No. _____

In The
Supreme Court of the United States

RURAL WATER DISTRICT NO. 4,
DOUGLAS COUNTY, KANSAS,

Petitioner,

vs.

CITY OF EUDORA, KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 18, 2013

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QUESTIONS PRESENTED

A jury determined that a "Bank Loan" made to Petitioner ("Douglas-4") was necessary in accord with Kansas Law, K.S.A. § 82a-619(g). Specifically, the jury found that the Bank Loan was not for the sole purpose of Douglas-4 securing federal protection under 7 U.S.C. § 1926(b). (See Jury Instruction 17, App. 102 and Verdict, App. 105). This fact determination was affirmed in *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969 (10th Cir. 2011) ("*Eudora I*"). *Eudora I* reversed and remanded the case for the sole question of whether the guarantee issued by the U.S. Department of Agriculture in connection with the Bank Loan was also "necessary" and not solely for the purpose of securing 7 U.S.C. § 1926(b) protection. On remand the District Court entered an order on cross-motions for summary judgment which expanded the issues on remand to include a re-trial of the issue of whether the Bank Loan was necessary. (App. 53). The District Court also certified questions for an interlocutory appeal. (App. 28).

The Panel in *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.,* 720 F.3d 1269, 1275 (10th Cir. 2013) ("*Eudora II*") re-examined the fact determination made in *Eudora I* regarding the necessity of the Bank Loan. Contrary to the jury finding, the *Eudora II* Panel concluded that 7 U.S.C. § 1926(b) protection was the sole reason for Douglas-4 securing the Bank Loan. *Eudora II* at 1281 (App. 24-25).

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Did the *Eudora II* Panel violate Douglas-4's Seventh Amendment right to jury trial by re-examining and re-deciding the fact issue of whether the Bank Loan was necessary, and not secured solely for the purpose of securing 7 U.S.C. § 1926(b) protection, contrary to the fact finding by jury which was affirmed in *Eudora I*?

2. Did the *Eudora II* Panel violate the Supreme Court's decisions concerning doctrines of Issue Preclusion, Res Judicata and Law of the Case?

3. Did the *Eudora II* Panel improperly overrule and create a direct conflict with *Eudora I,* violating the doctrines of Issue Preclusion, Res Judicata, Law of the Case, and Judicial Estoppel?

PARTIES TO THE PROCEEDINGS

Petitioner, Rural Water District No. 4, Douglas County, Kansas, Appellant in the Court below, and the City of Eudora, Kansas, Appellee in the Court below.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporations and no publicly held corporation owns 10% or more of Petitioner's stock or ownership.

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Jury Verdict rendered in *Eudora I* is unpublished but is included in the Appendix, p. 105.

United States District Court for the District of Kansas Memorandum and Order Granting Permanent Injunction dated September 2, 2009, is unreported but included in the Appendix, p. 94.

Rural Water District No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan., 659 F.3d 969 (10th Cir. 2011) (App. 58).

United States District Court for the District of Kansas Memorandum and Order on Cross-Motions for Summary Judgment dated June 19, 2012 is unreported but is included in the Appendix, p. 28.

United States Court of Appeals for the Tenth Circuit Order dated July 25, 2012, granting permission for an Interlocutory Appeal of the District Court's June 19, 2012 Order is unreported but included in the Appendix, p. 26.

Rural Water District No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan., 720 F.3d 1269 (10th Cir. 2013) (App. 1).

United States Court of Appeals for the Tenth Circuit Order dated July 26, 2013, denying the Petition

for Rehearing is unreported but included in the Appendix, p. 101.

STATEMENT OF JURISDICTION

The judgment or order sought to be reviewed was entered on July 1, 2013. (App. 1).

The Petition for Rehearing was denied on July 26, 2013. (App. 101).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

> 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).

> Every district incorporated under this act shall have perpetual succession, subject to dissolution or consolidation pursuant to law and shall have the power to:
>
> (g) cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the purposes of its organization; and to accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to 16 U.S.C., Secs. 590r, 590s, 590x-1, 590x-a and 590x-3, and amendments thereto.

K.S.A. § 82a-619(g) (1997 & Supp.2002).[1]

[1] Language of the Kansas Statute at the time relevant to this case. The Statute was amended in 2012 by substituting "7 U.S.C. § 1921 et seq., as in effect on the effective date of this act" for "16 U.S.C.A., secs. 590r, 590s, 590x-1, 590x-a and 590x-3, and amendments thereto."

STATEMENT OF THE CASE

Rural Water District No. 4, Douglas County, Kansas ("Douglas-4") is a quasi-municipal corporation organized pursuant to K.S.A. § 82a-616(a), for the purpose of providing water service to the residents within its geographical boundaries ("Douglas-4 Territory").

The City of Eudora, Kansas ("Eudora") owns and operates water treatment and distribution facilities located in Douglas County, Kansas and competes with Douglas-4 for the provision of domestic potable water service.

Douglas-4 needed to borrow funds for the construction of water transmission and pumping facilities to enable it to purchase and transport water from Johnson County Consolidated Rural Water District No. 6. These facilities advanced Douglas-4's statutory enumerated purpose (pursuant to K.S.A. 82a-616(a)(3)) of providing potable water to the residents within the Douglas-4 Territory ("Johnson-6 Project").

The Johnson-6 Project was projected to cost 1.25 million dollars, most of which Douglas-4 was required to borrow because it lacked sufficient cash reserves. Douglas-4 elected to borrow part of the money for the Johnson-6 Project from a private lender, First State Bank & Trust located in Tonganoxie, Kansas (hereinafter "Bank").

In order to obtain the loan from the Bank in the amount of $250,000 (the "Bank Loan"), Douglas-4

cooperated with the Bank and the United States Department of Agriculture ("USDA") to obtain a USDA guarantee for the benefit of the Bank. This cooperation included Douglas-4 agreeing to and meeting the conditions required by the USDA.

The USDA provided a guarantee for the Bank Loan (the "Guarantee"). The Bank Loan was made on June 15, 2004.

Douglas-4 filed suit against Eudora in U.S. District Court for the District of Kansas on September 27, 2007 to enforce its rights under 7 U.S.C. § 1926(b) and sought damages exceeding $20.00. At trial the jury awarded Douglas-4 $23,500 in damages. (App. 106.) The District Court entered judgment on the damage award and issued a permanent injunction against Eudora. All fact determinations made by the jury were affirmed on appeal in *Eudora I*, however the panel reversed and remanded for the purpose of a single additional fact determination not made by the jury in *Eudora I*, namely whether the Guarantee issued by the USDA was also necessary for the organizational purposes of Douglas 4.

The undisputed evidence on remand discloses that if the USDA had not provided the Guarantee, the Bank would not have made the Bank Loan to Douglas-4. *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.,* 720 F.3d 1269, 1280 (10th Cir. 2013) ("*Eudora II*") (App. 22). The Guarantee also resulted in more favorable terms for the Bank Loan. (App. 36, 53-54).

Douglas-4 utilized the proceeds from the Bank Loan to pay for construction of a pump station and a portion of the soft costs which were an integral part of the Johnson-6 Project.

Eudora annexed four tracts of land within the Douglas-4 Territory ("Annexed Land"). Following annexation, Eudora took action to bar Douglas-4 from providing water service to the Annexed Land.

Douglas-4 initiated this litigation asserting that because the Bank Loan was guaranteed by the USDA, Douglas-4 was entitled to 7 U.S.C. § 1926(b) protection precluding the City from providing water service to the Annexed Land.[2]

At trial the jury returned a verdict for Douglas-4 finding that Eudora had violated Douglas-4's rights under 7 U.S.C. § 1926(b) and specifically that Douglas-4 had "the power under Kansas law to cooperate with

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[2] 7 U.S.C. § 1926(b) provides:

> 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.

and enter into agreements with the federal government." (App. 105, Verdict Form, Question 1).

In so holding, the jury necessarily found:

> The Bank Loan was necessary for at least one of the Enumerated Purposes of Douglas-4:
>
> > K.S.A. § 82a-619(g) authorizes Douglas-4 to "cooperate with and enter into agreements with the [Federal Government] necessary to carry out the purposes of its organization."
> >
> > Douglas-4 had the power under Kansas law to cooperate with and enter into agreements with the Federal Government if it [sic] its loan guaranteed by Federal Government was necessary for:
> >
> > (1) an operational purpose identified under Kansas law and Douglas-4's bylaws; (2) a business purpose identified under Kansas law and Douglas-4's bylaws; or (3) protecting Douglas-4 from impairment of its ability to fulfill an operational or business purposes identified under Kansas law and Douglas-4s [sic] bylaws.
> >
> > [Followed by a statement of the Enumerated Purposes of Douglas-4].

App. 102, Jury Instruction No. 17, and App. 105, Verdict Form.

> Obtaining 7 U.S.C. § 1926(b) protection was *not* the sole purpose of obtaining the Bank Loan:
>
> > Douglas-4 did **not** have the power under Kansas law to cooperate with and enter into agreements with the Federal Government **for the sole purpose of securing federal protection under 7 U.S.C. 1926(b). If obtaining federal protection under 7 U.S.C. 1926(b) was Douglas-4's only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora**.

App. 102, Jury Instruction No. 17, last paragraph and App. 105, Verdict Form. (Emphasis added).

After Trial, the Court entered a Memorandum and Order Granting a Permanent Injunction. (App. 94, Memorandum and Order Granting Permanent Injunction).

Eudora appealed the Jury Verdict challenging the "Necessary Instruction" (Jury Instruction No. 17) on the basis that the instruction limited the "necessary" analysis to the Bank Loan, and failed to instruct the jury that the Guarantee itself must also be "necessary". *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan*., 659 F.3d 969, 973-980 (10th Cir. 2011) ("*Eudora I*") (App. 69-70).

The *Eudora I* Panel reversed on the sole issue that the jury instructions should have included an

instruction that the Guarantee itself was also required to be "necessary," i.e., that Kansas law provides that a rural water district (Douglas-4) may obtain a loan and a federal guarantee if *both* are "necessary to carry out the purposes of its organization . . . ":

> By allowing the jury to consider **the loan** as a trigger for Douglas-4's indebtedness, the district court shifted the focus of the jury's inquiry away from the actual subject matter of the cooperation, i.e., **the guarantee**.
>
> * * *
>
> Although each has its own purpose and must be analyzed independently, without a loan there is nothing to guarantee. Thus, for a guarantee to be necessary the underlying loan must **also** be necessary.

Eudora I, pp. 977-978 (App. 69-70). (Emphasis added).

The sole question on remand from *Eudora I* was whether the Guarantee was necessary. The jury had previously found the Bank Loan was "necessary" (furthered at least one of the Enumerated Purposes of Douglas-4) and was not obtained solely for the purpose of obtaining 7 U.S.C. § 1926(b) protection). (App. 102, Jury Instruction No. 17 and App. 105, Verdict Form Question 1). *Eudora I* affirmed the jury's finding of fact that the Bank Loan was necessary and remanded for the sole purpose of determining whether the Guarantee was necessary:

By allowing the jury to consider **the loan** as a trigger for Douglas-4's indebtedness, the district court shifted the focus of the jury's inquiry away from the actual subject matter of the cooperation, i.e., **the guarantee**.

* * *

Douglas-4 must still prove that its *co-operation with the USDA* – **i.e., the guarantee was also necessary**. The jury was not asked to consider **this question**. This error alone entitles Eudora to a new trial **on this one issue**.

* * *

We must reverse, vacate the judgment, and remand for a new trial **for the limited purpose** of determining whether Douglas-4's cooperation to secure **the federal guarantee** was necessary for the purpose of its organization.

* * *

The district court's judgment is REVERSED and the trial verdict VACATED. The matter is REMANDED for further proceedings **solely on the issue of whether Douglas-4's cooperation to secure a Rural Development guarantee was necessary** to carry out the purposes of its organization. **All other issues on appeal and cross-appeal are AFFIRMED.** Both parties' motion to strike portions of each other's reply briefs are DENIED.

Eudora I, pp. 977, 978, 980 and 987 (App. 69, 70, 75 and 93). (Emphasis added).

The *Eudora I* Panel recognized the purpose of a guarantee is to assist in obtaining funding (a loan) which might not otherwise be available, or to assist the borrower in obtaining more favorable terms, such as a lower interest rate, more favorable pay-off terms, etc., i.e., that "a guarantee serves to bolster an organization's existing credit." *Eudora I*, p. 977 (App. 69).

On remand from *Eudora I*, Douglas-4 provided the District Court undisputed evidence that the Guarantee was necessary in order to obtain the Bank Loan. (App. 36, 53-54).

The parties filed cross-motions for summary judgment. Eudora argued that the Guarantee was not necessary because the underlying Bank Loan was not necessary. Douglas-4 argued that the issue of whether the Bank Loan was necessary had been resolved by the jury and affirmed in *Eudora I*. (App. 52-53).

The District Court denied both summary judgment motions finding that re-litigating the necessity of the Bank Loan was not barred by the law of the case or the limited remand from *Eudora I*. (App. 53). The District Court also certified the case for an interlocutory appeal. (App. 54).

In the second appeal, the *Eudora II* panel re-examined and re-decided the issue of the necessity of the Bank Loan. *Eudora II* disregarded the jury's finding that the Bank Loan was necessary and not for

the sole purpose of securing 7 U.S.C. § 1926(b) protection (a finding affirmed in *Eudora I*). *Eudora II* broke with *Eudora I*, holding that the Bank Loan was not necessary and had indeed been secured for the sole purpose of securing 7 U.S.C. § 1926(b) protection. *Eudora II* then concluded the Guarantee was not necessary solely because the Bank Loan was not necessary. *Eudora II*, p. 1280-1281 (App. 24-25).

This case involves a review of a judgment of the United States Court of Appeals for the Tenth Circuit:

The U.S. District Court for the District of Kansas had subject matter jurisdiction by virtue of 28 U.S.C. § 1331 (Federal Question Jurisdiction) because the claims asserted arose under the laws of the United States (7 U.S.C. § 1926(b), 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202).

The Tenth Circuit had jurisdiction over the appeal by virtue of 28 U.S.C. § 1292(b) and Fed. R. App. P. 5 because the appeal related to an order of the U.S. District Court for the District of Kansas, which was not otherwise appealable, but which the District Court certified for appeal and the Tenth Circuit granted permission to appeal. See 10th Cir. Case No. 12-604, Doc. 01018886218 (App. 26-27).

The appeal to the Tenth Circuit was timely because the District Court entered its order on June 19, 2012. (App. 28-57). Douglas-4 filed its Petition for Permission to Appeal on June 29, 2012, pursuant to the District Court's Order and as required by 28 U.S.C. § 1292(b).

The Tenth Circuit rendered its opinion in *Eudora II* on July 1, 2013. Douglas-4's Petition For Rehearing was denied on July 26, 2013.

REASONS FOR GRANTING CERTIORARI

The Tenth Circuit in *Eudora II* re-examined a fact tried by jury, disregarded the jury finding, and undertook its own fact finding which directly contradicted the jury finding, all in violation of Douglas-4's Seventh Amendment right to jury trial.

The Tenth Circuit in *Eudora II* entered a decision in conflict with its prior decision in *Eudora I*, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervising power.

I. THE TENTH CIRCUIT HAS DENIED DOUGLAS-4 ITS RIGHT TO JURY TRIAL PROVIDED BY THE SEVENTH AMENDMENT

The Seventh Amendment provides that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, **and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law**." U.S. Const. amend. VII. (Emphasis added).

The right to a jury trial is a basic and fundamental right:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. City of New York, 315 U.S. 752, 752-753 (1942).

In this case, the jury found that the Bank Loan was necessary (was not obtained for the sole purpose of securing 7 U.S.C. § 1926(b) protection). In so holding, the jury necessarily found:

> The Bank Loan was necessary for at least one of the Enumerated Purposes of Douglas-4:
>
> > K.S.A. § 82a-619(g) authorizes Douglas-4 to "cooperate with and enter into agreements with the [Federal Government] necessary to carry out the purposes of its organization."
> >
> > Douglas-4 had the power under Kansas law to cooperate with and enter into agreements with the Federal Government if it [sic] its loan guaranteed by Federal Government was necessary for:

> (1) an operational purpose identified under Kansas law and Douglas-4's bylaws; (2) a business purpose identified under Kansas law and Douglas-4's bylaws; or (3) protecting Douglas-4 from impairment of its ability to fulfill an operations or business purposes identified under Kansas law and Douglas-4s [sic] bylaws.
>
> [Followed by a statement of the Enumerated Purposes of Douglas-4].

App. 102, Jury Instruction No. 17, and App. 105, Verdict Form.

Obtaining § 1926(b) protection was ***not*** the sole purpose of obtaining the Bank Loan:

> Douglas-4 did not have the power under Kansas law to cooperate with and enter into agreements with the Federal Government **for the sole purpose of securing federal protection under 7 U.S.C. § 1926(b). If obtaining federal protection under 7 U.S.C. § 1926(b) was Douglas-4's only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora**.

App. 102, Jury Instruction No. 17, last paragraph and App. 105, Verdict Form. (Emphasis added).

The Panel in *Eudora II* recognized that the jury found the Bank Loan was necessary, and that the

"sole question" on remand was whether the guarantee was necessary:

> The question at trial, as framed by the district court, was whether the USDA-guaranteed **private loan** was "necessary". . . .
>
> * * *
>
> If the loan was not "necessary to carry out the purposes of its organization," then Douglas-4 would not merit § 1926(b) protection.
>
> * * *
>
> **Eudora** objected, arguing that the **necessity of the loan** (i.e., to build the Johnson-6 project) **was never at issue, just the necessity of the federal guarantee on that loan**. The district court overruled the objection, stating that the loan and the guarantee were "one and the same" for purposes of this case.
>
> The district court therefore **instructed the jury to consider whether the loan guaranteed by the USDA was necessary, not whether the guarantee itself was necessary. The jury found the loan necessary** (presumably to fund the Johnson-6 project) and gave a verdict in favor of Douglas-4.
>
> * * *
>
> On appeal, Eudora again argued that the district court erred **by not separating the necessity of the loan from the guarantee. We agreed** with Eudora on this question,

> **holding that the necessity of the guarantee, not the loan, was the salient question**. *Eudora I*, 659 F.3d at 977.

Eudora II, pp. 1273-1274 (App. 6-7). (Emphasis added).

