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Arkansas Court of Appeals
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2019-Oct-17 15:59:49
CV-19-595
46 Pages

CV-19-595

IN THE COURT OF APPEALS OF ARKANSAS

ST. FRANCIS RIVER REGIONAL WATER DISTRICT — **APPELLANT**

V.

CITY OF MARMADUKE, ARKANSAS — **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF GREEN COUNTY, ARKANSAS

HONORABLE MELISSA RICHARDSON

APPELLEE'S BRIEF

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TABLE OF CONTENTS

Page

I. TABLE OF CONTENTS …………………………………………...…….2

II. POINTS ON APPEAL ……………………………………………….......4

III. TABLE OF AUTHORITIES ……………………………………….......5

IV. APPELLEE'S RESPONSE TO JURISDICTIONAL STATEMENT …........8

V. STATEMENT OF THE CASE AND FACTS ……………………......11

VI. ARGUMENT …………………………………………………………...14

I. The Circuit Court Correctly Granted Summary Judgment in Favor of the City of Marmaduke………………………14

A. Standard of Review for Summary Judgment………………………………………………...14

B. The District does not Have the Exclusive Right to Provide Water Services Within Its Geographical Boundaries by Virtue of the Regional Water Distribution Act…........………………………………16

C. The District does not have the Exclusive Right to Provide Water Services Within its Geographical Boundaries by Virtue of Section §15-22-223……….....……21

D. Providing Water Services to the East Plant and Refurb Plant does not Constitute a Water Development Project Such that the City Needs Approval by the ANRC Pursuant to Ark. Code Ann. § 15-22-503……………………………………….....31

II. The Trial Court Ruled Correctly in Denying the District's Motion for Summary Judgment……………………………………39

VII. REQUEST FOR RELIEF …………………………………………………...44

VIII. CERTIFICATE OF SERVICE …………………………………………...45

IX. CERTIFICATE OF COMPLIANCE ……………………………………46

POINTS ON APPEAL

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE CITY OF MARMADUKE.

II. THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR SUMMARY JUDGMENT OF ST. FRANCIS RIVER REGIONAL WATER DISTRICT.

TABLE OF AUTHORITIES

Cases *Page*

Alcoa World Alumina, L.L.C. v. Weiss, 2010 Ark. 94, 377 S.W.3d 164…………..22

Arkansas Soil and Water Conservation Commission v. City of Bentonville, 351 Ark. 289, 92 S.W.3d 47 (2002)……………………41

Board of Trs. of Univ. of Ark. v. Andrews, 2018 Ark. 12, 535 S.W.3d 616……21,22

BPS, Inc. v. Parker, 345 Ark. 381, 388, 47 S.W.3d 858, 864 (2001)……………..39

Brock v. Townsell, 2009 Ark. 224, 309 S.W.3d 179……………………………...22

City of Fort Smith v. River Valley Regional Water Dist., 344 Ark. 57, 37 S.W.3d 631 (2001)…………………………………………39

Clark v. Johnson Regional Medical Center, 2010 Ark. 115, 362 S.W.3d 311……19

Foster v. Foster, 2016 Ark. 456, 506 S.W.3d 808…………………………………22

First State Bank v. Metro Dist. Condominiums Property Owners' Ass'n, Inc., 2014 Ark. 48, 432 S.W.3d 1…………………………………...22

Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844………………………………15,39

Holbrook v. Healthport, Inc., 2014 Ark. 146, 432 S.W.3d 593……………………21

Le-Ax Water Dist. v. City of Athens, 345 F.3d 701 (6th Cir. 2003)……………….29

Martin v. Smith, 2019 Ark. 232, 576 S.W.3d 32…………………………………..15

May v. Akers–Lang, 2012 Ark. 7, 386 S.W.3d 378………………………………..15

Pub. Water Supply Dist. No. 3 of Laclede Cnty, Mo. v. City of Lebanon, 605 F.3d 511 (8th Cir. 2010)…………………………………………………..27

Scoggins v. Medlock, 2011 Ark. 194, 381 S.W.3d 781……………………………22

Stokes v. Stokes, 2016 Ark. 182, 491 S.W.3d 113……………………………...15

Washington County v. Board of Trustees of the University of Arkansas, 2016 Ark. 34, 480 S.W.3d 173……………………………………………..16

