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Is the Service Area of a Federally Indebted Water Utility Still "Sacrosanct" Under 7 USC 1926(b)?

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Water For the Future: Texas at the Crossroads
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Austin, Texas

Introduction

- What is 7 USC 1926(b)
- Characteristics of Retail W/WW Service
- Classic Service Encroachment Case
- What Constitutes "Service Made Available"
- Impact of Recent Court Decisions

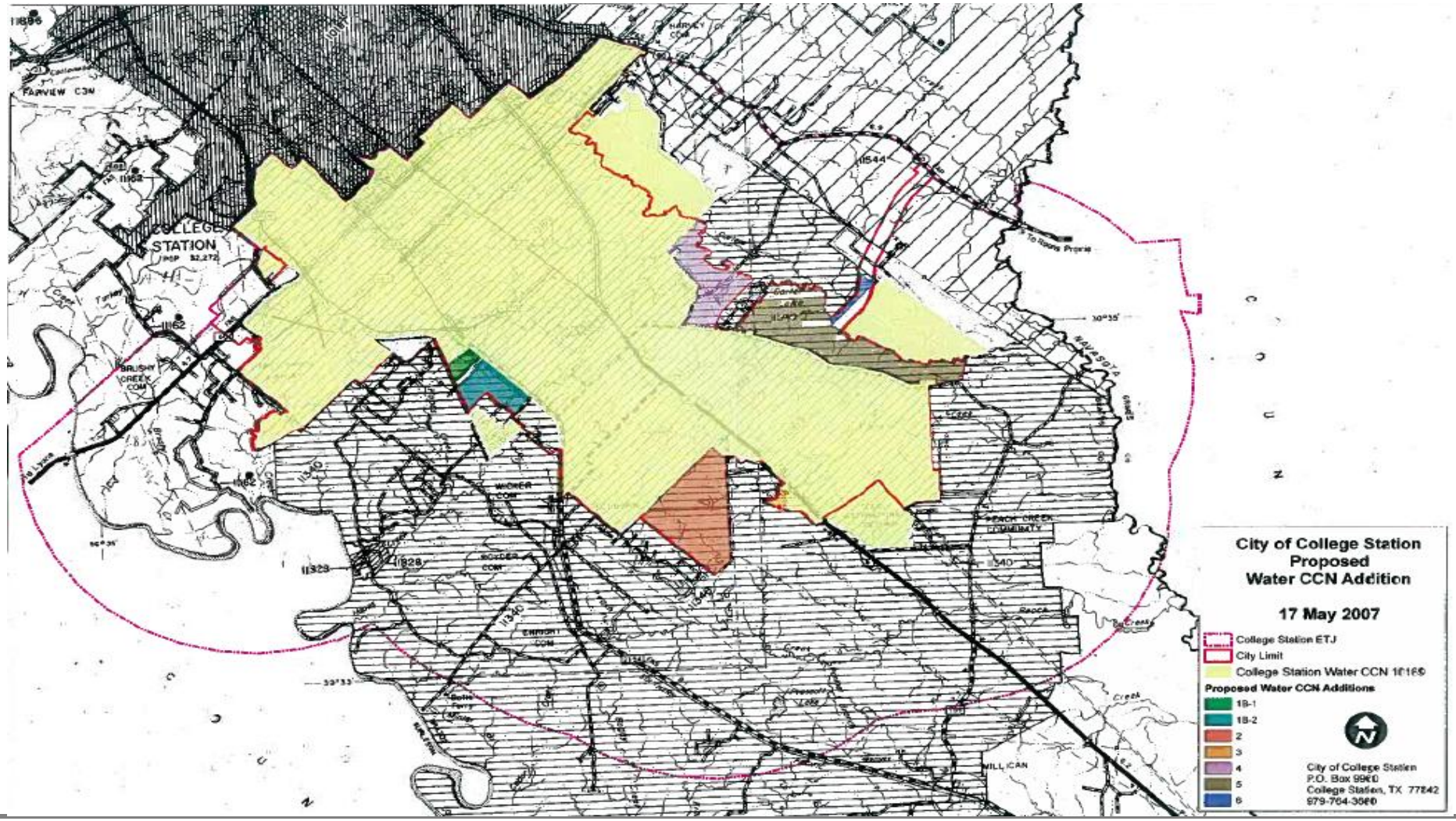
Federal Debt Protection
7 U.S.C. §1926(b)

"The service provided or made available [by a federally indebted rural water] 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 . . ."