Eudora I entered judgment affirming all issues with the sole exception of the necessity of the USDA Guarantee, and remanded the case for the purpose of determining whether the USDA Guarantee was necessary:

> By allowing the jury to consider **the loan** as a trigger for Douglas-4's indebtedness, the district court shifted the focus of the jury's inquiry away from the actual subject matter of the cooperation, i.e., **the guarantee**.
>
> * * *
>
> Douglas-4 must still prove that its *cooperation with the USDA* – **i.e., the guarantee was also necessary**. The jury was not asked to consider this question. This error alone entitles Eudora to a new trial **on this one issue**.
>
> * * *
>
> We must reverse, vacate the judgment, and remand for a new trial **for the limited purpose** of determining whether Douglas-4's cooperation to secure **the federal guarantee** was necessary for the purpose of its organization.
>
> * * *

> The district court's judgment is REVERSED and the trial verdict VACATED. The matter is REMANDED for further proceedings **solely on the issue of whether Douglas-4's cooperation to secure a Rural Development guarantee was necessary** to carry out the purposes of its organization. **All other issues on appeal and cross-appeal are AFFIRMED.** Both parties' motion to strike portions of each other's reply briefs are DENIED.

Eudora I, pp. 977, 978, 980 and 987 (App. 69, 70, 75 and 93). (Emphasis added).

The Seventh Amendment controls the allocation of authority to review jury verdicts and assigns the decisions of disputed questions of fact to the jury. *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 432 (1996). The panel in *Eudora II* overlooked this allocation of powers. *Eudora II* disregarded the limitations on remand and the finality of the jury's finding of fact that the Bank Loan was necessary (a fact specifically tried by jury and affirmed in *Eudora I).* Contrary to the jury's finding, *Eudora II* held that the Bank Loan was not necessary – which in turn served as the sole basis for *Eudora II* concluding that the Guarantee was not necessary:

> Under this standard, Douglas-4 fails both the "absolutely necessary" and "necessary" inquiries. As to "absolutely necessary," the evidence shows that Douglas-4 could have obtained the KDHE loan for the entire $1.25

> million. **Thus, the USDA-guaranteed private loan was not absolutely necessary**.
>
> * * *
>
> As for "necessary," the undisputed evidence shows that **the USDA-guaranteed loan was not the qualitatively best loan available – save** for § 1926(b) protection. Indeed, § 1926(b) protection was the sole reason Schultz recommended obtaining a USDA-guaranteed loan. Schultz further acknowledged that it would be cheaper to finance the entire project through a KDHE loan.
>
> Given this evidence, no reasonable jury could find in favor of Douglas-4 on the "necessary" question. Eudora therefore deserves summary judgment.

Eudora II, pp. 1280-1281 (App. 24-25). (Emphasis added).

Eudora II plainly violated Douglas-4's Seventh Amendment right to jury trial and improperly re-examined a fact tried by the jury, and affirmed by *Eudora I*:

> " . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. Const. amend. VII.

Eudora II's holding that there was insufficient evidence for a jury to find that the Bank Loan was

necessary, is even more egregious because *Eudora I* found that Eudora could not attack the sufficiency of evidence relating to the jury's findings:

> In addition to appealing the district court's legal conclusions, jury instructions, and admissions of evidence, Eudora challenges the sufficiency of the evidence at each step of the § 1926(b) analysis. It was required to renew these challenges at the close of all the evidence in a motion for judgment as a matter of law under Rule 50(a) and again after the entry of judgment as a renewed motion under Rule 50(b). **Having failed to file a Rule 50(b) motion, Eudora has waived any challenges on appeal to the sufficiency of the evidence . . .**

Eudora I, p. 975 (App. 63-64). (Emphasis added).

II. *EUDORA II* CONFLICTS WITH THE SUPREME COURT'S DECISIONS CONCERNING ISSUE PRECLUSION, RES JUDICATA AND LAW OF THE CASE

The *Eudora II* finding that the Bank Loan was not necessary conflicts with U.S. Supreme Court decisions concerning issue preclusion, res judicata and law of the case. Consistent with the Seventh Amendment's prohibition against re-examining a fact tried by jury, this Court has recognized and applied various doctrines which preclude retrial of issues previously decided:

> Issue preclusion bars successive litigation of "an issue of fact or law" that "is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment". Restatement (Second) of Judgments § 27 (1980).

Bobby v. Bies, 556 U.S. 825, 834 (2009).

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. 94, 101 S.Ct. 411 (citations omitted).

Allen v. McCurry, 449 U.S. 90, 94 (1980).

The law of the case doctrine also precludes relitigation of issues which have been previously resolved. *Quern v. Jordan*, 440 U.S. 332, 348 (1979).

This Court has explained that the rules prohibiting retrial of issues already decided are:

> . . . demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked

> for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect to all maters properly put in issue and actually determined by them. *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 42 L.Ed. 355 (1897).

San Remo Hotel, L.P. v. City and Cnty. of S.F., Cal., 545 U.S. 323, 337 (2005).

The question at trial was whether the USDA-guaranteed Bank Loan was "necessary. . . ." *Eudora II,* p. 1273 (App. 6-7). Eudora argued at trial that the Bank Loan was not necessary because Douglas-4 had a better and cheaper loan available from an alternative lender (KDHE), therefor contending the KDHE loan was qualitatively better. The jury rejected Eudora's argument and evidence, finding (under the guidance of Instruction 17) that the Bank Loan was indeed necessary and *not* obtained solely for the purpose of obtaining 7 U.S.C. § 1926(b) protection. *Eudora I* at fn. 1 (App. 62). *Eudora I* affirmed all aspects of the jury's findings but remanded for the sole determination of whether the USDA Guarantee was also necessary. *Eudora I,* p. 987 (App. 93). The decision in *Eudora II* that the Guarantee was not necessary, because the Bank Loan was not necessary, conflicts with doctrines adopted by this Court prohibiting the re-trial of issues previously decided.

III. THE TENTH CIRCUIT DECISION IN *EUDORA II* IS IN CONFLICT WITH THE PANEL DECISION IN *EUDORA I*

The decision in *Eudora II* overrules and conflicts with the Panel decision in *Eudora I*.

The only issue on remand from *Eudora I* was whether the Guarantee was "necessary," i.e., whether the Guarantee was necessary for Douglas-4 to obtain the Bank Loan, a loan which the jury found to be "necessary". Reconsideration of whether the Bank Loan was necessary was barred as the law of the case. *Eudora II*'s ruling that the Bank Loan was not necessary overrides a fact tried by jury and affirmed in *Eudora I*. "[I]t is well established that one panel 'cannot overrule the judgment of another panel of this court' . . . absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Barber v. T.D. Williamson, Inc*., 254 F.3d 1223, 1229 (10th Cir. 2001) citing *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal. *Rohrbaugh v. Celotex Corp*., 53 F.3d 1181, 1183 (10th Cir. 1995). "The rule prevents questions already considered and decided once in the case from being reargued at every subsequent stage of the case." *Richardson ex rel. Richardson v. Navistar Intern. Transp. Corp*., 231 F.3d 740, 743 (10th Cir.

2000) citing *Hale v. Gibson,* 227 F.3d 1298, 1328-1329 (10th Cir. 2000).

Under the doctrine of judicial estoppel, a party is not allowed to change its position once an issue has been decided:

> In the unusual circumstances this case presents, we conclude that a discrete doctrine, judicial estoppel, best fits the controversy. Under that doctrine, we hold, New Hampshire is equitably barred from asserting – contrary to its position in the 1970's litigation – that the inland Piscataqua River boundary runs along the Maine shore.

New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

This case was tried by jury concerning whether the Bank Loan was necessary over Eudora's objection that the necessity of the Bank Loan was not at issue, and that only the Guarantee was at issue:

> The question at trial, as framed by the district court, was whether the USDA-guaranteed **private loan** was "necessary". . . .
>
> * * *
>
> If the loan was not "necessary to carry out the purposes of its organization," then Douglas-4 would not merit § 1926(b) protection.
>
> * * *
>
> **Eudora** objected, arguing that the **necessity of the loan** (i.e., to build the Johnson-6

> project) **was never at issue, just the necessity of the federal guarantee on that loan**. The district court overruled the objection, stating that the loan and the guarantee were "one and the same" for purposes of this case.
>
> The district court therefore **instructed the jury to consider whether the loan guaranteed by the USDA was necessary, not whether the guarantee itself was necessary. The jury found the loan necessary** (presumably to fund the Johnson-6 project) and gave a verdict in favor of Douglas-4.

Eudora II, pp. 1273-1274 (App. 6). (Emphasis added).

During the first appeal (*Eudora I*) Eudora continued its argument that the necessity of the Bank Loan was not at issue, only the Guarantee. The *Eudora I* Panel found that both the Bank Loan and the Guarantee must be necessary:

* * *

> On appeal, Eudora again argued that the district court erred **by not separating the necessity of the loan from the guarantee. We agreed** with Eudora on this question, **holding that the necessity of the guarantee, not the loan, was the salient question**. *Eudora I*, 659 F.3d at 977.

Eudora II, pp. 1273-1274 (App. 6-7). (Emphasis added).

Eudora I affirmed the fact tried by jury that the Bank Loan was necessary and remanded the case for the *sole* purpose to determine if the Guarantee was necessary:

> By allowing the jury to consider **the loan** as a trigger for Douglas-4's indebtedness, the district court shifted the focus of the jury's inquiry away from the actual subject matter of the cooperation, i.e., **the guarantee**.
>
> * * *
>
> Douglas-4 must still prove that its *cooperation with the USDA* – **i.e., the guarantee was also necessary**. The jury was not asked to consider this question. This error alone entitles Eudora to a new trial **on this one issue**.
>
> * * *
>
> We must reverse, vacate the judgment, and remand for a new trial **for the limited purpose** of determining whether Douglas-4's cooperation to secure **the federal guarantee** was necessary for the purpose of its organization.
>
> * * *
>
> The district court's judgment is REVERSED and the trial verdict VACATED. The matter is REMANDED for further proceedings **solely on the issue of whether Douglas-4's cooperation to secure a Rural Development guarantee was necessary** to carry out the purposes of its organization. **All other**

> **issues on appeal and cross-appeal are AFFIRMED.** Both parties' motion to strike portions of each other's reply briefs are DENIED.

Eudora I, pp. 977, 978, 980 and 987 (App. 69, 70, 75 and 93). (Emphasis added).

On remand to the District Court from *Eudora I* and in *Eudora II* (inconsistent with its position in *Eudora I* that the Bank Loan was *not at issue*), Eudora attempted to re-litigate the necessity of the Bank Loan. Eudora took this position although it failed to file a Fed. R. Civ. P. Rule 50(b) Motion and was precluded from challenging the sufficiency of the evidence concerning the necessity of the Bank Loan in *Eudora I*. *Eudora I*, p. 975. (App. 63-64).

Eudora II functions to reverse the jury's finding that the Bank Loan was necessary, which was affirmed in *Eudora I*, by finding the Bank Loan was not necessary:

> Under this standard, Douglas-4 fails both the "absolutely necessary" and "necessary" inquiries. As to "absolutely necessary," the evidence shows that Douglas-4 could have obtained the KDHE loan for the entire $1.25 million. **Thus, the *USDA-guaranteed private loan* was not absolutely necessary.**"
>
> * * *
>
> As for "necessary", the undisputed evidence shows that the **USDA-guaranteed loan**

> **was not the qualitatively best loan available** – save for § 1926(b) protection.
>
> * * *
>
> Given this evidence, no reasonable jury could find in favor of Douglas-4 on the "necessary" question. Eudora therefore deserves summary judgment.

Eudora II, pp. 1280-1281 (App. 24-25). (Emphasis added).

In doing so, *Eudora II* has re-examined and overturned the jury's finding that the Bank Loan was necessary, (a finding affirmed by *Eudora I*), and failed to limit the scope of review to the necessity of the USDA Guarantee, i.e., *Eudora II* held that the USDA Guarantee was not necessary *because* the Bank Loan was not necessary thereby negating a fact tried by jury and affirmed in *Eudora I*.

Eudora I held that a loan and a guarantee serve separate purposes and must be analyzed independently.

> Generally, a loan functions as a source of funds . . . whereas a guarantee serves to bolster an organization's existing credit. Although each has its own purpose and must be analyzed **independently**, without a loan there is nothing to guarantee.

Eudora I, p. 977 (App. 69). (Emphasis added).

Eudora II (contrary to *Eudora I*) held that the Bank Loan and the Guarantee must be reviewed together:

> . . . we cannot divorce the guarantee's purpose from the loan's purpose.

Eudora II, p. 1280 (App. 22).

Eudora II challenged the Bank Loan as being unnecessary and pursued solely for the purpose of obtaining § 1926(b) protection. *Eudora II* placed great emphasis on the "Schultz memo," which was evidence that weighed against Douglas-4 at trial. However, the Schultz memo (together with all other evidence on this issue of the necessity of the Bank Loan) was fully and fairly considered by the jury. The necessity of the Guarantee analysis must be performed under the mandate of *Eudora I*, namely that the Bank Loan was indeed necessary and not for the sole purpose of obtaining § 1926(b) protection. The scope of the Guarantee analysis must be confined to whether the **necessary** Bank Loan would not have been made without the Guarantee or that the Guarantee served to improve (qualitatively) the **necessary** Bank Loan.

Eudora I held that the Bank Loan coupled with the USDA Guarantee need not be " . . . the only or even the cheapest course of action available". *Eudora I*, p. 980 (App. 75).

Eudora II adopted a *new* qualitative test holding that because the Bank Loan was more expensive, it was not necessary:

> To sustain a finding that the guarantee was necessary, the water district would need to demonstrate that **the guarantee made the loan qualitatively better than other reasonably available loans**.
>
> * * *
>
> . . . **the evidence shows that Douglas-4 could have obtained the KDHE loan for the entire $1.25 million. Thus, the USDA-guaranteed private loan was not absolutely necessary.**
>
> * * *
>
> As for "necessary", the undisputed evidence shows that the **USDA-guaranteed loan was not the qualitatively best loan available** – save for § 1926(b) protection.

Eudora II, pp. 1280-1281 (App. 23-24). (Emphasis added).

These specific arguments that the Bank Loan was not necessary because of the available KDHE Loan were presented by Eudora to the jury. The jury concluded from all the evidence (not limited to the Schultz memo) that the Bank Loan was necessary and not for the sole purpose of obtaining 1926(b) protection. This fact was affirmed in *Eudora I*.

The *Eudora II* decision is in conflict with *Eudora I*, and in conflict with the rules of judicial estoppel and the doctrines which preclude one panel from overturning a previous decision of another panel.

CONCLUSION

For the above and foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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720 F.3d 1269

United States Court of Appeals,
Tenth Circuit.
RURAL WATER DISTRICT NO. 4,
DOUGLAS COUNTY, KANSAS, Plaintiff-Appellant,
v.
CITY OF EUDORA, KANSAS, Defendant-Appellee.

No. 12-3197.
July 1, 2013.

Steven M. Harris, Doyle Harris Davis & Haughey, Tulsa, OK (Michael D. Davis, Doyle Harris Davis & Haughey, Tulsa, OK, and John W. Nitcher, Riling Burkhead & Nitcher, Lawrence, KS, with him on the briefs) for Appellant.

Curtis Tideman (David Frye and Jeffrey R. King with him on the brief), Lathrop & Gage LLP, Overland Park, KS, for Appellee.

Before TYMKOVICH, Circuit Judge, HOLLOWAY, Senior Circuit Judge, and HOLMES, Circuit Judge.

TYMKOVICH, Circuit Judge.

This is the second appeal in a dispute involving Rural Water District No. 4 in Douglas County, Kansas and the City of Eudora, Kansas. The water district, Douglas-4, neighbors Eudora and contends Eudora is trying to poach Douglas-4's customers. Douglas-4 is currently indebted on a USDA-guaranteed loan, so Eudora's actions potentially violate a federal law which prohibits municipalities from poaching rural water districts' customers while

a USDA-guaranteed loan is in repayment. Douglas-4 therefore sued Eudora under 42 U.S.C. § 1983, claiming Eudora violated Douglas-4's federal statutory right to be free from poaching. The case went to trial resulting in a jury verdict and damages for Douglas-4.

On appeal, we vacated the verdict. *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.,* 659 F.3d 969 (10th Cir.2011) (*Eudora I*). The appeal turned on a Kansas statute that prevents rural water districts from obtaining USDA loan guarantees unless those guarantees are "necessary." Absent a showing the loan was necessary, Douglas-4 could not claim the anti-poaching protections granted by federal law. We held the jury was improperly instructed on the meaning of "necessary" and remanded for a new trial.

Soon after our decision, the Kansas legislature amended the relevant Kansas statute and removed the "necessary" requirement. The district court, considering cross-motions for summary judgment on remand, ruled that the amendment does not apply retroactively. The district court also denied summary judgment for both parties. The district court then certified the retroactivity question to us, which we accepted. Douglas-4, however, asks us to reach two additional issues, both of which come down to whether it deserves summary judgment on this record. If we agree to expand the scope of the appeal as Douglas-4 suggests, Eudora asks us to consider

whether it, rather than Douglas-4, deserves summary judgment.

Exercising jurisdiction under 28 U.S.C. § 1292(b), we uphold the district court's conclusion that the amended Kansas statute does not apply retroactively. The "necessary" requirement therefore still binds Douglas-4. We also agree to take up the parties' arguments about the propriety of summary judgment. In that regard, we hold Douglas-4 fails the "necessary" requirement as a matter of law, entitling Eudora to summary judgment.

I. Background

A. The Johnson-6 Project

Douglas-4 is a rural water district organized under Kansas's Rural Water Districts Act. Sometime before 2002, Douglas-4 was running low on water and looking to buy from an adjoining rural water district known as "Johnson-6." But getting water from Johnson-6 would require Douglas-4 to lay new pipes and build a new pumping station. The estimated cost for such improvements was $1.25 million. Douglas-4 received initial approval of a loan for the entire $1.25 million from the Kansas Department of Health and Environment (KDHE) at a 4.08% fixed interest rate for twenty years.

B. The Choice to Pursue a USDA Guarantee

Eudora is a Kansas municipality whose boundaries run up against Douglas-4's service area. In 2002,

Eudora annexed a part of Douglas-4's service area. Douglas-4 saw Eudora's actions as a threat to its customer base.

In May 2003, Douglas-4's administrator, Scott Schultz, wrote a memo to Douglas-4's governing board proposing a new financing arrangement for the Johnson-6 project. Instead of borrowing $1.25 million from the KDHE, Schultz proposed borrowing $1 million from the KDHE and $250,000 through a private loan guaranteed by the USDA's Rural Development agency. Schultz argued the private, USDA-guaranteed loan was advantageous because federal law prohibits municipalities from poaching a rural water district's customer base while a USDA-guaranteed loan remains in repayment:

> The service provided or made available through any [rural water district with a USDA-backed loan] shall not be curtailed or limited by inclusion of the area served by such [district] within the boundaries of any municipal corporation or other public body . . . during the term of such loan. . . .

7 U.S.C. § 1926(b). This restriction helps rural water districts to maintain a revenue stream through which to pay back their loans. *See Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1196 (10th Cir.1999).