Statutes

Ark. Code Ann. § 14-40-601…………………………………………………20

Ark. Code Ann. § 14-40-604…………………………………………………21

Ark. Code Ann. § 14-40-605…………………………………………………20

Ark. Code Ann. § 14-40-606………………………………………………...20,21

Ark. Code Ann. §§ 14-116-101–801 *(Regional Water Distribution Act)*………..…16

Ark. Code Ann. § 14-116-102……………………………………………16,19

Ark. Code Ann. § 14-116-107……………………………..……………39

Ark. Code Ann. § 14-116-402……………………………………………16,20

Ark. Code Ann. § 14-37-105…………………………………………………18

Ark. Code Ann. § 14-54-702…………………………………………………18

Ark. Code Ann. § 14-56-413…………………………………………………41

Ark. Code Ann. § 14-234-111 ……………………………………………18,40

Ark. Code Ann. § 15-20-207…………………………………………………25

Ark. Code Ann. § 15-22-201…………………………………………………23

Ark. Code Ann. § 15-22-223……………………..........................21-25,27,29,30,31

Ark. Code Ann. § 15-22-503…………………………………………..…23,31,42

Other

7 U.S.C. § 1926……………………………………………………….............27,30

JURISDICTIONAL STATEMENT

The St. Francis River Regional Water District (the "District") filed suit against the City of Marmaduke (the "City") alleging that the City was illegally providing water services to American Railcar Industries, Inc. ("ARI"), the City's long-standing customer. The ARI facilities the District claimed were being illegally served were two plants, constructed in 2006 and 2015, that were physically located within the District's geographical boundaries set by a Greene County Circuit Court Order in 1987. The City filed a timely Answer to the Complaint. Before the discovery process could be completed, the District moved for summary judgment. The trial court held a hearing on the motion on June 7, 2018. **(RT1-43).** The court reserved a ruling on the motion and granted additional time for the City to undertake discovery. **(RT42).** The trial court also ruled that the District could refile or renew its motion after the discovery was completed. **(RT42).**

After completing discovery, the City filed a Motion for Summary Judgment and supporting documentation on March 8, 2019. The District filed a response and the City filed a reply. Thereafter, the trial court held a second hearing on April 8, 2019, at which it heard argument on the summary judgment motions of both parties. The trial court issued a letter opinion on April 17, 2019. The court stated that it agreed with the parties that there were no genuine issues of material fact and that summary judgment was an appropriate disposition of the case.

On May 3, 2019, the trial court entered a Judgment consistent with the letter opinion of April 17, and dismissed the case with prejudice. The District filed a Notice of Appeal on May 8, 2019, and an Amended Notice of Appeal on May 28, 2019. **(RP808-811).**

In a case where parties file cross-motions for summary judgment, as in this case, "they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case." *Washington County v. Board of Trustees of the University of Arkansas,* 2016 Ark. 34, at 3 480 S.W.3d 173, 175; *Hobbs v. Jones,* 2012 Ark. 293, at 8, 412 S.W.3d 844, 850. This matter, therefore, is properly before this Court and is ripe for decision.

The decision by the trial court below turned on the court's interpretation of Ark. Code Ann. § 15-22-223. The Arkansas Supreme Court determines the meaning of a statute and, in the absence of a showing that the circuit court erred, the Court accepts the trial court's interpretation on appeal. *Board of Trs. of Univ. of Ark. v. Andrews,* 2018 Ark. 12, at 8, 535 S.W.3d 616, 621. Therefore, pursuant to Ark. Sup. Ct. R. 1-2, this appeal should be decided by the Arkansas Supreme Court.

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STATEMENT OF THE CASE

The St. Francis River Regional Water District (the "District") was established by an Order the Greene County Circuit Court entered on July 27, 1987. **(RP511).** The Order defined the geographical boundaries of the District; it did not contain any provision that accorded the District the exclusive right to serve any customer who then resided within the geographical boundaries or who might later move to an address within the boundaries. The Order was silent with respect to the issue of exclusivity. **(RP511-513).**

The City of Marmaduke (the "City") is located in Greene County, Arkansas. The City has continuously provided water and sewer services to customers since October 1935. **(RP477).** In 1999, the City began providing water and sewer services to American Railcar Industries, Inc. ("ARI"). **(RP477-478).** This first ARI facility is referred to as the West Plant.