Classic 1926(b) Case

- Municipal Expansion of Water Service Facilities into Rural Area
- Often Accompanied by Annexation of Territory into City
- New Subdivision/Customers Served by City
- City Policy Arguments: Cost, Fireflow, Economic Development, Sovereignty, etc.

Example of Municipal Expansion
City of College Station



Federal Debt Protection
Basic Policy

- Secure Repayment of the Federal Debt
- Reduce the Cost of Service, by Expanding Number of Customers

City of Madison v. Bear Creek WaterAssociation
816 F.2d 1057 (5th Cir. 1987)

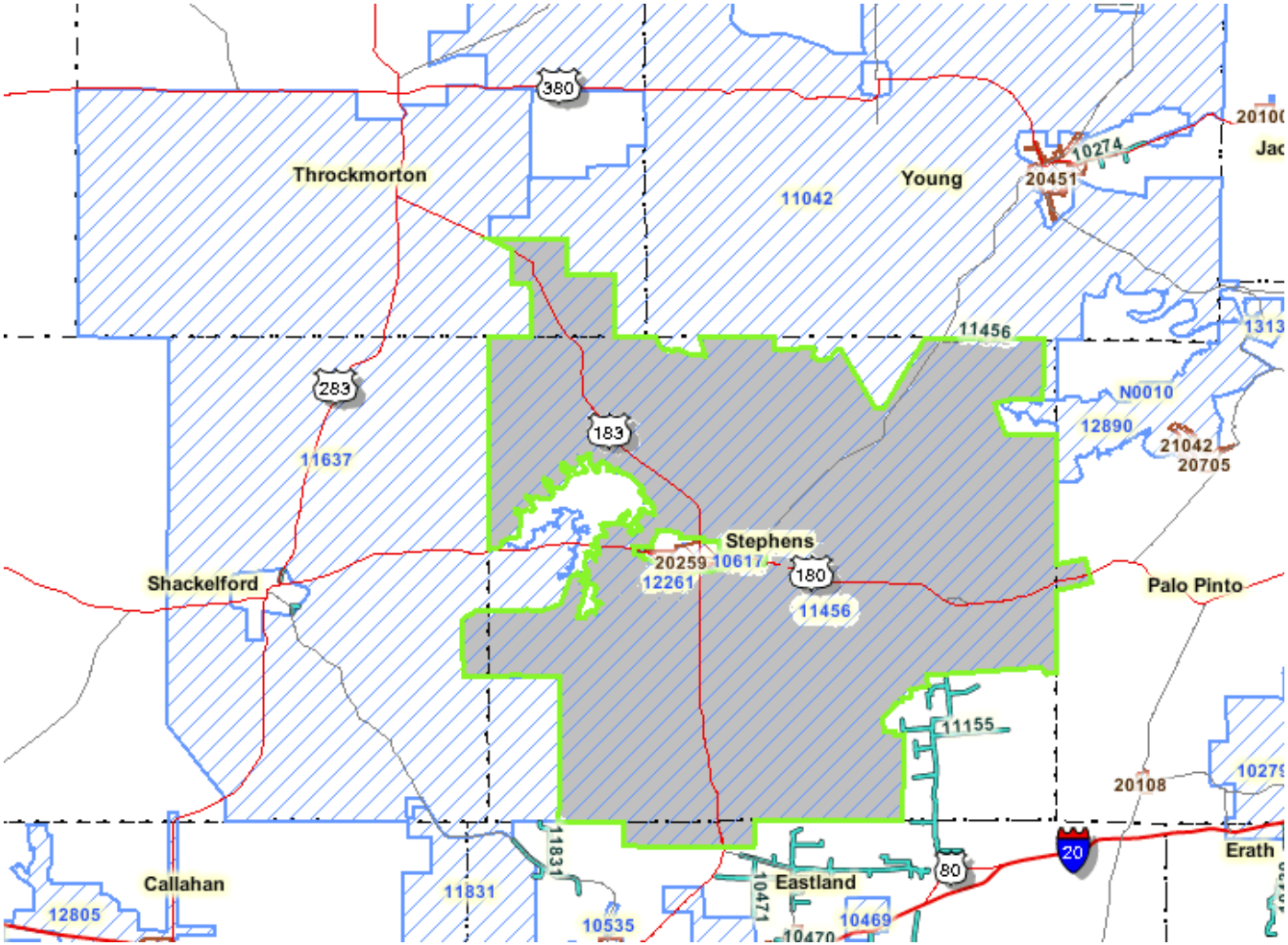
North Alamo Water Supply Corp. (5th Cir. 1996)

The service area of a federally indebted water association is sacrosanct.