Schultz's memo (which he affirmed in deposition and trial testimony) states that the USDA-backed loan would have a higher interest rate than the

already-approved KDHE loan and would cost $5,000 to $10,000 more in closing and professional fees. "Really, the only motivation for this loan," he said, "is the potential for annexation protection." Aple. Addendum at 49. Schultz also told the board, "[W]e are going to proceed with the project regardless of the financing issues – if an obstacle surfaces on getting the [federal loan guarantee], we will simply take the entire loan from KDHE as originally planned." *Id.* at 51.

Based on Schultz's recommendation, the board approved a plan to finance $1 million through the KDHE and $250,000 through a private bank loan with a USDA guarantee. Douglas-4 eventually got both loans and the guarantee. When Eudora nonetheless threatened to poach Douglas-4's customer base in the annexed area, Douglas-4 filed a § 1983 complaint, alleging violation of 7 U.S.C. § 1926(b).

C. The Litigation Before the First Appeal

In prior cases involving rural water districts, we have held that such districts do not enjoy § 1926(b) protection unless state law authorizes the water district to incur federal obligations. *See, e.g., Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694, 717-19 (10th Cir.2004). Much of the litigation between Douglas-4 and Eudora therefore revolved around whether Kansas law permits rural water districts to take out federal loans, or guarantees, or both.

The question at trial, as framed by the district court, was whether the USDA-guaranteed private loan was "necessary" as required by a Kansas statute that gives rural water districts power to "cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative *necessary* to carry out the purposes of its organization." K.S.A. § 82a-619(g) (emphasis added). If the loan was not "necessary to carry out the purposes of its organization," then Douglas-4 would not merit § 1926(b) protection.

Eudora objected, arguing that the necessity of the loan (*i.e.,* to build the Johnson-6 project) was never at issue, just the necessity of the federal guarantee on that loan. The district court overruled the objection, stating that the loan and the guarantee were "one and the same" for purposes of this case.

The district court therefore instructed the jury to consider whether the loan guaranteed by the USDA was necessary, not whether the guarantee itself was necessary. The jury found the loan necessary (presumably to fund the Johnson-6 project) and gave a verdict in favor of Douglas-4.

D. The First Appeal

On appeal, Eudora again argued that the district court erred by not separating the necessity of the loan from the guarantee. We agreed with Eudora on this question, holding that the necessity of the guarantee,

not the loan, was the salient question. *Eudora I,* 659 F.3d at 977.

We also addressed a cross-appeal argument from Douglas-4 regarding K.S.A. § 82a-619(g), the subsection creating the "necessary" requirement. That subsection actually contains two clauses, one containing the "necessary" requirement and another which has no such requirement. At that time, the entire subsection provided as follows:

> Every district incorporated under this act . . . shall have the power to * * * cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the purposes of its organization; *and to accept financial or other aid* which the secretary of the United States department of agriculture is empowered to give pursuant to 16 U.S.C., secs. 590r, 590s, 590x-1, 590x-a and 590x3, and amendments thereto. . . .

K.S.A. § 82a-619(g) (1997 & Supp.2002) (emphasis added). Douglas-4 claimed that the "accept financial or other aid" clause, which contains no "necessary" requirement, gave it authority to obtain a USDA guarantee and its attendant § 1926(b) protection without making a necessity showing.

We rejected that argument because the cross-referenced federal statutes – "16 U.S.C., secs. 590r, 590s, 590x-1, 590x-a and 590x-3" – had been repealed in 1961. Moreover, they had been replaced with what

we characterized as a "radically different statutory scheme" with different numbering, so "amendments thereto" could not plausibly encompass the new federal regime. *Eudora I,* 659 F.3d at 977 n. 5.

After resolving various other issues not relevant here, we remanded "for a new trial for the limited purpose of determining whether Douglas-4's cooperation to secure the federal guarantee was necessary for the purposes of its organization." *Id.* at 980.

E. Developments on Remand

Our discussion in *Eudora I* of § 82a-619(g)'s "accept financial or other aid" clause apparently prompted the Kansas legislature to propose a statutory amendment:

> The supplemental note [to the bill proposing the amendment] indicates that [a representative from the] Kansas Rural Water Association[ ] spoke in favor of the amendment, noting that the federal code had changed and been put into another statute, that "an alert Attorney General caught the change in the federal law," and the amendment "just puts back into place the authority to issue and refinance the bonds."

App. 1305 (quoting http://www.kslegislature.org/li_2012/b2011_12/committees/resources/ctte_h_engy_utls_1_20120208_min.pdf). Subsection (g) was therefore amended, effective July 1, 2012, as follows (strikeouts indicate deletions; underscoring indicates insertions):

> Every district incorporated under this act . . . shall have the power to * * * cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the purposes of its organization; and to accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to ~~16 U.S.C.A., secs. 590r, 590s, 590x-1, 590x-a and 590x -3, and amendments thereto~~ *7 U.S.C. § 1921 et seq., as in effect on the effective date of this act*. . . .

The citation to "§ 1921 et seq." includes § 1926(b). *See* Consolidated Farmers Home Administration Act, Pub.L. No. 87-128, Tit. III, § 306(b), 75 Stat. 307, 308 (1961).

At the time of the amendment, the district court had been considering new cross-motions for summary judgment on the "necessary" question. Douglas-4 then raised the possibility that the amended version of § 82a-619(g)'s "accept financial or other aid" clause might moot the "necessary" question and give Douglas-4 the power, as a matter of law, to enter into the loan guarantee.

The district court rejected Douglas-4's argument, holding that the amendment does not apply retroactively to this dispute. The district court nonetheless certified to us this question: "whether the recent amendment to K.S.A. § 82a-619(g) is retroactive and, if so, whether Douglas-4 was empowered to accept

financial or other aid from the USDA in the form of a guarantee, without the requirement of necessity." App. 1312. We agreed to hear the appeal.

II. Analysis

A. Retroactivity of 2012 Amendment to K.S.A. § 82a-619(g)

As we explained in *Eudora I,* a rural water district may only obtain § 1926(b) protection if state law authorizes it to do so. This requirement accommodates federalism concerns. If a rural water district could obtain § 1926(b) protection without state authorization, it might unduly upset the states' interests in maintaining control of quintessentially local activities such as land development and zoning – both of which almost always involve questions of water supply. No matter what the state or its municipalities deem best for the advancement of the community, a rural water district with § 1926(b) protection may effectively veto any plan that would diminish its customer base. Thus, we require states to authorize their rural water districts to seek § 1926(b) protection (with whatever conditions the state may impose) so that the state itself maintains ultimate control over the circumstances in which a water district may call down federal protection and potentially frustrate future zoning, development, or annexation plans. *See Eudora I,* 659 F.3d at 976.

As previously noted, the Kansas statute under which Douglas-4 claims its authority is § 82a-619(g),

which we will refer to as "subsection (g)" for simplicity. As also noted, subsection (g) has two clauses. At the time this dispute arose (and at the time we issued *Eudora I*), the first clause gave Douglas-4 power to "cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the purposes of its organization," and the second clause granted Douglas-4 power "to accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to 16 U.S.C.A., secs. 590r, 590s, 590x-1, 590x-a and 590x-3, and amendments thereto." K.S.A. § 82a-619(g) (1997 & Supp.2002).

Before the first appeal, Eudora primarily argued that Douglas-4 did not satisfy the "necessary" condition imposed by the first clause and therefore deserved no § 1926(b) protection. Douglas-4 disputed that, but also argued in the alternative that the second clause gave it authority to obtain the USDA guarantee with no need to prove necessity. The district court rejected this argument and we affirmed that decision in *Eudora I*.

The Kansas legislature has now amended the second clause, striking out the cross-reference to the repealed federal statutes and replacing it with a cross-reference to "7 U.S.C. § 1921 et seq., as in effect on the effective date of this act." The "et seq." brings § 1926(b) within the second clause's ambit, thus suggesting that water districts may seek § 1926(b) protection without making any showing of necessity.

If so, and if the amendment applies retroactively, this case's focus on necessity becomes moot.

Whether the amendment to subsection (g) applies retroactively is a matter of Kansas law. We review a district court's interpretation of state law de novo. *Salve Regina Coll. v. Russell,* 499 U.S. 225, 239, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). As the district court did, we must look to Kansas courts' retroactivity principles for resolving this question. *Burleson v. Saffle,* 278 F.3d 1136, 1140 (10th Cir.2002) ("whether or not a new rule of state law may be applied retroactively is a pure state law question").

In Kansas, "[t]he fundamental rule is that a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively." *State v. Williams,* 291 Kan. 554, 244 P.3d 667, 670 (2010) (citation omitted). The amended version of subsection (g) does not "clearly indicate[ ]" that it should operate retroactively.

But there is an exception to the "clearly indicates" rule, namely: "if the statutory change [1] does not prejudicially affect the substantive rights of the parties and [2] is merely procedural or remedial in nature, it applies retroactively." *Williams,* 244 P.3d at 670. A law affects "substantive rights" if it "establish[es] the rights and duties of parties." *State of Kansas/State of Iowa ex rel. Sec'y of Soc. & Rehab. Servs. v. Bohrer,* 286 Kan. 898, 189 P.3d 1157, 1162 (2008). By contrast, a law is "merely procedural" if it "deal[s] with the manner and order of conducting

suits – in other words, the mode of proceeding to enforce legal rights." *Denning v. Johnson Cnty., Sheriff's Civil Serv. Bd.,* 46 Kan.App.2d 688, 266 P.3d 557, 572 (2011).

Under these principles, the amendment to subsection (g) is a substantive amendment. Before the amendment, a municipality could annex a rural water district's territory and take the district's customers despite a USDA-backed loan if the municipality was willing to prove that the loan was not necessary to the district's purposes. In other words, Eudora had a right to take Douglas-4's customers if Douglas-4's USDA-backed loans were unnecessary. Retroactively applying subsection (g), as amended, would strip Eudora of that right. That is not simply an amendment to "the manner and order of conducting suits." *Denning,* 266 P.3d at 572. Thus, it appears to be a substantive amendment.

Douglas-4 counters that the amendment was remedial or clarifying. No party has directed us to a Kansas state-law definition of "remedial" in this context. Douglas-4 apparently believes it means "to remedy a mistake or ambiguity in the text," which is really another way of saying "clarifying." Douglas-4 further believes the Kansas legislature simply clarified that "16 U.S.C.A., secs. 590r, 590s, 590x-1, 590x-a and 590x-3, and amendments thereto" was always meant to refer to "7 U.S.C. § 1921 et seq."

The legislative history cited by the district court admittedly provides some loose support for this idea.

See App. 1305 (noting the Kansas legislative report stating that the amendment "just puts back into place the authority to issue and refinance the bonds"). The Kansas Supreme Court, however, has never endorsed a "clarifying" exception to the rule against retroactivity. The first instance we can locate of a clarifying exception in Kansas law is a Kansas Court of Appeals decision from 2004 which explored the possibility of a clarifying exception solely through citations to federal cases. *In re Hunt,* 32 Kan.App.2d 344, 82 P.3d 861, 871 (2004). Among other examples, the Kansas court cited one of our cases interpreting Oklahoma law for the proposition that "a clarifying amendment that explained an ambiguous statute to more clearly express legislative intent would be given retroactive application if it did not impair vested rights." *Id.*

Ultimately, the Kansas Court of Appeals in *Hunt* did not explicitly adopt a clarifying exception, but instead concluded that the amendments at issue "constitute[d] a clear statement not only that legislators wanted the amendments to be seen as clarifying but that they intended them to be applied retroactively." *Id.* at 872. Of course, if the legislature made a clear statement of intent to apply the amendments retroactively, then there is no need for a clarifying exception – because the exceptions apply only when the legislature has made no "clear statement."

Nonetheless, subsequent Kansas Court of Appeals decisions have read *Hunt* as establishing a

clarifying exception. *See, e.g., State v. Montgomery,* 34 Kan.App.2d 511, 120 P.3d 1151, 1154 (2005). The Kansas Supreme Court also noted in passing that *Hunt* discusses a clarifying exception but it did not endorse (or impugn) the analysis. *Brennan v. Kan. Ins. Guar. Ass'n,* 293 Kan. 446, 264 P.3d 102, 112-13 (2011).

Even assuming a clarifying exception exists, we can confidently predict that the Kansas courts would apply it only if the clarification "did not impair vested rights," as *Hunt* suggested. 82 P.3d at 871. This is evident from how the Kansas-endorsed exception analysis is phrased: "if the statutory change [1] does not prejudicially affect the substantive rights of the parties *and* [2] is merely procedural or remedial in nature, it applies retroactively." *Williams,* 244 P.3d at 670 (emphasis added). Assuming we insert "or clarifying" after "merely procedural or remedial," we are still left with a conjunctive test. Thus, even if clarifying, an amendment may not apply retroactively if it would "prejudicially affect the substantive rights of the parties."

Here, as already noted, retroactively applying the subsection (g) amendment would strip Eudora of its only defense to this lawsuit. Accordingly, we agree with the district court that subsection (g), as amended, is "substantive" and not retroactive. Douglas-4 therefore remains constrained by the requirement

that the USDA guarantee be "necessary to carry out the purposes of its organization."[1]

B. Propriety of Summary Judgment

1. Whether We May Consider Douglas-4's Proposed Summary Judgment Issues

In the same order in which the district court certified the retroactivity question, it also refused to grant summary judgment for either side. Having ruled that Douglas-4 must satisfy the "necessary" requirement regardless of the amendment, the district court went on to evaluate the parties' claims in that regard and concluded that genuine issues of material fact precluded summary judgment.

The district court did not certify that question to us – *i.e.,* whether a genuine material factual dispute precludes summary judgment. It only certified whether retroactive application of the amended subsection (g) has any effect on the current dispute. Douglas-4's opening brief nonetheless attempts to expand the issues on appeal to include:

> 1. Is the issue of whether the Bank Loan was "necessary" barred by the law of the case, and/or beyond the scope of the remand?

---

[1] The district court alternatively held that even if the amended subsection (g) applies retroactively, it would not relieve Douglas-4 from satisfying the "necessary" requirement. Given our conclusion that amended subsection (g) does not apply retroactively, we need not reach this alternative reasoning.

> 2. Did the District Court commit error by denying Douglas-4's summary judgment motion because the undisputed evidence discloses that the Guarantee was necessary ("absolutely necessary" as defined by this Court in [*Eudora I*]) to obtain the Bank Loan?

Aplt. Br. at 2.

Whether we may take up Douglas-4's proposed extra issues depends on the statute giving us jurisdiction here, 28 U.S.C. § 1292. In pertinent part, it reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order. . . .

28 U.S.C. § 1292(b). Facing an issue similar to ours (an interlocutory appeal ranging beyond the district court's certified question), the Supreme Court expounded on § 1292(b) and concluded that courts of appeal are not limited to the certified question:

> As the text of § 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court. The court of appeals may not reach beyond the certified order to address other orders made in the case. But the appellate court may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court.

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (internal quotation marks and citations omitted; emphasis in original); *see also Pelt v. Utah,* 539 F.3d 1271, 1283 n. 6 (10th Cir.2008) (applying *Yamaha Motor* to reach an "issue [that] was 'fairly included' in the [certified] order," even though the certified question did not encompass that issue); 16 Charles Alan Wright et al., Fed. Prac. & Proc. § 3929 (2d ed., April 2013 update) ("The court may . . . consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court.").

Although the Supreme Court did not emphasize it, presumably an additional requirement (drawn from § 1292(b)'s text) also applies, *i.e.,* that the issue must comprise "a controlling question of law." Thus, if an issue is "fairly included within the certified order" and is "a controlling question of law," then we

have discretion to take it up on appeal. Here, the summary judgment denial was a part of the district court's retroactivity order.

Having reviewed the parties' positions at summary judgment, we believe that no re-trial is necessary. In the interest of judicial economy, we therefore exercise our discretion to address Douglas-4's proposed additional issues. We condense and reformulate those issues into the following inquiry: Did the district court err in determining that a genuine issue of material fact precluded summary judgment? We review that question de novo. *Borchardt Rifle Corp. v. Cook,* 684 F.3d 1037, 1041-42 (10th Cir.2012).

2. "Necessary" Generally

As already noted at length, this case turns on whether Douglas-4's USDA guarantee was "necessary to carry out the purposes of its organization." K.S.A. § 82a-619(g). In *Eudora I,* we discussed what sorts of needs would suffice to show that Douglas-4's USDA guarantee is "necessary."

First, in general terms, we distinguished the need for a loan from the need for a guarantee:

> Generally, a loan functions as a source of funds, whereas a guarantee serves to bolster an organization's existing credit.
>
> Although each has its own purpose and must be analyzed independently, without a loan there is nothing to guarantee. Thus, for a

> guarantee to be necessary the underlying loan must also be necessary. The converse, however, is not always true: not every loan gives rise to a guarantee. Therefore, even if the parties would agree that the loan was necessary to carry out the purposes of Douglas-4's organization, Douglas-4 must still prove that its *cooperation with the USDA* – i.e., the guarantee – was also necessary.

659 F.3d at 977-78 (emphasis in original; citations omitted).

> Second, we concluded that
>
> Douglas-4's decision to seek out a federal guarantee must . . . be justified by more than the incidental monopoly protections afforded by § 1926(b); the guarantee must further at least one of the District's purposes as a rural water service provider as provided in its charter, bylaws, or enacting statutes. Protection from competition does not suffice. Nor can Douglas-4 justify its cooperation by appealing to the abstract goals of maintaining its corporate existence, profits, or integrity without some direct association to an enumerated purpose under its charter, bylaws, or relevant statutes.

Id. at 980.

3. Douglas-4's "Absolutely Necessary" Theory

The foregoing restrictions on the meaning of "necessary" present a problem for Douglas-4. Douglas-4's administrator, Scott Schultz, told Douglas-4's board members that the USDA-backed loan would have a higher interest rate than the already-approved KDHE loan and would cost $5,000 to $10,000 more in closing and professional fees. "Really, the only motivation for this loan," he said, "is the potential for annexation protection." Aple. Addendum at 49. This seems to run afoul of our requirement that "Douglas-4's decision to seek out a federal guarantee must . . . be justified by more than the incidental monopoly protections afforded by § 1926(b)." *Eudora I,* 659 F.3d at 980.

But Douglas-4 sees something of a lifeline in subsequent language from *Eudora I,* where we clarified that necessity does not imply absolute need: "This does not mean that Douglas-4's cooperation with the USDA must be 'absolutely necessary,' i.e., that it could not receive financing without the guarantee. Nor must Douglas-4 prove that a guarantee was the only or even the cheapest course of action available." *Id.* Douglas-4 therefore argues as follows in support of summary judgment in its favor:

First, according to *Eudora I,* a water district need not prove "absolute necessity" – but it stands to reason that it is a home run for the water district if it *can* prove "absolute necessity." Second, according to

Eudora I, the "necessary" requirement is an inquiry directed at the guarantee, not the loan – and no party disputes that Douglas-4 needed a loan to borrow money to build the Johnson-6 project. Third, Douglas-4 submitted uncontradicted testimony from a bank officer that the bank would never have made the $250,000 loan but for the USDA guarantee. Therefore, according to Douglas-4, the USDA guarantee was "absolutely necessary" to obtaining the loan.