In 2006, ARI expanded and began construction of an additional facility known as the East Plant. The City began providing water and sewer services to the new plant that same year. **(RP478-479).** In 2015, ARI expanded once again with the construction of the Refurbishing Plant, more commonly referred to as the "Refurb Plant." **(RP479).** The City began providing water to the Refurb Plant in April 2016 and has continued to do so up to the present day. **(RP479).**

Approximately ten years after the City began providing services to the East Plant, the District asserted for the first time in March 2016 that it had an exclusive right to serve the East Plant, and made demand on the City to stop providing water services to the ARI expansion. **(RP479).** ARI representatives advised the City that the company desired to continue to utilize the City for all its water service needs. **(RP479).** Upon receiving this request from ARI, the City conferred with its legal counsel and made the decision to continue serving all three ARI facilities.

On June 19, 2018, the area where the East Plant and Refurb Plant are located was annexed into the City upon the adoption of a city council resolution, resulting in ARI's expansions being located both within the city limits of Marmaduke and the District's boundaries. **(RP477-483; 595-596).**

On June 21, 2017, the District filed suit against the City. In the Complaint, the District requested an injunction preventing the City from continuing to provide water service to the East Plant and Refurb Plant and money damages. **(RP14-18).** Thereafter, the parties filed competing summary judgment motions with the circuit court. Two hearings were held on the motions.

On April 17, 2019, the court issued a letter opinion, in which it agreed that there were no genuine issues of material fact, and summary judgment was the appropriate procedure to dispose of the case. **(RP800-802).** The court found that the District did not have the exclusive right to provide water to persons or entities who

were located within its geographical boundaries. **(RP800).** The court also found that there was no dispute that the City had been the provider of water services to ARI from 1999 to the date of the letter opinion. **(RP801).** Further, because the District never served the ARI plants, revenue pledged by the district to repay loans from the Arkansas Natural Resources Commission ("ANRC") could not have included any revenue form the ARI plants. Therefore, as the trial court found, there was no evidence that the District was indebted to the ANRC as required by Ark. Code Ann. § 15-22-223.

The court granted the City's motion for summary judgment and entered judgment in favor of the City on May 3, 2019. **(RP806-807).** The District then filed a Notice of Appeal on May 9, 2019, and an Amended Notice of Appeal on May 28, 2019. **(RP808-811).**

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE CITY OF MARMADUKE.

The trial court's decision to grant summary judgment for the City of Marmaduke (the "City") was correct because the undisputed facts established the City's right to judgment as a matter of law.

This case concerns the appellant's attempt to interfere in a longstanding customer relationship based on the appellant's misreading of Arkansas statutes. Simply put, under the undisputed facts, no provision of law grants to the appellant the exclusive or absolute right to serve the customer at issue. Rather, the applicable statutes provide that the appellee's provision of water and wastewater services to its longstanding customer was at all times lawful.

A. Standard of Review for Summary Judgment

Both the St. Francis River Regional Water District (the "District") and the City of Marmaduke (the "City") filed motions for summary judgment, supporting documentation, and briefs with the trial court. In addition, two hearings were held by the court during which the parties were afforded the opportunity for oral argument. After the second hearing on April 8, 2019, the court issued a letter opinion on April 17, 2019, in which the court agreed with the parties that there were no genuine issues of material fact and that summary judgment was an appropriate manner in which to dispose of the case. **(RP800-802).** The court granted the City's

Motion for Summary Judgment, and entered a Judgment dismissing the case with prejudice on May 3, 2019. **(RP806).**

Summary judgment is appropriate when it is apparent that no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Stokes v. Stokes*, 2016 Ark. 182, at 8-9, 491 S.W.3d 113, 120. In reviewing a summary judgment, the Court determines whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Id.* The Court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*; *Martin v. Smith,* 2019 Ark. 232, at 4, 576 S.W.3d 32, 35.

Ordinarily, upon reviewing a circuit court's decision on a summary judgment motion, the Court examines the record to determine if genuine issues of material fact exist. *May v. Akers–Lang,* 2012 Ark. 7, at 6, 386 S.W.3d 378, 382. However, where the parties agree on the facts, such as in this case where both the District and the City filed motions for summary judgment, the Court simply determines whether the appellee was entitled to judgment as a matter of law. *Hobbs v. Jones,* 2012 Ark. 293, at 8, 412 S.W.3d 844, 850 ("When parties file cross-motions for summary judgment, as was done in this case, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case.").

