water corporation could assign its duties and still obtain § 1926(b) protection. Plainly, as with virtually all the cases, *Bell Arthur* proceeded with an understanding that the water association was the entity responsible to finance and construct the needed water pipes. 173 F.3d at 525–26. Under § 1926's framework and purpose, that understanding makes sense. After all, Congress didn't enact § 1926 so water associations could tell rural users to collect their pocket change to finance laying pipes or else remain dry and thirsty. And calling anticipated Country Colonnade residents "rural users," Maj. Op. at 19 n.10, is blushworthy. That might well explain why Deer Creek hasn't even bothered to seek a loan under § 1926(a).

new water pipes. And in any event, *Ellsworth* favorably cited *Sequoyah* and certainly didn't seek to overrule it. *Id.* at 1270–71.[7] Further, post-*Ellsworth* cases have continued to quote and rely on the *Sequoyah* standard. *E.g.*, *Douglas*, 659 F.3d at 980; *Logan*, 654 F.3d at 1064–65; *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 700 (10th Cir. 2004); *Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262, 1267–68 (10th Cir. 2002).

In fact, *Ellsworth* is important in a different way—for requiring water associations to provide water service at reasonable, non-excessive costs. The majority remands on that very determination. Maj. Op. 25, 31. But *Ellsworth* does not alleviate a water association's responsibility to put pipes in the ground through timely financing, whether under § 1926(a) or otherwise.

So I see nothing supporting Deer Creek's view that it has "provided or made available" the needed water service. Nothing in § 1926 justifies Deer Creek's approach of "you, the developer, pay for and arrange for construction of the needed water-pipe infrastructure, and we'll take the water fees." By

[7] The majority also relies on a footnote from an unpublished order in *Pittsburg County Rural Water District No. 7 v. City of McAlester*, No. 98-7148, 2000 WL 525942, at *4 n.7 (10th Cir. May 2, 2000) (unpublished), for its statement that "requiring the customer to foot the bill for basic utility infrastructure is not entirely unheard of, at least in regard to new developments, nor is it per se unreasonable." Maj. Op. 21. Suffice it to say that this unpublished decision doesn't cite *Sequoyah* for that point, let alone explain how it flows from *Sequoyah*'s mandate that water associations take steps to put pipes in the ground.

blessing that approach, the majority permits water associations to hinder water development rather than facilitate it as envisioned by § 1926.

* * *

In sum, I would affirm the district court's grant of summary judgment to the Bolings. I respectfully dissent.