The problem with Douglas-4's argument is that it would obviate the "necessary" inquiry because no water district with a USDA guarantee could ever fail this test. Before the USDA will agree to guarantee a loan, the lender must certify that it "would not make the loan without [the] guarantee." 7 C.F.R. § 1779.63(a)(13). Under Douglas-4's theory, then, every USDA-guaranteed loan is "absolutely necessary." We cannot accept a construction that makes all USDA guarantees "absolutely necessary" as a matter of Kansas law.

4. Applying the Appropriate Standard

Douglas-4 also erroneously interprets our distinction in *Eudora I* between the loan and the guarantee. Although no party disputes that the Johnson-6 project was necessary in a larger sense, nor that *some* loan was necessary to build the Johnson-6 project, we cannot divorce the guarantee's purpose from the loan's purpose. If Douglas-4 could not have received *any* loan for the Johnson-6 project without

the guarantee, or could not have borrowed the needed amount without it, then the guarantee would be absolutely necessary because the loan depends on the guarantee, the project depends on the loan, and Douglas-4's continuing viability depends on the project. We presume that would satisfy § 1926(b).

But if the guarantee was not absolutely necessary in this sense, the guarantee must have a "direct association to an enumerated purpose under its charter, bylaws, or relevant statutes." *Eudora I,* 659 F.3d at 980. A "direct association" means the guarantee would further at least one of the water district's enumerated purposes even if the guarantee did not provide § 1926(b) protection.

If a direct association exists, the final question is whether the USDA guarantee is ultimately "necessary." To sustain a finding that the guarantee was necessary, the water district would need to demonstrate that the guarantee made the loan qualitatively better than other reasonably available loans. The guaranteed loan need not present literally "the cheapest course of action available." *Eudora I,* 659 F.3d at 980. But interest rates, closing fees, professional fees, and so forth are highly probative of the quality of the loan as compared to other loans, as are less quantifiable terms (*e.g.,* collateral requirements, the length of the repayment period, and so forth). The water district's own views, if any, on the quality of various loans in comparison to each other would certainly be relevant.

Under this standard, Douglas-4 fails both the "absolutely necessary" and "necessary" inquiries. As to "absolutely necessary," the evidence shows that Douglas-4 could have obtained the KDHE loan for the entire $1.25 million. Thus, the USDA-guaranteed private loan was not absolutely necessary.

As to "necessary," Douglas-4 fails both the direct association element and the necessary inquiry itself. Douglas-4 offers numerous arguably direct associations, such as "prevent[ing] the city from cherry picking Douglas-4's customers which would result in higher rates and charges to remaining customers" and "prevent[ing] the city from annexing areas causing Douglas-4 to have one or more dead-end lines serving customers, requiring more flushing, and more wasted water." Aplt. Br. at 47, 53 (capitalization normalized). But all of these outcomes depend on § 1926(b) protection, not on the guarantee. They do not stand independent of § 1926(b). Accordingly, they are not direct associations.

As for "necessary," the undisputed evidence shows that the USDA-guaranteed loan was not the qualitatively best loan available – save for § 1926(b) protection. Indeed, § 1926(b) protection was the sole reason Schultz recommended obtaining a USDA-guaranteed loan. Schultz further acknowledged that it would be cheaper to finance the entire project through a KDHE loan.

Given this evidence, no reasonable jury could find in favor of Douglas-4 on the "necessary" question. Eudora therefore deserves summary judgment.

III. Conclusion

We AFFIRM the district court's conclusion that the 2012 amendment to K.S.A. § 82a-619(g) does not apply retroactively. We also AFFIRM the district court's denial of summary judgment to Douglas-4 but REVERSE the district court's denial of summary judgment to Eudora.

On remand, the district court should enter summary judgment in Eudora's favor on the question of whether Douglas-4's USDA guarantee was "necessary to carry out the purposes of its organization" and otherwise proceed in a manner consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS Petitioner v. CITY OF EUDORA, KANSAS, Respondent.	No. 12-604 (D.C. No. 2:07-CV-02463-JAR)

ORDER

(Filed Jul. 25, 2012)

Before **MURPHY**, **GORSUCH**, and **HOLMES**, Circuit Judges.

This matter is before the court on petition by Rural Water District No. 4, Douglas County, Kansas (Douglas-4), for permission to appeal pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5. Douglas-4 seeks to appeal the June 19, 2012 order of the United States District Court for the District of Kansas, Case No. 07-2463-JAR. The City of Eudora, Kansas did not file a response.

Upon careful consideration of the pleadings, as well as the applicable law, the petition for permission to appeal is granted. Douglas-4 is granted permission to appeal the district court's June 19, 2012 order.

Within 14 days of the date of this order, Douglas-4 shall pay to the district court all required fees. Fed. R. App. P. 5(d)(1)(a). After the fees have been paid and the district court clerk has complied with Federal Rule of Appellate Procedure 5(d)(3), a new appeal with a new case number will be docketed. A notice of appeal need not be filed. The date of this order serves as the date of the notice of appeal for calculating time under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Briefing will proceed in accordance with Federal Rule of Appellate Procedure 31.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

/s/ Jane K. Castro

by: Jane K. Castro
Counsel to the Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS	)	
Plaintiff,	)	**Case No. 07-2463-JAR**
vs.	)	
CITY OF EUDORA, KANSAS,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Rural Water District No. 4, Douglas County, Kansas ("Douglas-4" or "the District") brought this suit against the City of Eudora, Kansas ("the City" or "Eudora"), under 42 U.S.C. § 1983, alleging the City violated Douglas-4's exclusive right to provide water service to current and prospective customers in violation of 7 U.S.C. § 1926(b). By order of the Tenth Circuit filed September 26, 2011, this case was remanded for further proceedings solely on the issue of whether Douglas-4's cooperation to secure a federal guarantee was necessary to carry out the purposes of the organization. This matter is before the Court on the parties' cross-motions for summary judgment (Docs. 461, 468).[1] The Court heard oral argument on

[1] Eudora also moves to strike Douglas-4's Reply Memorandum (Doc. 476) on the grounds that it improperly seeks to introduce new arguments and material for the first time on reply;

(Continued on following page)

February 16, 2012, at which time it took the matter under advisement. Douglas-4 supplemented its submissions (Doc. 482), citing a recent amendment to the controlling statute, K.S.A. § 82a-619(g), and Eudora responded. After reviewing the parties' arguments and submissions, the Court is prepared to rule. For the reasons explained in detail below, the Court denies both parties' motions, and certifies for interlocutory appeal under 28 U.S.C. § 1292(b) the question of whether the recent amendment to § 82-619(g) [sic] is retroactive and thus effectively eliminates the "necessity" issue from the case.

I. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law."[2] In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[3] "There is no genuine issue of material fact unless the evidence, construed in the light most favorable to the nonmoving party, is such that a

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Douglas-4 responds that its arguments were properly raised on reply (Doc. 479). Given the broad leeway given counsel at oral argument, coupled with the new issues raised in supplemental briefing, the Court denies Eudora's motion.

[2] Fed. R. Civ. P. 56(a).

[3] *City of Herriman v. Bell,* 590 F.3d 1176, 1181 (10th Cir. 2010).

reasonable jury could return a verdict for the non-moving party."[4] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[5] An issue of fact is "genuine" if "'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'"[6]

The moving party initially must show the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[7] In attempting to meet this standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[8]

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth

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[4] *Bones v. Honeywell Int'l, Inc.,* 366 F.3d 869, 875 (10th Cir. 2004).

[5] *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.,* 259 F.3d 1226, 1231-32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 670 (10th Cir. 1998)).

[6] *Thomas v. Metro. Life Ins. Co.,* 631 F.3d 1153, 1160 (10th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

[7] *Spaulding v. United Transp. Union,* 279 F.3d 901, 904 (10th Cir. 2002) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)).

[8] *Adams v. Am. Guar. & Liab. Ins. Co.,* 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler,* 144 F.3d at 671); *see also Kannady v. City of Kiowa,* 590 F.3d 1161, 1169 (10th Cir. 2010).

specific facts showing that there is a genuine issue for trial."[9] The nonmoving party may not simply rest upon its pleadings to satisfy its burden.[10] Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."[11] To accomplish this, the facts "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[12] Rule 56(c)(4) provides that opposing affidavits must be made on personal knowledge and shall set forth such facts as would be admissible in evidence.[13] The non-moving party cannot avoid summary judgment by repeating conclusory opinions, allegations unsupported by specific facts, or speculation.[14]" "Where, as here, the parties file cross-motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless

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[9] *Anderson,* 477 U.S. at 256; *Celotex,* 477 U.S. at 324; *Spaulding,* 279 F.3d at 904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)).

[10] *Anderson,* 477 U.S. at 256; *accord Eck v. Parke, Davis & Co.,* 256 F.3d 1013, 1017 (10th Cir. 2001).

[11] *Mitchell v. City of Moore, Okla.,* 218 F.3d 1190, 1197-98 (10th Cir. 2000) (quoting *Adler,* 144 F.3d at 671); *see Kannady,* 590 F.3d at 1169.

[12] *Adams,* 233 F.3d at 1246.

[13] Fed. R. Civ. P. 56(c)(4).

[14] *Id.*; *Argo v. Blue Cross & Blue Shield of Kan., Inc.,* 452 F.3d 1193, 1199 (10th Cir. 2006) (citation omitted).

inappropriate if disputes remain as to material facts."[15]

Finally, summary judgment is not a "disfavored procedural shortcut"; on the contrary, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[16] In responding to a motion for summary judgment, "a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial."

II. Uncontroverted Facts and Procedural History

Douglas-4 is a quasi-municipal corporation organized pursuant to K.S.A. § 82a-616(a), for the primary purpose of providing water service to the residents within its geographical boundaries ("Douglas-4's Territory"). Its purpose under Kansas law is to provide water to "promote the public health, convenience and welfare" of the community.[17] Eudora owns and operates water treatment and distribution facilities located in Douglas County, Kansas.

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[15] *James Barlow Family Ltd. P'ship v. David M. Munson, Inc.,* 132 F.3d 1316, 1319 (10th Cir. 1997) (citation omitted).

[16] *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

[17] K.S.A. § 82a-614.

Douglas-4 needed to borrow funds for the construction of water facilities to enable it to purchase water from Johnson County Consolidated Rural Water District No. 6 (the "Johnson-6 Project"). The Johnson-6 Project was projected to cost $1.25 million, most of which Douglas-4 was required to borrow because it lacked sufficient cash reserves.

In May 2003, Scott Schultz, District Administrator for Douglas-4, prepared a Memorandum for Douglas-4's Board of Directors discussing financing options for the Johnson-6 Project.[18] By way of background, Schultz stated that the Board had previously approved the Johnson-6 Project, "with financing of $1.25 million from the KDHE [Kansas Department of Health and Environment] revolving loan fund at a fixed interest rate of 4.08% over 20 years." Because KDHE loans do not provide water districts with any protection against annexation by cities, however, Schultz proposed that Douglas-4 obtain part of the $1.25 [sic] loan from a private bank guaranteed by Rural Development. Schultz recommended the Board "carve off the pump station part of our project" that could be financed with a $250,000 private loan and the remaining $1 million loan from KDHE as planned. Schultz explained that "[t]he point of this loan would be to gain negotiating leverage," and "[t]he only reason I can think of that anyone would do a guaranteed loan from Rural Development is for annexation

[18] Doc. 462, Ex. E.

protection." Although the cost of splitting the financing this way would exceed the amount needed for the KDHE loan by $5000 to $10,000, Schultz stated that the total would be less since the term of the private loan would be ten years rather than twenty. Schultz concluded by explaining that "I want you to know that we are going to proceed with the project regardless of the financing issues – if an obstacle surfaces on getting the Rural Development guaranteed loan, we will simply take the entire loan from KDHE as originally planned." Finally, Schultz stated, "[i]f it costs you a little more in fees and interest rates, but saves hundreds of thousands of dollars down the road by allowing us to negotiate on an even par with the cities, it will pay off handsomely."

Douglas-4 borrowed the $250,000 necessary for the Johnson-6 Project from a private lender, First State Bank & Trust located in Tonganoxie, Kansas ("the Bank"). In order to obtain the $250,000 loan from the Bank ("the Bank Loan"), Douglas-4 cooperated with the Bank and the United States Department of Agriculture ("USDA") to obtain a USDA guarantee for the benefit of the Bank. The USDA provided the Bank a Conditional Commitment for Guarantee on September 17, 2003, in advance of the disbursement of any loan proceeds.[19] The Conditional Commitment required the Bank, among other things, to close on the Bank Loan, disburse funds and for

[19] Doc. 469, Exs. 9, 10.

the Johnson-6 Project to be substantially completed before the Loan Guarantee was executed.[20]

A six-month promissory loan was executed by Douglas-4 in favor of the Bank on September 11, 2003, for the actual construction of the pump station. The note was extended by agreement to June 15, 2004, and thereafter, the twenty-year Bank Loan was made on that date, and the Loan Note Guarantee was provided on August 26, 2004.[21] On July 23, 2003, Ken Pierce, Senior Vice President of the Bank, signed a Lender's Credit Evaluation that stated

> The lender has review [sic] the audited financial statements of the District and the financial feasibility analysis. The lender is comfortable in making the loan with a Rural Development Guarantee. Without this guarantee the lender would not be able to make a loan to the District. The lender has prepared their own internal review and would not make a loan without the guarantee.[22]

Pierce also executed a Lender's Certification that states, "Lender would not make the loan without an Agency Guarantee."[23] Pierce avers that

> An essential and necessary requirement of [the Bank Loan] . . . was that [the Bank

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[20] *Id.*

[21] Doc. 469, Ex. 12.

[22] Doc. 469, Ex. 24 at 2.

[23] *Id.* Ex. 8 at 3.

> Loan] be guaranteed by the United States Department of Agriculture – Rural Development. Without such a guarantee, [the Bank Loan] would not have been made. . . . As a necessary part of securing the said Loan Note Guarantee, [the Bank] was required to certify to [the USDA] that [the Bank] would not make the loan to Douglas-4 without the above described Loan Note Guarantee. . . . In point of fact, [the Bank] would not make the loan to Douglas-4 without the above-described Loan Note Guarantee.[24]

Douglas-4 utilized the proceeds from the Bank Loan to construct a pump station and a related portion of the soft costs that was an integral part of the Johnson-6 Project.

In his declaration submitted in support of Douglas-4's Motion for Summary Judgment, Pierce further avers that the Bank Loan carried a fixed interest rate of 6.020% per annum for the first ten years and 7.520% per annum for the second ten years. He avers that the USDA guarantee allowed the Bank to provide interest rates and a term of loan more favorable to Douglas-4 than typical commercial loan rates and terms. Specifically, the interest rate was lower, the rate was fixed over two ten-year periods, and the term was longer than the Bank's typical commercial loan terms at the time, than if the Bank Loan were not supported by such a guarantee.

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[24] *Id.* Ex. 11.

Underlying Litigation

Eudora annexed four areas or tracts of land within the Douglas-4 Territory (the "Annexed Land"). At the time Douglas-4 was originally created in 1973, the Annexed Land was included within Douglas-4's geographical boundaries as established by Kansas state law. At the time Douglas-4 obtained its Bank Loan and the Guarantee from the USDA, Douglas-4 pledged as collateral various assets, including, but not limited to, all its general intangibles and net revenues. The Annexed Land has never been removed or de-annexed from the geographical boundaries of Douglas-4.

Douglas-4 filed its first amended complaint on April 24, 2008, alleging three causes of action: a violation of 42 U.S.C. § 1983, declaratory judgment regarding Douglas-4's rights under 7 U.S.C. § 1926(b), and injunctive relief barring the City from selling water in the affected area. Specifically, Douglas-4 asserted that due to the federally guaranteed Bank Loan, it was entitled to § 1926(b) protection precluding Eudora from providing water service to the Annexed Land. Eudora filed counterclaims for tortious interference with business advantage, fraud, abuse of process and declaratory relief.

After granting in part and denying in part the parties' cross-motions for summary judgment, and granting in part Douglas-4's motion to reconsider, the case proceeded to jury trial. At the conclusion of a ten-day trial, the case was submitted to the jury by

way of special interrogatories. The jury found that Douglas-4 had obtained § 1926(b) protection and Eudora had violated § 1926(b) in each of the disputed areas. According to the verdict form, the jury first answered "yes" to the general question of whether Douglas-4 had the power under Kansas law to cooperate with and enter into agreements with the federal government. The jury then determined for each affected property that Douglas-4 made water service available and that Eudora had limited or curtailed Douglas-4's water service. The jury also entered for each property the amount of damages, determining that $23,500.00 in damages arose from the Garber property and $1.00 in nominal damages arose from each of the three other properties. This Court then enjoined Eudora from serving or limiting Douglas-4's service to these areas. Eudora's appeal and Douglas-4's cross-appeal followed.

Tenth Circuit Decision/Scope of Remand

Eudora appealed the jury verdict and the injunction and, in pertinent part, challenged Instruction No. 17, the "Necessary Instruction," on the basis that the instruction limited the "necessary" element to the Bank Loan and did not instruct the jury that the USDA Guarantee itself was also required to be necessary. The Tenth Circuit reversed the jury verdict because the jury instructions incorrectly framed the necessity issue and remanded the case for a new trial "for the limited purpose of determining whether Douglas-4's cooperation to secure the

federal guarantee was necessary for the purposes of its organization."[25]

The court began its analysis with a review of the history and purpose of 7 U.S.C. § 1926(b), noting that for a water district indebted by a qualifying loan to the federal government,

> [t]he 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 by other public body, or by the granting of any private franchise for similar service within such area during the term of the loan.[26]

"To receive this protection, a water district must have both a continuing indebtedness to the USDA and have provided or made available service to the disputed area."[27]

Turning to the first element of § 1926(b), Douglas-4's qualifying indebtedness, the court determined that the federal guarantee of Douglas-4's private loan may be considered an indebtedness for purposes of meeting the requirements of § 1926(b).[28] In addition,

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[25] *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.,* 659 F.3d 969, 980 (10th Cir. 2011).

[26] *Id.* at 975 (quoting 7 U.S.C. § 1926(b)).

[27] *Id.* at 976 (citing *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694, 713 (10th Cir. 2004)).

[28] *Id.*

"a water district's qualifying action (i.e. assumption of the qualifying loan or guarantee) must also fall within its enumerated powers under state law."[29] The court held that K.S.A. § 82a-619, the statute that enumerates a water district's powers, is the only statute under which Douglas-4 may claim authority to accept a federal loan guarantee,[30] and "[t]hus, Douglas-4 must have either cooperated or entered into an agreement with the USDA, and this cooperation or agreement must be necessary to carry out the purposes of its organization."[31] The court then held

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[29] *Id.*

[30] *Id.* at 977. Specifically, a water district may "cooperate with and enter into agreements with the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the purposes of its organization." K.S.A. § 82a-619(g).