See also Washington County v. Board of Trustees of the University of Arkansas, 2016 Ark. 34, at 3 480 S.W.3d 173, 175.

B. The District does not have the exclusive right to provide water services within its geographical boundaries by virtue of the Regional Water Distribution Act.

The District was created pursuant to the Regional Water Distribution Act ("RWDA"), codified at Ark. Code Ann. §§ 14-116-101–801. Pursuant to the RWDA, the geographical boundaries of the District were set by an order of the Greene County Circuit Court filed on July 28, 1987. **(RP511-517).** Public nonprofit regional water districts may be organized for, among other purposes, "[f]urnishing water to persons desiring it." *See* Ark. Code Ann. § 14-116-102(4). The powers of regional water districts are set out in Ark. Code Ann. § 14-116-402. These provisions of the RWDA do not confer upon a water district the exclusive right to furnish water within its geographical boundaries. Thus, the 1987 order did not confer upon the District the exclusive right to provide water services to people or entities who happened to live or were located, or who later moved or located, within the geographical boundaries of the District.

The District did not begin providing water services to any customers until early in the year 2000, the year after the City began providing water to ARI. **(RP456; 531-532).** The City's relationship with ARI, which began in 1999 when the company opened its first plant, continued through the ensuing years as the company expanded

its operations with the construction of the East Plant and the Refurbishing Plant, more commonly referred to as the “Refurb” Plant. **(RP545-548).**

The District does not contest the City’s right to serve the original ARI facility, known as the West Plant. Rather, it contends that it has the exclusive right to serve the East Plant, opened in 2006, and the Refurb Plant, which was constructed in 2015. These two facilities lie within the District’s geographical boundaries and within the City’s limits after the area where they are located was annexed into the City with the adoption of a City Council resolution on June 19, 2018. **(RP477-483; 595-596).**

During their depositions, two of the District’s board members, Brad Nelson and Ronald Pigue, and the District’s manager, Tonya Thompson, testified that the District relied *solely* on the 1987 Order that created the District as the basis for its claim that it has the exclusive right to sell water within the boundaries set by the Order. **(RP557-558; 584-585; 639).** However, it is undisputed that the 1987 Order does not contain the word “exclusive” with respect to the sale of water by the District. It merely established the District’s existence and location, and granted it the powers afforded by the RWDA. **(RP511-517).**

Nonetheless, the District argues that the authority to serve customers within its geographical boundaries necessarily precludes the possibility of another entity serving customers who are located within its boundaries, but who desire to purchase water from another provider. The District, however, is incorrect. The City is a

municipal corporation organized and existing under the laws of the State of Arkansas and is a City of the Second Class. Ark. Code Ann. § 14-37-105. Municipal corporations possess the power to "[p]rovide a supply of water by constructing or acquiring, by purchase or otherwise, wells, pumps, cisterns, reservoirs, or other waterworks and to regulate them." Ark. Code Ann. § 14-54-702(a)(1).

Further, "[f]or the purpose of establishing and supplying waterworks, any municipal corporation *may go beyond its territorial limits*." Ark. Code Ann. § 14-54-702(b) (emphasis added). Also, "[a]ny municipality in the State of Arkansas owning and operating a municipal waterworks system or a municipal sewer system or both *may extend its service lines beyond its corporate limits* for the purpose of giving water service, sewer service, or both, to adjacent areas where the demand for service is sufficient to produce revenues that will retire the cost of the service lines." Ark. Code Ann. § 14-234-111(a) (emphasis added).

When ARI constructed the East Plant in 2006 and the Refurb Plant in 2015, it expanded its facilities into areas that were within the geographical boundaries of the District. Pursuant to Ark. Code Ann. §§ 14-54-702(b) and 14-234-111(a), the City lawfully extended its service lines beyond its corporate limits to continue to provide services to its customer, ARI. And, as noted above, the territory where these facilities are located has now been annexed into the City.