Statute should be liberally interpreted to protect . . . rural water associations from municipal encroachment.

North Alamo Water Supply Corporation
90 F.3d 910 (5th Cir. 1996)

Stephens Regional SUD
Service Area



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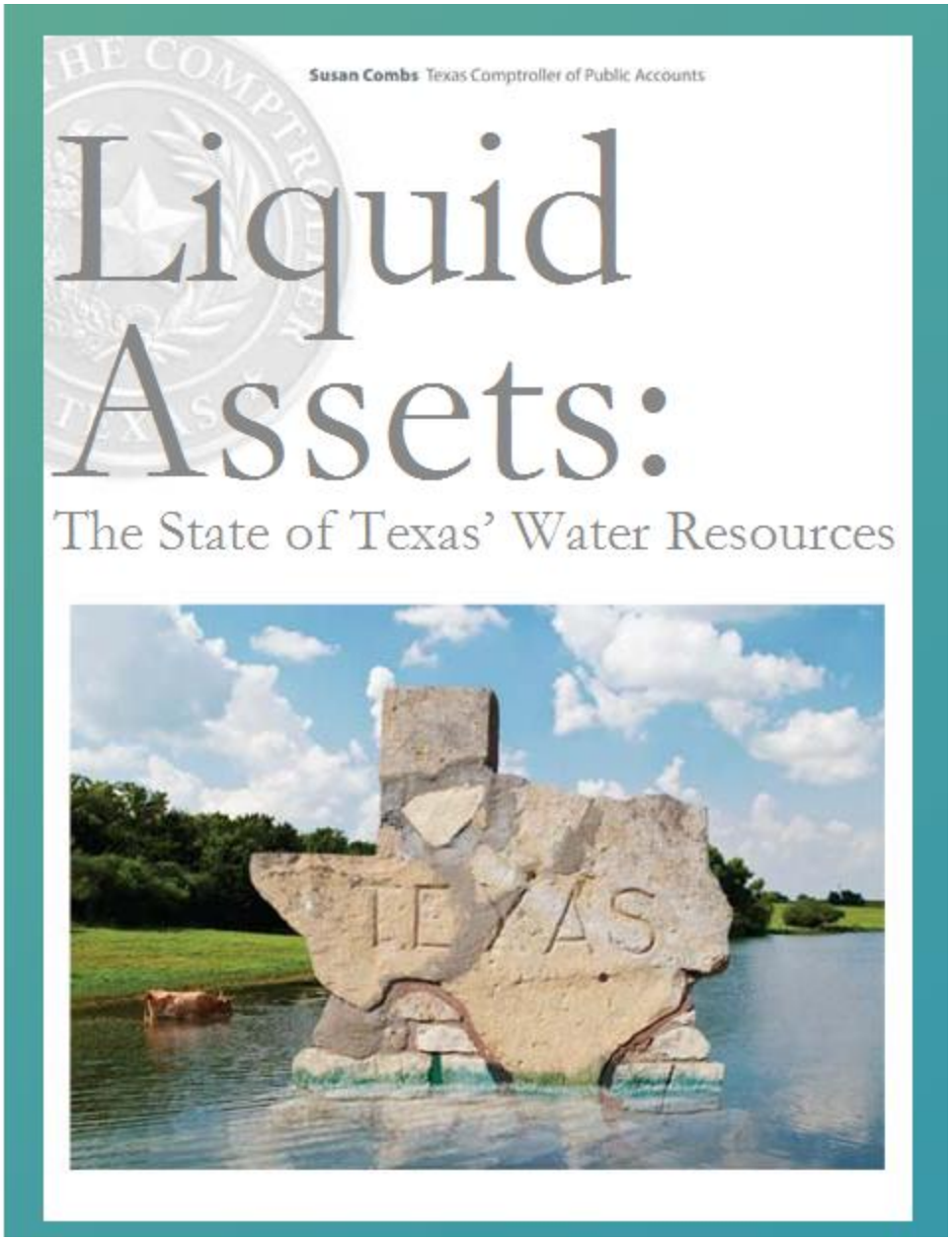
ATTORNEYS & COUNSELORS