[31] *Id.* Douglas-4's Enumerated Purposes as set forth in its charter and bylaws include:

> a) To acquire water and water rights and to build and acquire pipelines and other facilities, and to operate the same for the purpose of furnishing water for domestic, garden, livestock and other purposes to owners and occupants of land located within the District, and others as authorized by these Bylaws.
>
> b) To borrow money from any Federal or State agency, or from any other source, and to secure said loan by mortgaging or pledging all of the physical assets and revenue and income of the District, including easements and rights-of-way.
>
> c) To hold such real and personal property as may come into its possession . . . as may be necessary and convenient for the proper conduct and operation of the business of the District.

(Continued on following page)

that although the Guarantee was between the USDA and the Bank, Douglas-4's interaction with the USDA in seeking the Guarantee and its benefits "may qualify as 'cooperation' under K.S.A. § 82a-619(g), but the cooperation must be necessary to carry out a purpose of Douglas-4's organization. And in this case, if Douglas-4's cooperation is to be necessary, the guarantee itself must too be necessary."[32] The court further noted that under Kansas law, "any reasonable doubt as to the existence of a water district's power must be resolved against its existence."[33]

In a footnote, the court rejected Douglas-4's claim that it was also empowered under the second clause of § 82a-619(g) to "accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to 16

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d) To establish rates and impose charges for water furnished to participating members and others.

e) To enter into contracts for the purpose of accomplishing the purposes of the District with any person or governmental agency.

f) To cooperate with any person or with any governmental agency in any undertaking designed to further the purposes of the District.

g) To do and perform any and all acts necessary or desirable for the accomplishment of the purposes of the District, which may lawfully be done by such District under the laws of the State of Kansas.

Doc. 469, Ex. 3.

[32] *Id.*

[33] *Id.* at 979-80.

U.S.C.A., secs. 590r, 590s, 590x-1, 590x-a and 590x-3, and amendments thereto," and that this authority does not require that the aid be "necessary" in any form.[34] The court reasoned,

> However, this clause only applies to financial aid provided under the specific federal statutes listed "and amendments thereto." the enumerated statutes, first enacted in 1937, were repealed by the Consolidated Farmers Home Administration Act of 1961 and are of no use to Douglas-4. Nor do we consider Congress's repeal of § 590r *et seq.* and replacement with a radically different statutory scheme in § 1926 an amendment to the repealed sections. *Compare* 7 U.S.C. § 1926(b) (providing annexation protection for qualifying loans), *with* 16 U.S.C. § 590x-3 (no protection from annexation).[35]

At the end of the trial, however, this Court concluded that the loan and the guarantee were "one and the same," and directed the jury to determine whether "the loan guaranteed by [the] Federal Government was necessary."[36] The Tenth Circuit found this instruction to be in error, explaining,

> By allowing the jury to consider the loan as a trigger for Douglas-4's indebtedness, the district court shifted the focus of the jury's

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[34] *Id.* at 977, n.5.

[35] *Id.*

[36] *Id.*

> inquiry away from the actual subject matter of the cooperation, i.e., the guarantee. Yet while the loan and the guarantee are certainly related, they are not one and the same. . . . Although each has its own purpose and must be analyzed independently, without a loan there is nothing to guarantee. Thus, for a guarantee to be necessary the underlying loan must also be necessary. The converse, however, is not always true: not every loan gives rise to a guarantee. Therefore, even if the parties would agree that the loan was necessary to carry out the purposes of Douglas-4's organization, Douglas-4 must still prove that its *cooperation with the USDA* – i.e., the guarantee – was also necessary. The jury was not asked to consider this question. This error alone entitles Eudora to a new trial on this one issue.[37]

The court next turned to the question of what constitutes a "necessary" cooperation or agreement under Kansas law, offering this guidance:

> Douglas-4's decision to seek out a federal guarantee must therefore be justified by more than the incidental monopoly protections afforded by § 1926(b); the guarantee must further at least one of the District's purposes as a rural water service provider as provided in its charter, bylaws, or enacting statutes. Protection from competition does

[37] *Id.* at 977-78 (emphasis in original).

> not suffice. Nor can Douglas-4 justify its cooperation by appealing to the abstract goals of maintaining its corporate existence, profits, or integrity without some direct association to an enumerated purpose under its charter, bylaws, or relevant statutes. . . . This does not mean that Douglas-4's cooperation with the USDA must be "absolutely necessary," i.e., that it could not receive *financing* without the guarantee. Nor must Douglas-4 prove that a guarantee was the only or even the cheapest course of action available. Additionally, nothing within § 82a-619, or any other section governing water districts, prohibits a water district from benefitting from the protections of § 1926(b) so long as its triggering cooperation or acceptance of aid furthered a purpose of the organization.[38]

The court then concluded, "because the jury instructions incorrectly framed the necessity issue, we must reverse, vacate the judgment, and remand for a new trial for the limited purpose of determining whether Douglas-4's cooperation to secure the federal guarantee was necessary for the purposes of its organization."[39]

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[38] *Id.* at 980 (emphasis added).

[39] *Id.* The court noted that because this Court utilized a special verdict, it is appropriate for this Court to limit retrial only to the issue of necessity. *Id.* at n.7 (citations omitted).

III. Discussion

A. Amendment to K.S.A. § 82a-619(g)

Douglas-4 asserts that the Kansas Legislature recently amended § 82a-619(g) by deleting the language relating to the old repealed federal financial aid statutes and replaced it with a specific reference to 7 U.S.C. § 1921 *et seq.* Specifically, the amended § 82a-619(g) states that every water district incorporated under the act shall have the power to:

> cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the purposes of its organization; and to accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to 7 U.S.C. § 1921, *et seq.,* as in effect on the effective day of this act . . .[40]

Douglas-4 argues that § 82a-619(g) contains two separate and distinct provisions: the first requiring non-financial cooperation and agreements to be necessary for purposes of a rural water district's organization, and the second to empower a district to obtain federal financial aid, without the need of necessity. Douglas-4 contends that the change to the second clause is remedial because it was meant to clarify the

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[40] 2012 Kan. Laws Ch. 29 (H.B. No. 2588) (effective July 1, 2012).

error pointed out by the Tenth Circuit in footnote 5, and should be given retroactive effect; because it was empowered "to accept financial or other aid" from the USDA in the form of the guarantee, the "necessary" issue has effectively been eliminated from this case.

In resolving this issue, it is well settled that this Court must attempt to ascertain and apply state law, which in this case is the law of Kansas.[41] The Court must look to the rulings of the state's highest court and, where no controlling state decision exists, the Court must endeavor to predict how the state's highest court would rule.[42] The Court should consider analogous decisions by the state supreme court, decisions of lower courts in the state, decisions of federal and other state courts, and the general weight and trend of authority.[43] Ultimately, the Court's task is to predict what decision the Kansas Supreme Court would make if faced with the same facts and issue.[44] In this case, while the law in Kansas is clear on the determination of whether a statute is retroactive, Kansas courts have not yet determined whether the amendment at issue has such application.

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[41] *Wade v. EMCASCO Ins. Co.,* 483 F.3d 657, 665 (10th Cir. 2007).

[42] *Id.*

[43] *MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc.,* 463 F.3d 1257, 1262 (10th Cir. 2006).

[44] *Oliveros v. Mitchell,* 449 F.3d 1091, 1093 (10th Cir. 2006).

The Court finds that the Kansas Supreme Court would find Douglas-4's arguments are without merit. First, it is not clear that the 2012 amendment to § 82a-619(g) applies retroactively. "In determining whether a statute applies retroactively or prospectively, the general rule is that a statute operates only prospectively unless its language clearly indicates that the legislature intended it to operate retroactively."[45] "However, notwithstanding such clear language, when an amendment to an existing statute or a new statute is enacted which prejudices a party's substantive rights, it will not apply retroactively."[46] A statute that creates a new right or duty that did not previously exist affects a substantive right.[47] Procedural laws deal with "'the manner and order of conducting suits – in other words, the mode of proceeding to enforce legal rights.'"[48] "Substantive laws establish the 'rights and duties of parties.'"[49]

Douglas-4 asks the Court for retroactive application of House Bill 2588. The supplemental note on H.B. 2588 indicates that Douglas Mays of Kansas

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[45] *State of Kansas/State of Iowa ex rel. Sec'y of Soc. and Rehab. Servs. v. Bohrer,* 189 P.3d 1157, 1162 (Kan. 2008) (citing *Owen Lumber Co. v. Chartrand,* 73 P.3d 753, 755 (Kan. 2003)).

[46] *Id.* (citing *Owen Lumber,* 73 P.3d at 755; *Halley v. Barnabe,* 24 P.3d 140, 144 (Kan. 2001)).

[47] *Bohrer,* 189 P.3d at 1162.

[48] *Denning v. Johnson Cnty., Sheriff's Civil Serv. Bd.,* 266 P.3d 557, 572 (Kan. Ct. App. 2011) (citing *Rios v. Bd. of Public Util. of Kansas City,* 883 P.2d 1177, 1182 (Kan. 1994)).

[49] *Id.*

Rural Water Association, spoke in favor of the amendment, noting that the federal code had changed and been put into another statute, that "an alert Attorney General caught the change in the federal law," and the amendment "just puts back into place the authority to issue and refinance the bonds."[50] Although Douglas-4 argues that this shows the amendment is merely remedial and corrects the error pointed out by the Tenth Circuit, that court noted that the statutory scheme of § 1926(b) is "radically different" than what it had been under the repealed statutes referenced in the second clause, and would not be considered an amendment to the repealed sections.[51] While the legislative history indicates that the amendment was to correct an oversight, i.e., to replace the repealed statutes with the current statutes, it does not follow that the legislature was clarifying that it intended for the past 51 years that a rural water district could obtain financial or other aid without the need of demonstrating necessity. Thus, the retroactive application of the amendment proposed by Douglas-4 would effectively legitimize action it took in 2003 and 2004 without any statutory authority. Accordingly, the Court finds that the amendment to § 82a-619(g) is substantive, as it empowers Douglas-4 to accept financial or other aid that the USDA is empowered to give under § 1921, *et seq.,* a right that it did not have in 2003 and 2004.

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[50] Supp. Note on H.B. 2588, http://www.kslegislature.org

[51] *Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.,* 659 F.3d 969, 977, n.5 (10th Cir. 2011).

Moreover, even if given retroactive effect, the Court disagrees that the issue of necessity of the Guarantee is no longer an issue. Douglas-4 makes the conclusory statement that federal loan guarantees are "financial or other aid" under the second clause, instead of "cooperation" with the USDA under the first clause, as the Tenth Circuit determined. Indeed, the Circuit specifically found "there is only one clause under which Douglas-4 was authorized to accept a federal loan guarantee," the first clause, as the interaction between Douglas-4 and the USDA qualified as "cooperation," and accordingly, must be necessary to carry out a purpose of Douglas-4's organization.[52] For this Court to now determine that the federal Guarantee is transformed into "financial or other aid" that does not require necessity would render the first half of the statute a nullity and ignore the scope of the Tenth Circuit's remand. Thus, the Court turns to the issue before it on remand: whether Douglas-4's cooperation to secure a Rural Development guarantee was necessary to carry out the purposes of its organization under § 83-619(g).

B. Necessity of the Federal Guarantee

Eudora contends that it is entitled to summary judgment on all claims because Douglas-4 lacks any evidence to show that its federal loan guarantee was "necessary to carry out the purposes of its

[52] *Id.* at 977.

organization. . . ." According to the Tenth Circuit, to pass the necessary test, Douglas-4 must prove that "the guarantee must further at least one of Douglas-4's purposes as a rural water service provider as provided in its charter, bylaws or enacting statutes. Protection from competition does not suffice. . . ."[53] Eudora argues that the uncontroverted statements of Douglas-4's Administrator Scott Schultz prove that it did not obtain the loan guarantee to further one of those purposes. Instead, as Schultz states in his memo to the Board, "[t]he only reason I can think of that anyone would do a guaranteed loan from Rural Development is for annexation protection." The Tenth Circuit held, however, that "Douglas-4's decision to seek out a federal guarantee must therefore be justified by more than the incidental monopoly protections afforded by § 1926(b). . . ."[54] Because the uncontroverted evidence shows that Douglas-4 obtained the guarantee only for monopoly protection, which is not necessary to its purposes under Kansas law, Eudora argues it merits summary judgment. Moreover, any attempt by Douglas-4 to tie the loan Guarantee to its Enumerated Purposes fails because the abstract benefits from "annexation protection" are the same thing as § 1926(b) monopoly protection, and as such were rejected by the Tenth Circuit.

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[53] *Id.* at 980.

[54] *Id.*

Douglas-4 counters that because the Bank Loan was necessary to Douglas-4's purposes, and the Guarantee was required to obtain the Bank Loan, it follows that the Guarantee itself is necessary to Douglas-4's purposes. Douglas-4 further asserts that the language of the conditional guarantee agreement shows that the federal Guarantee was absolutely necessary to obtain the Loan. Alternatively, Douglas-4 contends that obtaining the Federal Guarantee was necessary for at least one of its Enumerated Purposes as there was some direct association to the following purposes: to obtain necessary financing for water facilities needed to provide water to residents within the Douglas-4 Territory; to construct and maintain water facilities and to provide water services to all residents within the Territory by a) ensuring that Douglas-4 will have sufficient customers to repay the money borrowed without having to charge customers excessive rates, b) preventing Eudora from cherry picking Douglas-4's customers that would result in higher rates and charges to remaining customers, c) preventing Eudora from taking Douglas-4 facilities needed to serve residents within its Territory, d) protecting Douglas-4's power of eminent domain necessary to provide water service, e) preventing the situation where Eudora annexes an area leaving single or multiple residents stranded, with no ability to obtain water, f) preventing Eudora from annexing areas causing Douglas-4 to have one or more dead-end lines serving customers, requiring more flushing and more wasted water, g) enabling Douglas-4 to maintain a looped system in order to provide sufficient and

continued service to the residents within the Territory, and h) provide economy of scale to Douglas-4 allowing it to serve isolated residents at reasonable costs.

The Court views both parties' arguments as extremes on the spectrum outlined in the Tenth Circuit's opinion: according to Douglas-4, all USDA guarantees are inherently absolutely necessary; and according to Eudora, all of Douglas-4's Enumerated Purposes are abstract goals that stem from § 1926(b) protection. Either interpretation, however, would render the necessity requirement under § 82a-619(g) a nullity. The Tenth Circuit defines "absolutely necessary" as rendering Douglas-4 unable to "receive financing without the guarantee."[55] In other words, Douglas-4 could not obtain *any* loan without the Guarantee, instead of this specific loan. Further, by giving water districts the opportunity to offer evidence of a direct association to an enumerated purpose beyond "the abstract goals of maintaining its corporate existence, profits or integrity," the Tenth Circuit did not foreclose the possibility that such justification for the federal guarantee existed. However, the Tenth Circuit did not elaborate on what a water district could show to demonstrate that a guarantee specifically was necessary beyond monopoly protection.

Moreover, the Court rejects Eudora's argument that Douglas-4 did not need the federal Guarantee to

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[55] 659 F.3d at 980.

obtain the Bank Loan, as indicated by Schultz's memo to the Board. In fact, the Tenth Circuit's statement that Douglas-4's cooperation with the USDA does not need to be absolutely necessary, nor even the cheapest course of action available, neutralizes Eudora's evidence that Douglas-4 could have gotten more favorable terms without the Guarantee by taking the entire loan from the KDHE. And, although the Court does not agree with Douglas-4 that the law of the case dictates a finding that the Bank Loan was necessary, it does find that the Bank Loan was not a sham loan that Douglas-4 did not need for operational purposes, but rather, was money invested into its operational purposes.

Thus, the Court turns to the issue presented on remand – whether Douglas-4's cooperation to secure the federal Guarantee was necessary for purposes of its organization. At oral argument, the Court posed this hypothetical to both parties: what would a water district have to show beyond monopoly protection to satisfy the requirement that a guarantee was necessary for the purposes of its organization? After initially arguing that it could not think of any, counsel for Eudora suggested that one example would be if the guaranteed loan had some benefit that the other existing loan did not, such as a beneficial term or no collateral requirement. Douglas-4 argues that it needed long-term financing and could not have obtained the twenty-year Bank Loan without the federal Guarantee. Although it did obtain a 180-day bridge loan, the Bank agreed to a twenty-year term

at a fixed interest rate. As Ken Pierce avers, the federal Guarantee allowed the Bank to provide interest rates and a loan term that were more favorable to Douglas-4 than typical commercial loan rates and terms during 2003-2004.[56] Douglas-4 argues that this is a benefit it would not have received but for the federal Guarantee, and is directly tied to its Enumerated Purposes of borrowing money and spending it on infrastructure to provide services. While the favorable term differences are between loans offered by the Bank, not between the KDHE loan and the Bank Loan, the Tenth Circuit noted that Douglas-4 need not prove the guarantee was the cheapest course of action available. Thus, it is apparent to the Court that disputes remain as to material facts relative to whether the federal Guarantee was necessary, precluding summary judgment for either party.[57]

C. Certification for Interlocutory Appeal

28 U.S.C. § 1292 provides for appeals from interlocutory decisions by a federal district court under limited circumstances. Subsection (b) of § 1292 states:

> When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law

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[56] Doc. 469, Ex. 11, Declaration of Kenneth Pierce.

[57] The Court defers ruling on the content and substance of the "necessary instruction" until trial.

> as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if the application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of appeals or a judge thereof shall so order.[58]

There is a strong policy opposing piecemeal litigation and the delay and disruption associated with it.[59] Under § 1292(b), that policy may be overcome where an immediate appeal would materially advance the ultimate termination of the litigation.[60] In the Court's view, an appeal at this point on the issue of retroactivity of the amendment to § 82a-619(g) would accomplish that result.[61] First, the Court's

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[58] 28 U.S.C. § 1292(b).

[59] *See e.g., Conrad v. Phone Directories Co., Inc.,* 585 F.3d 1376, 1382 (10th Cir. 2009) ("there is a long-established policy preference in the federal courts disfavoring piecemeal appeals.").

[60] *Coffeyville Res. Refining & Mkting. LLC v. Liberty Surplus Ins. Corp.,* 748 F. Supp. 2d 1261, 1268 (D. Kan. 2010).

[61] *See United States v. Stanley,* 483 U.S. 669, 673 (1987) (noting district court has the authority under § 1292(b) to certify its orders sua sponte).

ruling that the amendment is not retroactive presents a question of law that would constitute reversible error if found, on appeal, to be erroneous, and thus meet the requirement that a "controlling issue of law" be involved. Second, while the Court is confident that its analysis of the retroactivity issue is correct, it is aware that the parties submitted extensive briefing in support of their respective submissions. While the Court denied Douglas-4's motion for summary judgment on this ground, it presented colorable arguments based on an alternative construction of the rules regarding retroactivity of statutes and based on the notion that the amendment was remedial and in response to the Tenth Circuit's opinion in this case. Thus, the Court's decision could be deemed erroneous by the Court of Appeals and "there is a substantial ground for difference of opinion" within the meaning of § 1292(b).