The plain meaning of the RWDA provisions cited above is that the District is authorized to furnish water to customers who desire to buy water from it, which is not the case here. The record before the trial court established that ARI desires to continue to buy water from the City. This undisputed fact was established in the affidavit submitted by James Breznay, the Capital Projects Manager for ARI. **(545-548).** The RWDA does not provide for a water district to monopolize and hold an entity hostage if the entity has and desires to utilize an alternative source to acquire water service. Otherwise, the General Assembly would not have included the language in the RWDA that permits a water district to furnish water to those who desire it. Likewise, if the General Assembly intended for a water district to have the absolute and exclusive right to sell water without regard to the preference of persons residing within the geographical boundaries of the district, it could have included such a provision in the law.

To accept the District's argument, one would have to conclude that if ARI did not desire to purchase water from the District, it must do without water. That is an absurd interpretation of the RWDA. The Court has held on many occasions that it will not engage in statutory interpretations that defy common sense and produce absurd results. *Clark v. Johnson Regional Medical Center,* 2010 Ark. 115, at 8, 362 S.W.3d 311, 316. Simply put, the statutory provisions that delineate the purposes for which regional water districts may be formed, section 14-116-102, and the powers

they possess, section 14-116-402, do not state that the District's authority to sell water within its geographical boundaries is reserved exclusively for the District.

When the 1987 Order and the applicable statutory provisions cited above are read jointly, one cannot conclude that the District's authority to sell water within its geographical boundaries is absolute and exclusive. Furthermore, the General Assembly could have easily established the exclusive right for water districts to sell water to customers within their geographical boundaries if it so desired.

Additionally, as noted above, the East Plant and Refurb Plant have now been annexed into the City pursuant to Ark. Code Ann. § 14-40-601. The annexation was approved by the Greene County Circuit Court on June 19, 2018. **(RP593-594).** The City then passed Resolution No. 061918 confirming the annexation of the land pursuant to Ark. Code Ann. § 14-40-605. **(RP595-596).** Ark. Code Ann. § 14-40-606 provides,

> *As soon as* the resolution . . . declaring the annexation has been . . . passed, the territory *shall* be deemed and taken to be a part and parcel of the limits of the city . . . , and the inhabitants residing therein *shall* have and enjoy all the rights and privileges of the inhabitants within the original limits of the city . . . .

(emphasis added).

Assuming, *arguendo*, the District enjoyed an exclusive right to sell water to the ARI East and Refurb Plants before the annexation, which the City has conclusively established is inaccurate, the moment the resolution passed, ARI was

certainly allowed to enjoy and exercise its right to continue its business relationship with the City in order to receive all of its water and sewer needs.

Notably, before the resolution declaring the annexation passed, the District, as an interested party, had thirty days from the entry of the Order of Annexation to institute a proceeding in circuit court to prevent the annexation. *See* Ark. Code Ann. § 14-40-604. However, it chose not to take advantage of that right of action, and the District cannot deprive the City of annexed parcels through argument in this case.

ARI has vested rights under section 14-40-606, and for that reason alone, this Court should affirm the summary judgment in favor of the City.

C. The District does not have the exclusive right to provide water services within its geographical boundaries by virtue of section 15-22-223(a).

The District challenges the trial court's interpretation of Ark. Code Ann. § 15-22-223(a), again asserting an exclusive right to serve the East and Refurb Plants.

The primary rule of statutory interpretation is to give effect to the intent of the legislature. *Board of Trs. of Univ. of Ark. v. Andrews,* 2018 Ark. 12, at 8, 535 S.W.3d 616, 621. The Supreme Court construes the statute "just as it reads, giving the words their ordinary and usually accepted meaning in common language." *Id.* If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it is unnecessary to resort to the rules of statutory interpretation. *Holbrook v. Healthport, Inc.,* 2014 Ark. 146, at 5, 432 S.W.3d 593, 597. The Supreme Court

determines the meaning of a statute and, in the absence of a showing that the circuit court erred, the Court accepts the trial court's interpretation on appeal. *Board of Trs. of Univ. of Ark. v. Andrews,* 2018 Ark. at 8, 535 S.W.3d at 621.

When the meaning of a statute is not clear, courts look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Alcoa World Alumina, L.L.C. v. Weiss,* 2010 Ark. 94, at 3, 377 S.W.3d 164, 166.