Characteristics of Retail Water/Wastewater Service

- Dominated by Cities, Districts and Non-Profits
- Monopoly Service Areas Due to CCNs and Political Boundaries
- New Sources of Supply Come at Increased Cost (reservoirs, long transmission lines, more exotic treatments)
- Capital Intensive
- No Statewide "Grid"; Little "Wheeling" of Potable Water between Suppliers

Texas Comptroller Report: Liquid Assets

- Texas Population Growth 2x National Rate
- Population to Double by 2060 to 46M
- Needed Water Infrastructure Investment = $30B



USDA Rural Development
2009 Funds Obligated (Millions)

	National	Texas
Water/WW Direct	$1,564	$ 56
Water/WW Grant	$ 916	$ 35
Total	**$2,480**	**$ 91**

7 U.S.C. 1926(b)
What is Protected?

- Water or Sewer System Indebted to USDA
- Customers Actually Served
- Areas Where Service is "Made Available"

What Constitutes "Service Made Available"?

Phrase is Undefined in Statute

Typically Two Considerations:

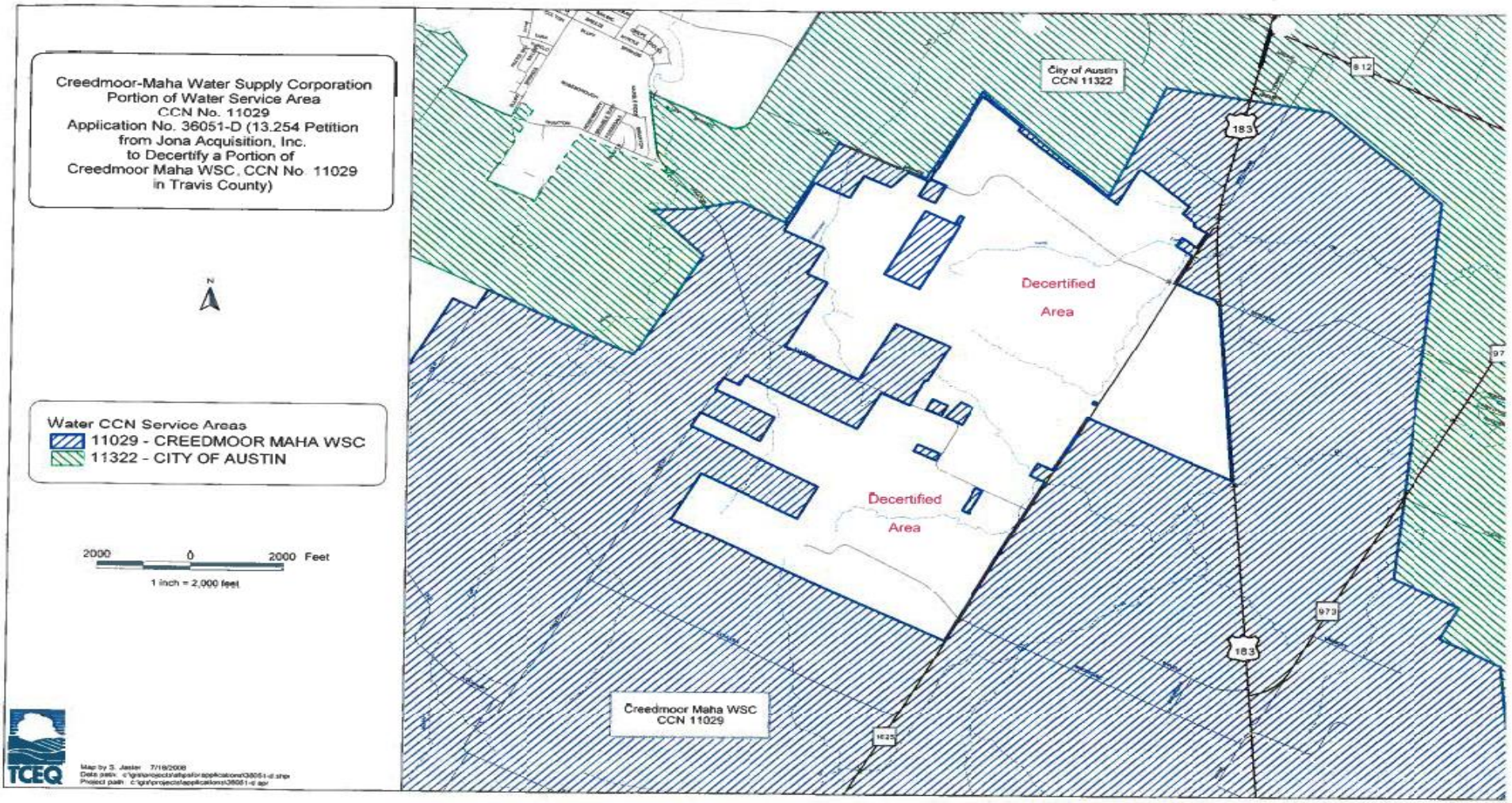
1. "Pipes in the Ground" or Physical Ability to Serve (Proximity, Timing, Cost); and
2. Legal Right or Legal Duty to Serve
   - Political Boundaries
   - Service Area or CCN