Finally, the Court finds that an immediate appeal would "materially advance the ultimate termination of the litigation." Denial of the parties' cross-motions for summary judgment means this case is headed for trial. Should the Tenth Circuit reverse this Court's denial of summary judgment on the retroactivity issue, this trial will be unnecessary.

In sum, the Court concludes that an interlocutory appeal is appropriate in this case and satisfies the requirements of 28 U.S.C. § 1292(b). The Court certifies the following questions: whether the recent amendment to K.S.A. § 82a-619(g) is retroactive and, if so, whether Douglas-4 was empowered to accept

financial or other aid from the USDA in the form of a guarantee, without the requirement of necessity. The Court further orders that these proceedings be stayed until resolution of an interlocutory appeal, should Douglas-4 determine an application is appropriate. If Douglas-4 opts not to file an application for interlocutory appeal of this issue, the Court will schedule a status conference to determine pretrial issues and to set a date for trial.

IT IS THEREFORE ORDERED BY THE COURT that the parties' respective Motions for Summary Judgment (Docs. 461, 468) are DENIED; Eudora's Motion to Strike (Doc. 476) is also DENIED.

IT IS FURTHER ORDERED that the following questions are certified for interlocutory appeal: whether the recent amendment to K.S.A. § 82a-619(g) is retroactive and, if so, whether Douglas-4 was empowered to accept financial or other aid from the USDA in the form of a guarantee, without the requirement of necessity.

IT IS SO ORDERED.

Dated: June 19, 2012

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES
DISTRICT JUDGE

659 F.3d 969

United States Court of Appeals,
Tenth Circuit.
RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS, Plaintiff-Appellee/Cross-Appellant,
v.
CITY OF EUDORA, KANSAS, Defendant-Appellant/Cross-Appellee.

Nos. 09-3282, 09-3299.
Sept. 26, 2011.

Curtis Tideman (David Frye and Jeffrey R. King with him on the briefs), of Lathrop & Gage LLP, Overland Park, KS, for Defendant-Appellant/Cross-Appellee.

Steven M. Harris of Doyle Harris Davis & Haughey, Tulsa, OK, (Michael D. Davis of Doyle Harris Davis & Haughey; John W. Nitcher of Riling Burkhead & Nitcher, Lawrence, KS, with him on the briefs) for Plaintiff-Appellee/Cross-Appellant.

Before TYMKOVICH, McKAY, and GORSUCH, Circuit Judges.

McKAY, Circuit Judge.

This appeal arises out of a dispute between a city and a rural water district over their rights to serve customers in several recently annexed areas of Douglas County, Kansas. Rural Water District No. 4 ("Douglas-4" or "the District") brought this suit against the city of Eudora under 42 U.S.C. § 1983,

alleging the City violated Douglas-4's exclusive right to provide water service to current and prospective customers in violation of 7 U.S.C. § 1926(b). On appeal, this court is asked to resolve a host of federal and state legal issues concerning the competitive relationship between a dueling water district and local municipality. Finding jurisdiction under 28 U.S.C. § 1291, we affirm in part and reverse in part.

BACKGROUND

The parties are well aware of the facts, which we will not repeat in detail. In basic form, Douglas-4 was created to provide water service to areas of Douglas County, Kansas. Its purpose under Kansas law is to provide water to "promote the public health, convenience and welfare" of the community. *See* K.S.A. § 82a-614. Under its own bylaws, Douglas-4 was developed, inter alia, to "acquire water and water rights and to build and acquire pipelines and other facilities, and to operate the same for the purpose of furnishing water for domestic, garden, livestock and other purposes to owners and occupants of land located within the District, and others as authorized by these By-Laws." (Appellant's Add. at 7.) To further its purpose, it is also authorized to borrow money, secure loans, and enter into contracts or cooperate with any person or governmental agency. (*Id.* at 7-8.)

Beginning in 2000, Douglas-4 developed and then enacted a plan to increase its service area and effectiveness by purchasing water from a nearby water

district to meet increasing demand from existing and prospective customers, but it needed to borrow $1.25 million to finance construction of new infrastructure in order to exploit its new water source. It first secured a loan for the full amount from the Kansas Department of Health and Environment ("KDHE"), but upon a recommendation by the District's administrator, it decided to obtain part of its financing from a private bank backed by a federal guarantee from the U.S. Department of Agriculture ("USDA"). Ultimately, Douglas-4 decided to separate its debt into two loans: the first $1 million from the KDHE and the remaining $250,000 from First State Bank & Trust, a private bank. First State in turn entered into a guarantee agreement with Rural Development, a lending branch of the USDA. Douglas-4 does not deny that it pursued the guaranteed loan specifically for the added benefit of § 1926(b) protection, despite the additional costs to the District in the form of higher closing fees and interest rates.

In 2006, the city of Eudora, which also provides water service within its boundaries, annexed several areas around the southern edge of its city limits: Fairfield Addition (also known as the "Garber Property"), Meadow Lark Property, Grinnell Property, and Kurtz Addition. From May to September 2007, both Douglas-4 and Eudora repeatedly contacted the Fairfield Addition's owner, Doug Garber, to discuss his water needs. After the City's annexation, Douglas-4 notified Mr. Garber it possessed the exclusive right to provide water service to his property. It also

exchanged correspondence with Mr. Garber regarding cost estimates and a timeline to begin water service. For its part, Eudora informed Mr. Garber it knew he intended to obtain water from Douglas-4 but it was still willing to work with him to provide water service. Eudora also informed Mr. Garber that it might de-annex his property should he refuse its water service.

Leading up to and during this same period, the parties communicated extensively with each other. From 2004 to mid-2007, Douglas-4 and Eudora engaged in a series of discussions regarding changes to both parties' territories as a result of the City's annexations. The parties held what would ultimately result in failed negotiations for a repurchase plan, to ensure that Douglas-4 could remain financially viable as Eudora annexed portions of Douglas-4's service area and began serving water to Douglas-4's customers.

Once the Garber property was annexed and Douglas-4 began speaking to Mr. Garber about water service, Douglas-4 notified Eudora that attempts by the City to provide water to the Garber property would violate the District's right to protection under § 1926(b). However, Eudora sought to continue where the failed negotiations ended. It notified Douglas-4 that, unless Douglas-4 submitted to an appraisal to sell its assets to Eudora by the end of September, the City would file suit to compel the District's compliance. Rather than accept the City's demands, Douglas-4 filed a complaint with the district court.

During the course of litigation, the district court issued several critical orders in which it denied both parties' motions for summary judgment, denied Eudora's motions in limine to exclude certain communications by City officials regarding attempts to provide water service to the affected areas, and rejected proposed jury instructions submitted by both parties. At the conclusion of a ten-day trial, the case was submitted to the jury by way of special interrogatories. The jury found that Douglas-4 had obtained § 1926(b) protection and Eudora had violated § 1926(b) in each of the disputed areas.[1] The district court then enjoined Eudora from serving or limiting Douglas-4's service to these areas. Eudora's appeal and Douglas-4's cross-appeal followed.

DISCUSSION

"Where a jury instruction is legally erroneous, we must reverse if the jury might have based its verdict on the erroneously given instruction." *City of Wichita,*

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[1] According to the verdict form, the jury first answered "yes" to the general question of whether Douglas-4 had the power under Kansas law to cooperate with and enter into agreements with the federal government. It then determined for each affected property that Douglas-4 made water service available and that Eudora had limited or curtailed Douglas-4's water service. The jury also entered for each property the amount of damages. Specifically, the jury determined that $23,500.00 in damages arose from the Garber property and $1.00 in nominal damages arose from each of the three other properties. (*See* Appellant's App. at 1666-1669.)

Kan. v. U.S. Gypsum Co., 72 F.3d 1491, 1495 (10th Cir.1996). We therefore review de novo whether the district court's jury instructions correctly stated the governing law. *See United States v. Platte,* 401 F.3d 1176, 1183 (10th Cir.2005); *Cann v. Ford Motor Co.,* 658 F.2d 54, 58 (2d Cir.1981) ("We will reverse a judgment entered upon answers to questions . . . which inaccurately frame the issues to be resolved by the jury."). We review evidentiary rulings for abuse of discretion and will not reverse unless the challenging party shows that the ruling was "based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *Phillips v. Hillcrest Med. Ctr.,* 244 F.3d 790, 799 (10th Cir.2001).

In addition to appealing the district court's legal conclusions, jury instructions, and admissions of evidence, Eudora challenges the sufficiency of the evidence at each step of the § 1926(b) analysis. It was required to renew these challenges at the close of all the evidence in a motion for judgment as a matter of law under Rule 50(a) and again after the entry of judgment as a renewed motion under Rule 50(b).[2]

[2] Eudora claims the district court never entered a final judgment, and thus the time to file a 50(b) motion has yet to expire. Even if the district court did not enter a final judgment, we may nevertheless invoke jurisdiction under 28 U.S.C. § 1291. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386-88, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978); *Burlington N. R.R. Co. v. Huddleston,* 94 F.3d 1413, 1416 n. 3 (10th Cir.1996) ("Because the district court's order granted Plaintiff its requested relief and

(Continued on following page)

Having failed to file a Rule 50(b) motion, Eudora has waived any challenges on appeal to the sufficiency of the evidence, *see Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,* 546 U.S. 394, 404, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006), including challenges to any decisions at summary judgment where the facts were in dispute, *see Haberman v. Hartford Ins. Gr.,* 443 F.3d 1257, 1264 (10th Cir.2006). However, it may still challenge the district court's decisions pertaining to issues of law, *see Wilson v. Union Pac. R.R.,* 56 F.3d 1226, 1229 (10th Cir.1995), jury instructions, *see Kelley v. City of Albuquerque,* 542 F.3d 802, 818-20 (10th Cir.2008), and the admission of evidence, *see* Fed.R.Evid. 103(a).

This court has thoroughly reviewed the history and purpose of 7 U.S.C. § 1926(b) in several recent opinions, and we need not repeat it again here. *See, e.g., Rural Water Sewer & Solid Waste Mgmt. v. City of Guthrie,* 654 F.3d 1058 (10th Cir.2011); *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694 (10th Cir.2004); *Rural Water Dist. No. 1 v. City of Wilson, Kan.,* 243 F.3d 1263 (10th Cir.2001); *Sequoyah Cnty. Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192 (10th Cir.1999); *Glenpool Util. Servs. Auth. v. Creek Cnty. Rural Water Dist. No. 2,* 861 F.2d 1211 (10th Cir.1988). For a water district

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effectively terminated the action, we may properly exercise appellate jurisdiction over this appeal under § 1291."). However, given the absence of a 50(b) motion, Eudora is still unable to challenge the sufficiency of the evidence.

indebted by a qualifying loan to the federal government,

> [t]he 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.

7 U.S.C. § 1926(b). To receive this protection, a water district must have both a continuing indebtedness to the USDA[3] and have provided or made available service to the disputed area. *See Pittsburg Cnty.,* 358 F.3d at 713. "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the [USDA]-indebted party seeking protection for its territory."[4] *Sequoyah Cnty.,* 191 F.3d at 1197. If the water district

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[3] The USDA has operated the loan and guarantee program since 1994. *See Pittsburg Cnty.,* 358 F.3d at 701 n. 1; United States Dept. Of Agriculture, Rural Development Loan Assistance, www.rurdev.usda.gov/RD_Loans.html (last visited Aug. 15, 2011).

[4] This presumption does not mean, as Douglas-4 claims, that all doubts and evidentiary uncertainties must be resolved in favor of the indebted water district or that the City must meet a "clear and convincing" standard on every issue for which it carries the burden of proof. Rather, we simply note that "[e]very federal court to have interpreted § 1926(b) has concluded that *the statute* should be liberally interpreted." *Sequoyah Cnty.,* 191 F.3d at 1197 (emphasis added).

is entitled to protection, it then must prove that its services were curtailed or limited by the competing entity. *See Pittsburg Cnty.,* 358 F.3d at 716.

We now turn to the first element of § 1926(b): Douglas-4's qualifying indebtedness.

A. Douglas-4's cooperation to secure a USDA loan guarantee may qualify it as an indebted association under § 1926(b), but only if its cooperation was necessary to carry out its organizational purpose.

1. Federal and State Law empower Douglas-4 to cooperate for and accept the benefits of a federal guarantee.

To obtain protection, a water district must first show it has a qualifying, continued indebtedness to the federal government, as the water district is protected only "during the term of such loan." 7 U.S.C. § 1926(b). Under Section 1926(a), "such loans" include loans the government makes or insures, *see id.* § 1926(a)(1), and loans the government guarantees, *see id.* § 1926(a)(24). Therefore, under § 1926(b), the federal guarantee of Douglas-4's private loan may be considered one "such loan" for purposes of meeting the requirements of § 1926(b).

In addition to meeting the requirements set forth in § 1926(b), a water district's qualifying action (i.e. assumption of the qualifying loan or guarantee) must also fall within its enumerated powers under state law. As a quasi-municipal corporation, *see Dedeke v.*

Rural Water Dist. No. 5, 229 Kan. 242, 623 P.2d 1324, 1331 (1981), a rural water district possesses only those powers given to it by law or as may necessarily be implied to give effect to powers specifically granted, *see Wiggins v. Hous. Auth. of Kansas City,* 22 Kan.App.2d 367, 916 P.2d 718, 720 (1996); *Hous. Auth. of Kaw Tribe of Indians of Okla. v. City of Ponca City,* 952 F.2d 1183, 1192 (10th Cir.1991) ("Since political subdivisions are creatures of the state, they possess no rights independent of those expressly provided to them by the state."). Indeed, "any reasonable doubt as to the existence of a particular power must be resolved against its existence." *Wiggins,* 916 P.2d at 721. The state, by limiting a rural water district's powers, is "ultimately free to reject both the conditions and the funding [of federal loans], no matter how hard that choice may be." *Pittsburg Cnty.,* 358 F.3d at 718.

Turning then to K. S.A. § 82a-619, the statute that enumerates a rural water district's powers, there is only one clause under which Douglas-4 may claim authority to accept a federal loan guarantee. Specifically, Douglas-4 may "cooperate with and enter into agreements with the secretary of the United States department of agriculture or the secretary's duly authorized representative necessary to carry out the

purposes of its organization."[5] K.S.A. § 82a-619(g). Thus, Douglas-4 must have either cooperated or entered into an agreement with the USDA, and this cooperation or agreement must be necessary to carry out the purposes of its organization.

Here, although the guarantee agreement was between the USDA and First State Bank, Douglas-4 was the entity that sought the guarantee and hoped to benefit from it. Rural Development, a funding component of the USDA, provided Douglas-4 with a "Conditional Commitment for Guarantee," which outlined the terms and conditions of the guarantee, and Douglas-4 then signed and returned the Commitment documents to Rural Development. This interaction between Douglas-4 and the USDA may qualify as "cooperation" under K.S.A. § 82a-619(g), but the cooperation must be necessary to carry out a

[5] Douglas-4 claims it is also empowered to "accept financial or other aid which the secretary of the United States department of agriculture is empowered to give pursuant to 16 U.S.C.A., secs. 590r, 590s, 590x-1, 590x-a and 590x-3, and amendments thereto," and that this authority does not require that the aid be "necessary" in any form. *See* K.S.A. § 82a-619(g). However, this clause only applies to financial aid provided under the specific federal statutes listed "and amendments thereto." The enumerated statutes, first enacted in 1937, were repealed by the Consolidated Farmers Home Administration Act of 1961 and are of no use to Douglas-4. Nor do we consider Congress's repeal of § 590r *et seq*. and replacement with a radically different statutory scheme in § 1926 an amendment to the repealed sections. *Compare* 7 U.S.C. § 1926(b) (providing annexation protection for qualifying loans), *with* 16 U.S.C. § 590x-3 (no protection from annexation).

purpose of Douglas-4's organization. And in this case, if Douglas-4's cooperation is to be necessary, the guarantee itself must too be necessary.

The district court determined that, in its view, "the guarantee [was] just a piece of" the loan and was not something for which Douglas-4 contracted. (Appellant's App. at 3417). It therefore considered the guarantee and the loan to be "one and the same." (*Id.* at 3402.) Based on this conclusion, it directed the jury at the close of trial to determine whether "the *loan* guaranteed by [the] Federal Government was necessary." (*Id.* at 1648 (emphasis added).)

By allowing the jury to consider the loan as a trigger for Douglas-4's indebtedness, the district court shifted the focus of the jury's inquiry away from the actual subject matter of the cooperation, i.e., the guarantee. Yet while the loan and the guarantee are certainly related, they are not one and the same. A loan may be pursued either with or without a guarantee. Each may be contracted for with or without government assistance. Each has its own unique purpose. Generally, a loan functions as a source of funds, *see* USDA Rural Development, Water and Waste Disposal Direct Loans and Grants, www.rurdev.usda.gov/UWP-dispdirectloansgrants.htm (last visited Aug. 15, 2011), whereas a guarantee serves to bolster an organization's existing credit, *see* USDA Rural Development, Water and Waste Disposal Guaranteed Loans, www.rurdev.usda.gov/UWP-dispguaranteedloan.htm (last visited Aug. 15, 2011).

Although each has its own purpose and must be analyzed independently, without a loan there is nothing to guarantee. Thus, for a guarantee to be necessary the underlying loan must also be necessary. The converse, however, is not always true: not every loan gives rise to a guarantee. Therefore, even if the parties would agree that the loan was necessary to carry out the purposes of Douglas-4's organization, Douglas-4 must still prove that its *cooperation with the USDA* – i.e., the guarantee – was also necessary. The jury was not asked to consider this question. This error alone entitles Eudora to a new trial on this one issue.

2. Douglas-4's cooperation must relate to one of its purposes for the cooperation to be necessary.

Douglas-4 and Eudora also disagree over what exactly constitutes a "necessary" cooperation or agreement under Kansas law, with both parties challenging the district court's jury instruction on the matter. Instruction No. 17 first stated that the guaranteed loan must be:

> necessary for: (1) an operational purpose identified under Kansas law and Douglas-4's bylaws; (2) a business purpose identified under Kansas law and Douglas-4's bylaws; or (3) protecting Douglas-4 from impairment of its ability to fulfill an operational or business purposes [sic] identified under Kansas law and Douglas-4's bylaws.

> The term "necessary" does not mean there must be showing of absolute need.