Courts seek to reconcile multiple statutory provisions to make them consistent, harmonious and sensible. *Brock v. Townsell,* 2009 Ark. 224, at 9, 309 S.W.3d 179, 186. In doing so, the reviewing court will not "read words into" a statute that are simply not there. *Foster v. Foster,* 2016 Ark. 456, at 14, 506 S.W.3d 808, 817; *First State Bank v. Metro Dist. Condominiums Property Owners' Ass'n, Inc.,* 2014 Ark. 48, at 8, 432 S.W.3d 1, 5-6; *Scoggins v. Medlock,* 2011 Ark. 194, at 7, 381 S.W.3d 781, 785.

The District contends that Ark. Code Ann. § 15-22-223 prohibits the City from selling water to any customer that has property lying within the geographical boundaries of the District because the District is the current provider of water service within those boundaries. The District is incorrect. Subchapter 2 of Article 15 of the Arkansas Code addresses water resources, and one of its stated purposes is to

"[p]rotect the rights of all persons equitably and reasonably interested in the use and disposition of water." Ark. Code Ann. § 15-22-201(d)(2).

The District cites the following provisions from § 15-22-223(a) in support of its argument that the City cannot sell water to ARI facilities that have been annexed into the City's limits but lie within the geographical boundaries of the District:

> It is unlawful for a person to provide water or wastewater services to an area where such services are being provided by the current provider that has pledged or utilizes revenue derived from services within the area to repay financial assistance provided by the Arkansas Natural Resources Commission, unless approval for such activity has been given by the commission and the new provider has received approval under the Arkansas Water Plan established in § 15-22-503, if applicable.

Thus, to be an unlawful act under section 15-22-223, a person must: (1) provide water or wastewater services to an area where such services are being provided by the current provider; and (2) the current provider must have pledged or utilized revenue derived from services within the area to repay financial assistance provided by the Arkansas Natural Resources Commission ("ANRC"). The District is unable to satisfy either element of this statute.

As to the first element, in light of the City's longstanding provision of water and wastewater services to ARI, the trial court properly declined to characterize the District as the current provider for ARI's East Plant and Refurb Plant. The undisputed record establishes that, before the District began providing water services to *any* customers located within its geographical territory, ARI was already the

City's customer. The City is and always has been the provider of water services to ARI.

As to the second element, the District was indebted to the ANRC from 1995 to March 30, 2015 and then again from January 9, 2017, until the present—but at no time during those periods could the District have pledged revenue from the East Plant or Refurb Plant.

In March 2016, the District demanded that the City stop providing water to the East and Refurb Plants on the basis that it claimed the exclusive right to serve those plants pursuant to section 15-22-223. **(RP479).** The District's Manager, Ms. Thompson, testified in her deposition that all outstanding loans the District received from the United States Department of Agriculture ("USDA") were paid in full on March 26, 2015. **(RP633).** She confirmed that the District was not indebted to the USDA or the ANRC between that date and 2017 when it obtained a loan from the ANRC. **(RP633).**

The loan from the ANRC in the amount of $51,500, to which Ms. Thompson referred in her deposition, was effective on January 9, 2017. **(588-591).** Therefore, based on the undisputed testimony of Ms. Thompson, the City was serving all three ARI plants at a time when the District was not indebted to the ANRC. The trial court properly found that there is no evidence that the District was indebted to the ANRC

during all applicable timeframes, as required for Ark. Code Ann. § 15-22-223(a) to apply. **(RP800).**

In a further attempt to fall within the protections of Ark. Code Ann. § 15-22-223(a), the District looked to ANRC for support. That body, among other things, establishes policy and makes funding decisions relative to water rights and water resources planning and development. Ark. Code Ann. § 15-20-207. The ANRC has propounded rules and regulations governing its authority. One of the rules, Section 605.1, contains a verbatim recitation of the provisions of Ark. Code Ann. § 15-22-223(a). This rule is under Subtitle V, which is entitled "Review of proposed transfer of service area." **(RP657).**

Counsel for the District took the deposition of an ANRC attorney, Crystal Phelps, and pressed her to testify that the City had violated the law and Section 605.1 of the ANRC regulations in continuing to serve ARI. However, he was unsuccessful, as Ms. Phelps testified as follows in response to questions from the City's counsel:

> Q. Okay. So I take it that Section 605.5 – let me say that again. Section 605.1 is simply a restatement of Section – Arkansas Code Annotated 15-22-223?
>
> A. Yes.
>
> Q. Okay. Subsection A, I believe, is proper. And it says, as I read it here, "It is unlawful for a person to provide water or wastewater

service to an area where said services are being provided by a current provider that has pledged or used reviews derived from services within the area to repay financial assistance provided by the Commission.