Expedited Release Meets Federal Debt

"Does 1926(b) also preclude a state regulatory agency from modifying the service area of a federally indebted utility. But we leave that issue for another day"

North Alamo WSC v. City of San Juan, (5th Cir. 1996)

Application of Jona Acquisition, Inc. to Release Land from Creedmoor-Maha WSC CCN



Creedmoor-Maha WSC v. TCEQ (2010) Narrowing 1926(b) Protection?

- Refines "Service Provided or Made Available"
- Mere Possession of CCN is Not Enough
- Protection Limited to Areas Where:
  (1) Already Providing Service, or
  (2) Presently Has Physical Means to Serve
- See Also, *Moongate Water* (10 Cir. 2005)

Creedmoor-Maha v. TCEQ 307 SW3d 505 (Tex. 3rd Ct Appeals, 2010)

Compensation for Decertification
Creedmoor-Maha WSC

	Appraised Value
Creedmoor-Maha	$2,157,702
Jona Acquisitions, Inc.	$ 16,548
TCEQ Order	$ 179,392

TCEQ Docket No. 2010-0100-UCR
Order of 04-26-2010

Narrowing of Protections

- State Law Decertification/Physical Means to Serve (*Creedmoor-Maha, Tex. App 2010; Moongate Water, 10th Cir. 2005)*
- Unreasonable Costs or Delays are a Factor as to Whether "Service is made Available" (*Rural Water Dist. No. 1, 10th Cir. 2001*)
- Sewer Loan Does Not Protect Water System and its Customers *(PWS Dist No. 3 Laclede Co., 8th Cir. 2010)*
- Pre-Existing Service Encroachment, is Not Suddenly Cured by Closing on Federal Loan *(PWS Dist No. 3 Laclede Co., 8th Cir. 2010)*

Shield v. Sword
Recent Cases on Offensive Use

- Statute is Defensive: Intended to Protect Territory Already "Served" (*Creedmoor/Le Ax*)
- Not For Offensive Action:
  - To Encroach on Another's Service Territory or Customers
  - To Secure Unserved Customers Outside Utility's Lawful Service Boundaries (*Chesapeake Ranch Water Co*, 401 F3d 274 (4th Cir 2005)

Recovery of Attorney Fees

- A Number of Federally Indebted Systems have Sought to Recover Their Attorney Fees
- Theory is a Violation of Civil Rights Statute (42 USC §1983) Due to Encroachment Under §1926(b)
- Trial Courts Have Awarded Attorney Fees

(*Moongate Water*, 10th Cir. 2002)

Conclusion
Has 1926(b) Been Too Effective?

- National League of Cities Resolution No. 2010-10 -- In Support of Amending 1926(b)
- Texas Law Review Article (2001): "1926(b) A Proposal to Repeal Monopoly Status"
- *Creedmoor/Moongate* State Decertification
- Court Rejection of Offensive Use

Additional Resources

- www.ruralwater.org/sec1926b/news.htm
- scholar.google.com
- www.usda.gov/rus/water/index.htm
- www.krwa.net/lifeline/currentissue/0511when.pdf

QUESTIONS?

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