(Appellant's App. at 1648.) The instruction then listed for the jury Douglas-4's purposes under Kansas law and its own bylaws. Last, the instruction informed the jury:

> Douglas-4 did not have the power under Kansas law to cooperate with and enter into agreements with the Federal Government for the sole purpose of securing federal protection under 7 U.S.C. § 1926(b). If obtaining federal protection under 7 U.S.C. § 1926(b) was Douglas-4's only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora.

(*Id.* at 1649.)

Douglas-4 argues that the Kansas legislature left the determination of necessity to the discretion of the acting water district, and that the burden of proof is upon the party challenging the water district's exercise of discretion to establish that the district's decision was the result of fraud, bad faith, or abuse of discretion. *See, e.g., Steele v. Mo. Pac. R.R. Co.,* 232 Kan. 855, 659 P.2d 217, 222 (1983) (applying a "reasonable discretion" standard to determine the necessity of a railroad's exercise of eminent domain). Eudora in turn argues that Kansas's statutory scheme does not permit Douglas-4 to claim that monopoly protection – or the strength of its business that would result from such protection – is necessary

to its organization. Nor, it claims, does any statute grant Douglas-4 reasonable discretion or a presumption to determine for itself whether a loan or guarantee is necessary.

The legislature did not further define in K.S.A. § 82a-619 the meaning of "necessary to carry out the purposes of [a water district's] organization." However, parallel language exists, at least in part, across Chapter 82a. Other than two similar occurrences within § 619(e) and § 619(h), the only identically worded limitation in Chapter 82a is found in § 606, which authorizes rural water supply districts to "construct, install, maintain and operate such dams, wells and other works and such appurtenant structures and equipment as may be necessary to carry out the purposes of its organization."[6] But while the Kansas legislature limited rural water and water supply districts' exercise of some powers to those actions necessary to the purposes of their organizations, it expressly granted discretionary power in other circumstances. *See* K.S.A. § 82a-610 (authorizing a water supply district board to levy maintenance fees of "such amount as in its judgment is necessary to properly maintain and operate such works"); *id.* § 82a-644 (authorizing water district boards to change the bylaws of consolidated districts "as the directors shall deem necessary"); *id.* § 82a-1028 (authorizing groundwater management districts to

[6] The same language can also be found outside of Section 82a in K.S.A. § 19-3531 and § 80-1618.

buy and sell water and property rights that, "in the opinion of the board, [are] deemed necessary or convenient"). Other sections employ different language that may at first appear restrictive, but would likely result in a similar grant of discretion. *See, e.g., id.* § 82a-618 (directing rural water district boards to adopt rules and regulations "as are deemed necessary for the conduct of the business of the district"). Yet, other sections grant express discretionary authority to the state rather than to the district. *See, e.g., id.* § 82a-1022 (authorizing the chief engineer of Kansas's Division of Water Resources to "make any necessary modifications" to a proposed water district map "so that, in the opinion of the chief engineer, a manageable area will result").

Douglas-4 asks this court to view the question of necessity with the same level of deference given under Kansas law to decisions made by public utilities, for, as Douglas-4 points out, "[i]n law and in fact, a rural water district exercises the powers of a public utility." *Dedeke,* 623 P.2d at 1331. If the deference given to utilities broadly applied to all water-district actions, then presumably Douglas-4 could simply assert any reasonable excuse to justify taking out the private loan. *Cf. Schuck v. Rural Tel. Serv. Co.,* 286 Kan. 19, 180 P.3d 571, 576-78 (2008) (holding that utility company's exercise of eminent domain was "necessary to [its] lawful corporate purpose" where it unintentionally installed a cable outside of a preexisting easement and then asserted after the fact that

placing the cable along the easement would have caused a service interruption).

However, the cases under which the Kansas Supreme Court has favorably compared a water district's powers to those of a public utility appear limited to the realm of eminent domain. Nor is it clear the reasoning underlying a favorable comparison between public utilities and water districts is even applicable to a case where a water district seeks some form of federal aid to protect it from market competition. For example, in *General Communications System, Inc. v. State Corp. Commission,* 216 Kan. 410, 532 P.2d 1341, 1348 (1975), the Kansas Supreme Court held that, for the issuance of public utility certificates, "necessity does not necessarily mean there must be a showing of absolute need," but rather that "the word 'necessity' means a public need without which the public is inconvenienced to the extent of being handicapped." It is unclear how this use of the word "necessity" for a "public need" would apply by analogy to the exercise of powers reserved to water districts for at least the incidental benefit of protection from competition. Furthermore, we are reminded that under Kansas law, any reasonable doubt as to the existence of a water district's power must be resolved against its existence.

Douglas-4's decision to seek out a federal guarantee must therefore be justified by more than the incidental monopoly protections afforded by § 1926(b); the guarantee must further at least one of the District's purposes as a rural water service provider as

provided in its charter, bylaws, or enacting statutes. Protection from competition does not suffice. Nor can Douglas-4 justify its cooperation by appealing to the abstract goals of maintaining its corporate existence, profits, or integrity without some direct association to an enumerated purpose under its charter, bylaws, or relevant statutes.

This does not mean that Douglas-4's cooperation with the USDA must be "absolutely necessary," i.e., that it could not receive financing without the guarantee. Nor must Douglas-4 prove that a guarantee was the only or even the cheapest course of action available. Additionally, nothing within § 82a-619, or any other section governing water districts, prohibits a water district from benefitting from the protections of § 1926(b) so long as its triggering cooperation or acceptance of aid furthered a purpose of its organization.

To conclude, because the jury instructions incorrectly framed the necessity issue, we must reverse, vacate the judgment, and remand for a new trial for the limited purpose of determining whether Douglas-4's cooperation to secure the federal guarantee was necessary for the purposes of its organization.[7]

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[7] It is appropriate for the trial court to limit retrial here only to the issue of necessity. "A principal advantage of using a special rather than a general verdict is that an error may only affect a few of the trial court's findings, thus limiting a new trial or vacatur of the judgment to the issues covered by the tainted findings." *United States v. Ofchinick,* 883 F.2d 1172, 1180 (3rd

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B. The district court's decisions and portions of the jury verdict pertaining to the "made services available" prong are affirmed.

To receive the protections afforded by § 1926(b), Douglas-4 must also establish it "made services available" to the affected areas "prior to the time an allegedly encroaching association began providing service." *Sequoyah Cnty.,* 191 F.3d at 1202 (internal brackets and quotation marks omitted). "In order to determine whether a water association has made service available, 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." *Rural Water Dist. No. 1,* 243 F.3d at 1270 (internal quotation marks omitted). To meet this test, the water district 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.*

The parties dispute several issues of law pertaining to the "made services available" prong, discussed below.

Cir.1989); *see generally* David A. Lombardero, *Do Special Verdicts Improve The Structure of Jury Decision-Making?,* 36 Jurimetrics J. 275, 277-78 (1996) (observing that special verdicts facilitate appellate review and "may promote judicial economy by limiting the issues in a possible retrial").

1. The burden of proving unreasonable, excessive, and confiscatory costs rests with Eudora.

The parties first disagree over whether Eudora must prove that Douglas-4's costs of services are unreasonable, excessive, and confiscatory, or whether Douglas-4 must prove the counterfactual.

Even where a rural water district 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 water district's costs of service need not be competitive with the costs of services provided by other entities, including municipalities, but "the protection granted . . . by § 1926(b) should not be construed so broadly as to authorize the imposition of *any* level of costs." *Id.* Thus, costs may not be unreasonable, excessive, and confiscatory. *See id.* Although a determination of the reasonableness of costs is based on the totality of the circumstances, we have also identified four non-exclusive factors from Kansas law which help guide the factfinder in its determination: "(1) whether the challenged practice allows the district 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 districts do not follow the practice; (4) whether the practice establishes an arbitrary classification between various users." *Id.*

Eudora argues that Douglas-4 carries the burden of proving that its costs are *not* unreasonable, excessive, and confiscatory because the question of costs falls under the broader "made services available" prong, which the water district generally must establish. However, we have previously held that even if the water district meets the "pipes in the ground" test, then it is up to the defending city to show that the water district's rates are unreasonable, excessive, and confiscatory. *See id.* at 1272 ("[T]he City should be afforded an opportunity to show that Post Rock's practice was excessive, unreasonable, and confiscatory. If the City makes such a showing, then the court should conclude that the water district has not provided or made service available.") (internal quotation marks and brackets omitted). This distribution of burdens also aligns our case law with the decisions of the Kansas Supreme Court. *See, e.g., Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist. No. 6,* 217 Kan. 421, 537 P.2d 210, 217 (1975) (holding that water rates set by a municipal corporation such as a water district are generally presumed to be valid and reasonable until the contrary has been established by the challenging party).

2. The district court properly informed the jury that the cost of fire protection is relevant to the issue of whether Douglas-4's costs of service are unreasonable, excessive and confiscatory.

In its cross-appeal, Douglas-4 challenges the district court's jury instruction that the cost of fire protection services may be considered when determining the reasonableness of its cost of services. Specifically, the court informed the jury in Instruction No. 20 that:

> Water service does not include water service for fire protection. Thus, to provide or make service available, Douglas-4 is not required to provide or make water service available for fire protection.
>
> But, in determining whether Douglas-4's prices for water service were unreasonable, excessive, and confiscatory, you may consider the quality of water service that could be provided by Douglas-4, including whether and to what extent it could provide water for fire protection.

(Appellant's App. at 1652.) Douglas-4 argues that because it is not required to provide fire protection any fees it charges to offer fire protection to its customers are irrelevant.

The District reads too much into this circuit's case law on fire protection. It is well established that a water district's ability to provide water for fire protection is not a factor the court should analyze

when determining whether the district has made service available. *See, e.g., Rural Water Sewer,* 659 F.3d at 1066 (reviewing the case law on fire protection and concluding that the "ability to provide fire protection is simply not relevant to the specific question of whether [a rural water district] has adequate pipes in the ground to 'make service available' for purposes of the § 1926(b) protection from competition"); *Sequoyah Cnty.,* 191 F.3d at 1204 n. 10 ("[A] water association's *capacity* to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b)") (emphasis added). But in cases where a water district's fees are at issue and the fact-finder must – as we have previously held – analyze these costs under the totality of the circumstances, an inspection of the nature and cost of all services offered by the water district might very well include an inquiry into costs associated with fire protection.

Should a water district decide to provide fire-protection services, its pricing of such services could also bear on several of the factors outlined in *Rural Water District No. 1.* A water district may charge excessive fees for fire protection where no competing provider exists, or it may charge higher fees for fire protection only to lowball its fees for residential water. Perhaps it charges a flat fee for all water service when only some of its customers receive fire protection, thus providing more benefits to some customers over others. The cost of fire protection within the district's broader pricing scheme could allow the district to yield more than a fair profit,

establish a rate that is disproportionate to the services rendered, or establish an arbitrary classification between various users. We therefore find no legal error in the district court's conclusion that fire-protection services may be considered solely to determine whether Douglas-4's prices for water service were unreasonable, excessive, and confiscatory.

Of course, at no time does a water district's decision to provide or forgo fire-protection services affect its ability to establish that it has sufficient "pipes in the ground" to make service available, and it is up to the party challenging the water district's § 1926(b) protection to prove that the water district's costs are unreasonable, excessive, and confiscatory. Moreover, costs must be examined individually for each property. *See Rural Water Dist. No. 1,* 243 F.3d at 1271. Thus, the relationship between fire-protection services and costs is highly context-specific.

Last, we note that Eudora cannot now debate whether Douglas-4's costs of services were in fact unreasonable, excessive, and confiscatory because it has waived its arguments on the sufficiency of the evidence.

3. Douglas-4 lacks the authority under state law to provide service to the Church Property.

Douglas-4 also challenges the district court's dismissal of its claim that Eudora curtailed Douglas-4's service to property owned by the First Southern

Baptist Church of Eudora. At issue is whether Douglas-4 may legally serve water to properties outside its boundaries such that it could plausibly make service available and therefore claim protection under § 1926(b). We review the district court's dismissal of Douglas-4's claim de novo, *see Christy Sports, LLC v. Deer Valley Resort Co.,* 555 F.3d 1188, 1191 (10th Cir.2009), reversing only if Douglas-4's complaint states a claim for relief that is plausible on its face, *see Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). We do not, however, accept as true any of Douglas-4's legal conclusions. *See id.*

Eudora annexed the church property after the start of this litigation. At no time was the property within Douglas-4's geographic boundary. Douglas-4 then obtained leave to file a supplement to its first amended complaint, alleging § 1926(b) protection from the City's provision of water service to the church property. It claimed Eudora violated § 1926(b) by annexing the property and then offering incentives to the church to obtain water service from it rather than from Douglas-4. On the City's motion to dismiss, the district court concluded that Kansas law did not authorize Douglas-4 to serve the church property. Viewing the Kansas statutory scheme in its entirety, the court determined that a water district only has the legal right to provide service within its boundaries. On appeal, Douglas-4 challenges the district court's construction of the relevant statutes.

As part of a court's determination that a water district made service available, it must necessarily evaluate whether the water district possesses the legal authority to make service available. *See Sequoyah Cnty.,* 191 F.3d at 1201 n. 8 ("Without a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection."). Kansas law does not expressly permit or prohibit a rural water district from serving customers outside of its boundaries. *See* K.S.A. § 82a-619. However, a review of the statutes concerning rural water districts reveals a clear association between a water district's geographic boundaries and those laws pertaining to its corporate governance, facilities, and operations. For example, a petition to create a rural water district must be signed by property owners within the district's proposed boundaries and state that lands within the boundaries lack an adequate water supply. *See id.* § 82a-614. A water district possesses the express power of eminent domain only within its boundaries. *See id.* § 82a-619(a). It may employ labor "necessary to the proper performance of such work or improvement as is proposed to be done *within any such district.*" *Id.* § 82a-620 (emphasis added). To attach lands outside the district, the new landowners must follow procedures similar to those in § 82a-614: a petition must be signed by owners of the land within the newly proposed area stating that such lands are without adequate water supply, *see id.* § 82a-622, and upon the county's approval, those landowners are entitled to

subscribe to the water district's benefit units, *see id.* § 82a-624.

There is no indication within the statutory scheme of any authority that suggests water districts may serve customers outside their boundaries. *Cf. id.* § 82a-621 (permitting "[o]wners of land located *within the district* who are not participating members" to subscribe to benefit units) (emphasis added); *id.* § 82a-619(f) (authorizing the power to contract with cities or counties to treat wastewater "within the boundaries of the district"); *id.* § 82a-625 (authorizing the power to construct new works "within such district"). Although § 82a-619 does provide water districts with the general power to "contract" and to "construct, install, maintain and operate" facilities "necessary to carry out the purposes of its organization," the statutory scheme leaves more than a reasonable doubt as to the existence of the power to provide water service outside of a district's boundaries. We thus affirm the court's dismissal of Douglas-4's claim on the church property.

C. The district court's decisions and portions of the jury verdict pertaining to curtailment or limitation of Douglas-4's water service are affirmed.

We next review the legal grounds upon which the district court based its conclusion that Eudora curtailed or limited Douglas-4's water service. Without the City's sufficiency-of-the-evidence arguments, we

are left with two legal issues to resolve: first, whether a city's annexation of a protected area can, standing alone, violate § 1926(b); and second, whether a city's threats or solicitations regarding water service may, in the alternative, serve as the violative act.

7 U.S.C. § 1926(b) prevents a municipality from curtailing or limiting water service "by inclusion of the area served by [a protected] association within the boundaries of any municipal corporation or other public body." Although it annexed the affected area, Eudora never actually provided water service to any of Douglas-4's customers or prospective customers. There are instead two possible bases for Douglas-4's 1926(b) claim: Eudora's annexation of the affected areas, and Eudora's alleged threats to Douglas-4 and Douglas-4's customers that it might elect to de-annex the affected areas or condemn Douglas-4's assets. Eudora argues that neither annexation nor threats to de-annex or appraise Douglas-4's assets may be treated as actual curtailments or limitations under § 1926, while Douglas-4 asserts that both acts violate the statute. We address each in turn.

1. Annexation alone does not necessarily curtail water service.

As a matter of federal law, annexation alone does not cause curtailment; rather, there must be some further action that limits the protected water district's ability to serve its customers. *See Glenpool,* 861 F.2d at 1214 ("[A city] may not legally use inclusion of

[an area] within the boundaries of any municipal corporation *as a springboard* for providing water service to the area, and thereby limit the service made available by [a protected water district].") (emphasis added) (internal quotation marks omitted). A city may annex land within a water district's boundaries so long as it does not use the annexation as a means to provide water service or limit the water district's services to the annexed area.

Similarly, as a matter of Kansas law, an annexing municipality is not compelled to engage in some post-annexation conduct that would necessarily curtail or limit a water district's ability to serve the annexed area. K.S.A. §§ 12-540 and 541(a), enacted by the Kansas legislature in 2010, describe the process by which a city may, if it chooses, designate itself or some other water supplier for the recently annexed area.[8] "Following annexation, the rural water district

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[8] K.S.A. § 12-527, the statute cited in Douglas-4's briefs, stated: "[w]henever a city annexes land located within a rural water district . . . the city *shall* negotiate with the district" to acquire title to the district's assets within the annexed area. However, it was repealed in March 2010 and replaced by K.S.A. § 12-540 *et seq*. *See* 2010 Kan. Sess. Laws Ch. 15, House Bill No. 2283 (March 24, 2010). We thus apply the law in existence at the time of this appeal. *See State ex rel. Stephan v. Bd. of Cnty. Comm'rs of Lyon Cnty.,* 234 Kan. 732, 676 P.2d 134, 139 (1984) ("When called upon to consider legislative enactments which follow trial court rulings, this court has not hesitated.").

Yet, we also conclude that the enactment of K.S.A. § 12-540 *et seq*. "d [id] nothing more than clarify the ambiguities in the statute rather than [ ] change the law." *Trees Oil Co. v. State*

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shall remain the water service provider to the annexed area unless the city gives written notice designating a different supplier." K.S.A. § 12-541(a). Or, "[f]ollowing annexation . . . , the city and the [water] district may contract for the district to provide water service to all or certain portions of the annexed area." *Id.* § 12-540. Nor is the city required to impose a franchise, license, or permit should the water district retain its water service over an annexed area. *Id.* ("If the agreement includes a provision for the payment of a franchise fee to the city, such agreement shall be subject to the provisions of K.S.A. § 12-2001 *et seq.*"). Because §§ 12-540 and 541(a) do not obligate Eudora to violate § 1926(b), annexation alone cannot serve as the sole ground for Douglas-4's claim against Eudora.

Corp. Comm'n, 279 Kan. 209, 105 P.3d 1269, 1285 (2005). Even § 12-527's directive that the city "shall negotiate with the district" to acquire title would not necessarily compel the City to acquire Douglas-4's assets. In Kansas, statutory provisions directing these types of proceedings "are not regarded as mandatory[ ] unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated." *Paul v. City of Manhattan,* 212 Kan. 381, 511 P.2d 244, 249 (1973). Similarly, "failure to comply with the requirements of [a mandatory statute] either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities." *Wilcox v. Billings,* 200 Kan. 654, 438 P.2d 108, 111 (1968). Section 12-527 contained neither proviso. Thus, if we apply K.S.A. § 12-527 rather than § 12-540 *et seq.,* we reach the same conclusion.