"Unless approval for such activity has been given by the Commission and the new provider has received approval under Arkansas Water Plan, if applicable." Did I read that correctly?

Q. Yes.

A. Based upon your knowledge and understanding of the facts and circumstances involved in this dispute between Marmaduke and the District, are you aware of anything Marmaduke has done which you would conclude to be unlawful under that particular section of the Commission's rules?

A. No. (**RP606; 614).**

In its brief, the District refers to the City as a "claim jumper" in reference to the California gold rush in the mid-19th century. The gist of this curious argument is that the District was not providing water service to ARI because the City had already "jumped" the District's "claim" to serve ARI. The actions of the District in this case belie this assertion and demonstrate that is the District that seeks to inject itself and end a longstanding business relationship between the City and ARI.

When the City declined to terminate its relationship with ARI, the District sought the assistance of Mr. Jerome Alford, an engineer the District had used over the years of its existence in order to obtain a loan for the purpose of replacing PH, adding a chlorine system, pump, and fire hydrant, and repairing a building. **(RP643; 650).** Mr. Alford testified in his deposition that the District originally requested that the funding for the loan come from the USDA. **(RP651).** When asked in his deposition why this was the preference, Mr. Alford candidly admitted the purpose was to invoke the protection of a federal statute, 7 U.S.C. § 1926. **(RP651).** This statute authorizes the USDA to make water facility loans to entities such as the District. According to Mr. Alford, the attraction of invoking § 1926 was to secure the protection of the statute in an effort to eliminate the City as the water supplier for ARI. The relevant portion of the statute is akin to Ark. Code Ann. § 15-22-223(a) in that its purpose is to protect entities that have obtained loans in order to provide water service and require revenue from water sales to repay those loans. This statute has been the subject of a case decided by the United States Court of Appeals for the Eighth Circuit, *Pub. Water Supply Dist. No. 3 of Laclede Cnty, Mo. v. City of Lebanon,* 605 F.3d 511, 514 (8th Cir. 2010).

In *City of Lebanon*, a rural water district alleged that a city was wrongfully providing water and sewer services to customers within the district's boundaries. The district had obtained a loan from the USDA pursuant to 7 U.S.C. § 1926 for the

purpose of extending and improving the district's sewer system. *Id.* As a result, the district claimed that it was protected from competition from the city by § 1926(b) which provides, in relevant part:

> (b) Curtailment or limitation of service prohibited
>
> 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.

At the time the district closed on the USDA loan, the city was already providing sewer and water services to some customers within the district's boundaries. After the loan closed, the city extended service to additional customers within the district's boundaries who were not already being served by the district. The Eighth Circuit held that the city did not violate § 1926(b) by continuing to provide service to customers it began serving before the district was indebted to the USDA. *Id.* at 519.

> [I]f § 1926(b) permitted rural districts to capture customers that a city began serving before a rural district obtained a qualifying federal loan, cities would not be willing to invest in the necessary infrastructure to serve customers within a rural district's boundaries because such investments would be rendered worthless by a rural district that obtains a qualifying federal loan. Creating such a disincentive would undermine the purpose of encouraging rural utility development. Additionally, rural districts can continue to use § 1926(b) to protect

> their exclusive right to serve their existing customer base during the time of the qualifying federal loan, thereby ensuring the continued security of the loan. In sum, the plain language of the statute, the rule in favor of giving effect to all terms in the statute, and our analysis of the statute's purposes all confirm that the City did not violate § 1926(b) *merely by continuing to provide service to those customers it began serving before the District obtained the USDA loan.*

605 F.3d at 518 (emphasis added).

The Eighth Circuit also referenced the Sixth Circuit's distinction between offensive and defensive uses of section 1926(b). In *Le-Ax Water Dist. v. City of Athens,* 345 F.3d 701 (6th Cir. 2003), the court rejected a rural water district's attempt to use section 1926(b) offensively to become the exclusive service provider for a new development it had not previously served. *Id.* at 708. The Court noted that § 1926(b) had always been applied only to situations in which there was an actual encroachment on a water district's existing area or users. *Id.*

