by Elizabeth M. Dietzmann, JD

Collection of monetary damages and other relief in territorial dispute cases

In recent articles and as a participant in a panel discussion at last year's KRWA Annual Conference, I have emphasized the time and expense it takes to bring a successful territorial protection case either under federal law or when federal protection is unavailable under state law. Generally, I caution water districts about a leap from the frying pan into the fire, unless the district has conducted a full risk analysis and concluded that the law and the facts are on its side – and that it can afford to bring a case under the federal law. I also encourage water districts to explore compromise agreements that can garner them some monetary compensation for the loss of customers and revenue – even if they do technically have a good federal case. This has lead to a number of interesting questions concerning the types and availability of relief that can actually be collected in a 7 U.S.C. 1926(b) case if the water district wins. The most important point I can make is that each and every annexation dispute or 1926(b) case has a different set of facts. In fact, I don't think I have ever seen two cases with the exact same fact scenario and the initial fact scenario shapes the type of relief that the water district will ask for, which then shapes the structure of a final settlement. A water district which buys its water from a nearby city, but then has that city annex some undeveloped land which is not being served by the water district is in a completely different predicament than a water district which produces its own water and has existing customers annexed by a city or is able to sell water to new customers. Virtually any variation on these facts can and does occur.

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Add to that the fact that 7 U.S.C. 1926(b) does not "guaranty" monetary compensation of any kind. It is no wonder that it becomes very hard to predict what kind of relief a water district can expect. In its simplest interpretation, 1926(b) simply states that no other entity can encroach upon a federally indebted water district's territory. There is no magic formula set out in the statute for calculating money damages to a water district. 7 U.S.C. 1926(b) also does not guaranty any kind of injunctive relief, which is a fancy legal way of saying that 1926(b) does not guaranty that a judge will simply forbid a city from ever taking customers or running water lines into district territory. If water districts look to other federal laws and decisions in earlier 1926(b) cases, it is possible to ask for money damages and even attorney's fees, but getting a judge to award money damages is no sure thing. Interestingly, many of the 1926(b) cases on the books only asked for injunctive relief, because the water district just wanted the city to stop seizing customers or to give back former customers. No money changed hands at all.

So basically a water district that is going to seek monetary compensation, as in hard cold cash, first has to win on the facts and then has to put on a case to prove up its damages.

According to Steve Harris, J.D., Tulsa, Oklahoma, basically, the water district has to prepare the same types of business valuation calculations it would for any commercial tort litigation case. And guess what? The other side gets to disagree with those calculations and put on evidence opposing those calculations. That boils down to CPA vs. CPA or economist vs. economist. Then it is all up to the judge to decide which set of calculations to believe. So let me emphasize this again – there is no set formula under the law for calculating the damages in 1926(b) cases and it is up to the judge to decide which expert to believe. When the fight is over a "cherry-picking" scenario, where existing

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customers are at stake, it is somewhat simpler to arrive at those calculations. The water district should have past billing records available and should be able to project future water use.

However, for better or worse, more and more water districts are fighting with cities over the right to serve undeveloped land. That is they are claiming they will lose a certain amount of undetermined future revenue from yet unknown customers. In this scenario the water district attorney has to find and work with an economist or a CPA. In order to come up with a dollar amount of damages that will stand up in court, the district needs to factor in the following types of issues in an attempt to quantify a loss of future revenues:

a) A growth curve for the undeveloped land (some justifiable projection of how many connections a year will be added as well as some projections of what kind of development – commercial, residential, industrial – will be created); and

b) a valuation of the profit per connection (often a combination) of the average daily water use, the profit per 1,000 gallons and the monthly minimum); and

c) infrastructure asset valuation (maybe over 20 years).

This list is by no means comprehensive, but it illustrates the fact that the district has to make a sound, economically justifiable argument for why it should be paid X dollars. It is very analogous to valuing a business for a divorce case or some other type of business dispute. One side is going to argue the business is worth nothing and the other side will argue it is worth millions.

Are water districts getting actual cash settlements or injunctions in cases? Yes, some are, but usually ***after*** the main case is won and the parties sit down to settle the damages portion of the case.

According to Steve Harris in *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 211 F.3d 1279,* the district ended up with a settlement of cash and free water worth close to $1 million. In another series of cases Mr. Harris handled, involving Creek County Water District #2 and the cities of Jenks and Tulsa, Okla., the district received approximately $500,000. In a similar suit against the city of Glenpool, dating back to 1989, the same district agreed to receive a flat fee per customer that the city hooked up. Over the last 20 years that has amounted to nearly two million dollars. Louis Rosenburg, of San Antonio, Texas has also had success in settling a second go-round in the seminal Bell Arthur cases in North Carolina. In the most recent dispute over territory, a settlement was reached in which the city paid the water district over $2 million as compensation for infrastructure and also agreed to permanent service areas for both sides.

Dennis O'Toole, an attorney in Sheffield Village,

Ohio, had a similar experience with arriving at a favorable settlement after the case was won. After winning a summary judgment against the city in *Rural Lorain County Water Authority vs. Village of Grafton, Consol. Case No. 1:02 CV 2037 and 1:02 CV 2039, United States District Court, Northern District of Ohio,* the water district ended up receiving the right to sell water to the developing area and to receive a percentage of tap fees for new customers. It also received guarantees that future annexations would follow the same pattern. This sounds like water districts can benefit financially from winning 1926(b) cases, but as always I caution any water district about the hidden costs. For example in the Bell Arthur case, each side agreed to pay its own attorneys fees. As I have stated in other articles, this amount can run into the hundreds of thousands of dollars. Even when the water district wins, the judge still decides how much, if any, attorney's fees to award. Frankly, I have seen the attorney's fees alone exceed any realistic revenue a water district could hope to obtain from a disputed service area. In addition, no one seems to include the intangible costs of bringing a case. In protracted litigation, water district staff and board members spend countless hours gathering documents, dealing with public relations issues and otherwise assisting in litigation preparation. They may also be deposed and have to spend time preparing for a deposition. Boundary maps often have to be prepared, which means paying an engineer or surveyor to do that work. One water district had to buy a new copy machine and hire a part-time clerk just to comply with discovery requests! Rarely are these costs reimbursed.

But ideally, both sides can explore shared provider agreements, water wholesaling agreements, and shared billing agreements, to name a few. And USDA Rural Development could be pivotal in bringing all sides to the bargaining table.

As you can see, 1926(b) cases are not an easy or sure way for a district to "make money." This reality is only compounded by the fact that as a matter of policy, USDA Rural Development does not assist water districts in mounting litigation if no compromise can be reached, nor does it facilitate dispute resolution prior to litigation. This is a shame because the real benefit to districts and cities comes when they can work out joint ventures or territorial settlements. Then both sides can be flexible and creative in figuring out "win-win" scenarios for resolving disputes. Admittedly, sometimes it is only possible to sit down with a city after the water district has won the underlying case. But ideally, both sides can explore shared provider agreements, water wholesaling agreements, and shared billing agreements, to name a few. And USDA Rural Development could be pivotal in bringing all sides to the bargaining table. The fact remains that if they choose to do so, cities and water districts can always work together to come up with much more creative solutions than suing each other.