2. *A competing municipality may, however, curtail services through threats if the threats effectively limit the water district's ability to serve existing customers or acquire potential customers to whom it would otherwise provide service.*

We must also determine whether a city's threat to either de-annex a protected area or force an appraisal process violates 7 U.S.C. § 1926(b) by dissuading potential customers from seeking water service from the protected water district. The district court concluded that threats could limit Douglas-4's ability to provide water service if the threats deterred existing or potential customers from using the water district's services. On appeal, Eudora argues that such actions do not rise to the level of "competition" contemplated by § 1926(b).

We must first apply the general principle that "§ 1926(b) indicates 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." *Pittsburg Cnty.,* 358 F.3d at 715 (emphasis omitted). We therefore construe § 1926(b) liberally to protect water districts from the various forms of municipal encroachment. *See id.* Indeed, the type of encroachment contemplated by § 1926(b) is not limited to the traditional guise of an annexation followed by the city's initiation of water service. It also encompasses other forms of direct action that

effectively reduce a water district's customer pool within its protected area. *See id.* at 716 ("[T]he question becomes whether McAlester's sales to customers . . . purport to take away from Pitt 7's § 1926 protected sales territory.").

If a city informs a water district's customer that it will de-annex his property unless he requests water from the city and not the water district, the customer is effectively forced to make a choice: either cease water service from the water district or find a new provider for all other public services. Under these circumstances, the city's conduct creates a wedge between the water district and its customer anathematic to the protections intended by Congress. The property owner's dependence on the city for virtually all non-water services, from road and sewer maintenance to police and fire security, puts him – and by association the servicing water district – in a vulnerable position. It very well may prevent the water district from further developing and maintaining its customer base.

However, a city may instead act in a manner that does not curtail or limit water services provided or made available by a protected district. This might occur where, after annexation, a city allows the water district to continue as before. Or it may initiate negotiations with the district for purchase of the district's assets. When a city first notifies a water district of its intent, there is nothing impeding a customer from obtaining – or the water district from providing – water services. Under Kansas law, for

instance, the parties still must agree on the assets' value. If they cannot agree, then no change in water service provider shall occur until at least 120 days pass and the parties complete mandatory mediation. *See* K.S.A. § 12-541(a). If mediation is unsuccessful, only then is a third-party appraiser appointed. Throughout this entire period, the water district may continue to provide or make available water service, and ultimately the city may decide to either assert or waive its appraisal rights as the situation develops. Of course, a city's assertion of appraisal rights may give rise to an actual curtailment or limitation, but this occurs only when there is evidence that the city's assertions impeded the water district's ability to provide or make service available or deterred customers from obtaining the water district's services.

Eudora's remaining arguments that target whether its communications to Douglas-4 and Mr. Garber actually curtailed or limited Douglas-4's ability to provide or make service available to any of the affected properties challenge the sufficiency of the evidence and are waived.

3. The district court properly admitted Douglas-4's threat-based evidence.

Eudora also objects to the admissibility of so-called "threat" evidence based on a lack of relevance under Rule 401 and its potential for prejudice under Rule 403. Specifically, it challenges the admission of various letters from Eudora's attorney to Mr. Garber's

attorney and Douglas-4's attorney regarding Eudora's intent to appraise Douglas-4's property, and statements by Eudora's attorney to Mr. Garber contemplating de-annexation of Mr. Garber's development should Eudora be unable to provide water service. Yet, evidence that Eudora sought to influence, deter, or impede potential customers within Douglas-4's protected service area goes to the very heart of Douglas-4's theory of the case, and any such communication will make more or less probable that Eudora effectively curtailed or limited Douglas-4's ability to serve or make available its water service. The district court did not abuse its discretion by admitting such evidence.

Eudora also claims that letters between its attorney and Douglas-4's attorney were settlement negotiations and therefore should have been excluded under Rule 408. Upon reviewing the letters, the district court did not find evidence of "discussions between these two parties trying [to] work this out, trying to settle it, [or] trying to compromise," (Appellant's App. at 1805), but rather found evidence suggesting Eudora had staked out its position that it would ultimately enforce its appraisal rights without Douglas-4's immediate capitulation. For example, in his letter of September 18, 2007, counsel for Eudora informed counsel for Douglas-4 that Eudora planned to file suit against Douglas-4 if it did not begin complying with Kansas's appraisal law by October 1. And in his letter of September 21, 2007, counsel for Eudora informed Douglas-4 it would immediately file

suit if Douglas-4 took "any further action to expand its service into City limits" prior to October 1. (Appellant's Add. at 52.) By contrast, the district court did exclude portions of an earlier 2006 letter, (*id.* at 189-90), which contained elements of "a classic settlement offer," (Appellant's App. at 2675). We see no abuse of discretion in the district court's decision to distinguish between letters containing clear settlement offers and letters containing near-term demands for immediate compliance alongside promises of a possible lawsuit.

4. Eudora may not challenge the sufficiency of the evidence pertaining to its curtailment of the other properties.

The City's challenge to the jury verdict as it pertains to the non-Garber properties is waived for failure to file a Rule 50(b) motion.

D. Douglas-4's remaining claims on cross-appeal are not subject to review.

Finally, Douglas-4's remaining challenges in its cross-appeal have no bearing on the ultimate outcome of this case and are therefore unavailable for review. *See, e.g., Affiliated Ute Citizens v. Ute Indian Tribe,* 22 F.3d 254, 255 (10th Cir.1994) ("A prevailing party may not appeal and obtain a review of the merits of findings it deems erroneous which are not necessary to support the [district court's] decree.").

CONCLUSION

The district court's judgment is REVERSED and the trial verdict VACATED. The matter is REMANDED for further proceedings solely on the issue of whether Douglas-4's cooperation to secure a Rural Development guarantee was necessary to carry out the purposes of its organization. All other issues on appeal and cross-appeal are AFFIRMED. Both parties' motions to strike portions of each other's reply briefs are DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS	)	
Plaintiff,	)	**Case No. 07-2463-JAR**
vs.	)	
CITY OF EUDORA, KANSAS,	)	
Defendant.	)	

MEMORANDUM AND ORDER GRANTING PERMANENT INJUNCTION

Plaintiff Rural Water District No. 4, Douglas County, Kansas ("Rural"), filed this action under 42 U.S.C. § 1983, claiming that it is protected under 7 U.S.C. § 1926(b), which gives it the right to provide water service to its service area. Rural claims that defendant City of Eudora ("City") violated § 1926 by annexing certain properties within its service area and proceeding to enforce the provisions of K.S.A. § 12-527, allowing the City to purchase Rural's assets. Rural seeks damages, a declaratory judgment, and an injunction. The City filed a counterclaim for tortious interference with a business advantage, fraud, abuse of process, and for declaratory relief.[1] Defendant's tort

[1] *Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.,* 604 F. Supp. 2d 1298, 1305 (D. Kan. 2009).

counterclaims have been dismissed without prejudice, pursuant to the defendant's motion.

Before the Court is plaintiff's prayer for equitable relief (injunction) following jury trial and declaratory judgment. The defendant has also sought declaratory relief by virtue of its counterclaim. A jury trial was commenced May 18, 2009 in this matter and concluded May 28, 2009. The verdict determined fact issues in the case, namely (1) whether the Plaintiff had the legal authority to cooperate with and enter into agreements with the Federal Government, (2) whether plaintiff had made water service available to each of the four properties in controversy, (3) whether the Defendant had curtailed and limited the water service provided or made available by the Plaintiff to the four properties, and (4) whether the plaintiff had suffered damages as a result of any limitation or curtailment. The properties in controversy are generally referred to as the "Garber," "LMH," "LLC," and "Grinnell" properties. (These properties are identified in Plaintiff's exhibits 108, 110A, 115A, 117A, and 119A admitted in evidence at trial).

Plaintiff prevailed on all issues presented to the jury, and damages were awarded as to each of the four properties.

The parties agree that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, venue is proper, and that the governing law that applies to the case is 7 U.S.C. § 1926(b), 28 U.S.C.

§§ 2201-2202.[2] The Court further determines that 42 U.S.C. § 1983 applies to this case.

The Court incorporates by reference herein the Memorandum and Order filed simultaneously with this Order of Judgment. Based on the previous findings by the Court and the jury verdict, the Court finds that Rural is a quasi-municipal corporation under Kansas law and is protected by 7 U.S.C. § 1926(b), inasmuch as it is an "association" within the meaning of § 1926(b) with an outstanding debt guaranteed by the United States Department of Agriculture ("USDA"). Answers to special interrogatories submitted to the jury determined that Rural has indeed "provided or made service available" to the four properties in controversy, Garber, LMH, LLC, and Grinnell. The jury found that the defendant had engaged in conduct that "curtailed or limited" Rural's water service which was provided or made available to the four properties, as defined by § 1926(b). The jury awarded actual damages as to the Garber property in the sum of $23,500 and $1.00 nominal damages as to each of the remaining three (3) properties.

Section 1926(b) provides that "[t]he 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." By enacting § 1926(b), Congress intended

[2] Pretrial Order, (Doc. 219 at 2)

to protect rural water districts from competition to encourage rural water development and to provide greater security for and thereby increase the likelihood of repayment of USDA loans.[3] Section 1926(b) is broadly construed to protect rural water districts from competition with other water service providers.[4]

This case is governed by 42 U.S.C. § 1983.[5] Injunctive relief is an appropriate remedy in this case.[6] The Court determines that plaintiff is entitled to entry of an injunction, based on the facts as determined by the jury, namely that the defendant has violated 7 U.S.C. § 1926(b) by curtailing and limiting the service provided and made available to the four properties referenced above; therefore defendant must be enjoined and restrained from existing and further violations of § 1926(b). In determining the rights of the parties pursuant to the Declaratory Judgments Act, the Court finds as follows:

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[3] *See Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1196 (10th Cir.1999).

[4] *Rural Water Dist. No. 1, Ellsworth County, Kan. v. City of Wilson, Kan.,* 243 F.3d 1263, 1269 (10th Cir. 2001).

[5] *Id.* at 1275.

[6] *N. Alamo Water Supply Corp. v. City of San Juan,* 90 F.3d 910, 917 (5th Cir. 1996) (noting that "[s]ection 1926(b) does not create or specify a remedy for the enforcement of violations, but an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations")." *City of Wilson,* 243 F.3d at 1275.

1. Plaintiff is a quasi-municipal corporation under Kansas law and is protected by 7 U.S.C § 1926(b) inasmuch as it is an "association" within the meaning of § 1926(b) with an outstanding debt guaranteed by the USDA. Plaintiff has indeed "provided or made service available" to the four properties referenced above and is therefore entitled to the protection of § 1926(b) with respect to said properties.

2. Defendant has curtailed and limited the water service provided and made available to the four (4) properties in violation of § 1926(b).

3. Plaintiff is entitled to an award of a reasonable amount attorneys fees under 42 U.S.C. § 1988.[7]

4. Plaintiff is entitled to injunctive relief restraining the defendant from further violations of § 1926(b).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the defendant is enjoined and restrained from:

A. Limiting or curtailing the water service provided or made available by the plaintiff to the four properties referenced above, Garber, LMH, LLC, and Grinnell;

B. Engaging in acts of competition with the plaintiff for water service provided or made available

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[7] *Id.* at 1275.

by the plaintiff to the four properties, Garber, LMH, LLC, and Grinnell, including:

1. Engaging in any act that would serve to dissuade or frustrate an existing water customer of the plaintiff from continuing to receive water service from the plaintiff;

2. Engaging in any act that would serve to dissuade or frustrate a prospective customer from requesting or obtaining water service from the plaintiff;

3. Solicitation of plaintiff's customers;

4. Acts to compel the sale of facilities or land by plaintiff based on state statute; and

5. Furnishing, providing or selling water for use/consumption within the four properties in controversy.

IT IS FURTHER ORDERED that the operation, effect and enforcement of this Injunction is conditioned on the continued existence of the following: (1) plaintiff continues to provide water service or make water service available to the four properties within a reasonable time after a request for service has been made; and (2) the plaintiff continues to be indebted to USDA or on a loan guaranteed by USDA.

IT IS FURTHER ORDERED that the Court retains continuing jurisdiction to enforce and modify this Injunction.[8]

IT IS SO ORDERED.

Dated: September 2, 2009

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES
DISTRICT JUDGE

[8] S*ee, e.g., Battle v. Anderson,* 708 F.2d 1523, 1539 (10th Cir. 1983).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS, Plaintiff-Appellant, v. CITY OF EUDORA, KANSAS, Defendant-Appellee.	No. 12-3197

ORDER

(Filed Jul. 26, 2013)

Before **TYMKOVICH**, Circuit Judge, **HOLLOWAY**, Senior Circuit Judge, and **HOLMES**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL WATER DISTRICT NO. 4, DOUGLAS COUNTY, KANSAS Plaintiff, v. CITY OF EUDORA, KANSAS Defendant.	)	Case No. 07-2463

JURY INSTRUCTIONS

* * *

INSTRUCTION NO. 17

With respect to element 3, in Instruction Number 16, you are instructed as follows.

K.S.A. § 82a-619(g) authorizes Douglas-4 to "cooperate with and enter into agreements with the [Federal Government] necessary to carry out the purposes of its organization."

Douglas-4 had the power under Kansas law to cooperate with and enter into agreements with the Federal Government if it its loan guaranteed by Federal Government was necessary for: (1) an operational purpose identified under Kansas law and Douglas-4's bylaws; (2) a business purpose identified under Kansas law and Douglas-4's bylaws; or (3) protecting Douglas-4 from impairment of its ability to

fulfill an operational or business purposes identified under Kansas law and Douglas-4s bylaws.

The term "necessary" does not mean there must be showing of absolute need.

Douglas-4's purposes under Kansas law and its bylaws are:

> (a) To promote the public health, convenience and welfare;
>
> (b) To acquire water and water rights and to build and acquire pipelines and other facilities, and to operate the same for the purpose of furnishing water for domestic, garden, livestock and other purposes to owners and occupants of land located within the District, and others as authorized by these bylaws.
>
> (c) To borrow money from any Federal or State agency, or from any other source, and to secure said loans by mortgaging or pledging all of the physical assets and revenue and income of the District, including easements and right-of-ways.
>
> (d) To hold such real and personal property as may come into its possession by will, gift, purchase, or otherwise, as authorized by law, and to acquire and dispose of such real and personal property, including rights-of-way and easements, wherever located, and as may be necessary and convenient for the proper conduct and operation of the business of the District.

(e) To establish rates and impose charges for water furnished to participating members and others.

(f) To enter into contracts for the purpose of accomplishing the purposes of the District with any person or governmental agency.

(g) To cooperate with any person or with any governmental agency in any undertaking designed to further the purposes of the District.

(h) To do and perform any and all acts necessary or desirable for the accomplishment of the purposes of the District, which may lawfully be done by such District under the laws of the State of Kansas.

Douglas-4 did not have the power under Kansas law to cooperate with and enter into agreements with the Federal Government for the sole purpose of securing federal protection under 7 U.S.C. 1926(b). If obtaining federal protection under 7 U.S.C. 1926(b) was Douglas-4's only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL WATER DISTRICT NO. 4 DOUGLAS COUNTY, KANSAS	)	
Plaintiff,	)	**Case No. 07-CV-2463-JAR**
vs.	)	
CITY OF EUDORA, KANSAS,	)	
Defendant.	)	

VERDICT

SECTION ONE

We the jury, impaneled and sworn in the above entitled case, upon our oaths, do make the following answers to the questions propounded by the Court:

1. Did Douglas-4 have the power under Kansas law to cooperate with and enter into agreements with the federal government?

   _X_ Yes ___ No

Proceed to the remaining questions only if you answered "Yes" to question 1. If you answer "No" to question 1, do not answer any more questions, proceed to the end of the verdict form and sign the document.

SECTION TWO

2. Has Douglas-4 made water service available to the Garber Property?

_X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 2. If you answer "No" to question 2, do not answer any more questions in this section, and proceed to the next section.

3. Did the City of Eudora limit or curtail Douglas-4's water service to the Garber Property?

_X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 3. If you answer "No" to question 3, do not answer any more questions in this section, and proceed to the next section.

4. Insert below the amount of damages caused by any limitation or curtailment of Douglas-4's water service to the Garber Property caused by Eudora. If you find there has been no damages, you should enter a nominal damage amount of $1.00.

$ 23,500.00

SECTION THREE

5. Has Douglas-4 provided or made water service available to the Lawrence Memorial Hospital Property?

_X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 5. If you answer "No" to question 5, do not answer any more questions in this section, and proceed to the next section.

6. Did the City of Eudora limit or curtail Douglas-4's water service to the Lawrence Memorial Hospital Property?

_X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 6. If you answer "No" to question 6, do not answer any more questions in this section, and proceed to the next section.

7. Insert below the amount of damages caused by any limitation or curtailment of Douglas-4's water service to the Lawrence Memorial Property caused by Eudora. If you find there has been no damages, you should enter a nominal damage amount of $1.00.

$ 1.00

SECTION FOUR

8. Has Douglas-4 provided or made water service available to the SMG/JRB, Inc./ Clearwater LLC/New Streams LLC/ Clearstreams Holding LLC Properties?

   _X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 8. If you answer "No" to question 8, do not answer any more questions in this section, and proceed to the next section.

9. Did the City of Eudora limit or curtail Douglas-4's water service to the SMG/JRB, Inc./ Clearwater LLC/New Streams LLC/ Clearstreams Holding LLC Properties?

   _X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 9. If you answer "No" to question 9, do not answer any more questions in this section, and proceed to the next section.

10. Insert below the amount of damages caused by any limitation or curtailment of Douglas-4's water service to the SMG/JRB, Inc./ Clearwater LLC/New Streams LLC/ Clearstreams Holding LLC Properties caused by Eudora, If you find there has been no damages, you should enter a nominal damage amount of $1.00.

    $ 1.00

SECTION FIVE

11. Has Douglas-4 provided or made water service available to the Grinnell Property?

_X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 11. If you answer "No" to question 11, do not answer any more questions in this section, and sign and date the verdict form.

12. Did the City of Eudora limit or curtail Douglas-4's water service to the Grinnell Property?

_X_ Yes ___ No

Proceed to the remaining questions in this section only if you answered "Yes" to question 12. If you answer "No" to question 12, do not answer any more questions in this section, and sign and date the verdict form.

13. Insert below the amount of damages caused by any limitation or curtailment of Douglas-4's water service to the Grinnell Property caused by Eudora. If you find there has been no damages, you should enter a nominal damage amount of $1.00.

$ 1.00

Dated this 28 day of May, 2009.

_____