Here, the District, as admitted by Mr. Alford, wanted to obtain the loan from the USDA in order to invoke the protection of the federal statute—an offensive use of §1926(b). However, it was determined that the amount of the loan was too small an amount to make it practical to go through the application process with the USDA. **(RP652).** Thereafter, the loan was requested and obtained from the ANRC with the intent to use Ark. Code Ann. § 15-22-223(a) to force ARI to buy water from the District—again, an offensive use of § 15-22-223(a). Ms. Thompson conceded in her deposition that at the time the District obtained a loan from the ANRC, which closed

on January 9, 2017, it was not receiving any revenue from the sale of water to ARI. **(RP635-636).** She also stated that in the loan application with ANRC, the District pledged to repay the loan with revenues received from *existing* customers. **(RP710-711).** ARI was not an existing customer of the District.

The District's characterization of the City of Marmaduke as a "claim jumper" could be more accurately applied to the District itself. The desire to obtain a loan, from either the USDA or ANRC was a thinly-veiled attempt to terminate the relationship between the City and ARI, not to defend an actual encroachment on a water district's existing customer.

Here, as in *City of Lebanon,* the District's attempts to gain the protection of Ark. Code Ann. § 15-22-223 have been undeniably offensive. The trial court correctly held that the statute's true purpose is to serve as a shield for existing providers, such as the City, not as a sword to interfere with a current service relationship. **(RP800-802).**

The essential purpose of 7 U.S.C. § 1926(b) and section 15-22-223(a) is the protection of interests secured by taxpayer dollars. Like the *City of Lebanon*, the City of Marmaduke has continuously provided water services to the East Plant and Refurb Plant. The City has *never* solicited customers within the District's territory with whom it did not already have a relationship. The Eighth Circuit's interpretation

of the federal statute in *City of Lebanon* is instructive and appropriate for this case and the interpretation of Ark. Code Ann. § 15-22-223(a).

Continuing to provide water and sewer services to an existing customer who desires to purchase water from the City surely fits within the purpose of the state statute. As the trial court properly noted, to accept the District's position, the court would be disrupting ARI's service provider of the last twenty years, a scenario that is neither fair nor contemplated by this statute. Therefore, this Court should affirm the trial court's judgment in favor of the City.

D. Providing water services to the East Plant and Refurb Plant does not constitute a water development project such that the City needs approval by the ANRC pursuant to Ark. Code Ann. § 15-22-503.

The District also claims that City was required to obtain permission from the ANRC under Ark. Code Ann. § 15-22-503 and Section 601.4 of the ANRC Water Plan Compliance Review Procedures before providing water service to the ARI East Plant and Refurb Plant. This argument is based on the premise that the provision of water services to these facilities constituted a water development project.

Under such rules as it may adopt, the ANRC is charged with the duty of "preparing, developing, formulating, and engaging in a comprehensive program for the orderly development and management of the state's water and related land resources, to be referred to as the 'Arkansas Water Plan.'" Ark. Code Ann. § 15-22-503(a). Section 503(e)(1) requires political subdivisions of the state to obtain

approval from the ANRC before spending funds on or engaging in any water development project.

Pursuant to this statutory charge, the ANRC adopted rules and regulations developing and implementing the Arkansas Water Plan. Section 601.4 of the ANRC Water Plan Compliance Review Procedures provides that water plan compliance approval is needed for water development projects. With respect to political subdivisions such as the City of Marmaduke, the rule provides as follows:

> A. All political subdivisions must obtain water plan compliance approval prior to construction of a water development project.
>
> B. The term "project" as used in this title shall include the following:
>
> 1. Development of a new water supply source or water or wastewater treatment plant;
>
> 2. Development of a new or different location for water withdrawal or wastewater discharge;
>
> 3. Any increase to water or wastewater treatment plant capacity;
>
> 4. System expansion that would result in:
>
> a. Use of water exceeding eighty percent (80%) of the drinking water system's capacity to produce drinking water;

b. Increasing wastewater flow by greater than eighty percent (80%) of existing treatment capacity; or

c. An increase of more than twenty percent (20%) of the current average water usage or treatment capacity;

5. A project involving flood control or drainage;

6. Transfer of a service area currently receiving service from one utility to another;

7. Transfer of a service area not yet receiving service from a utility but included within another political subdivision's approved service area or within another entity's application for water plan compliance approval;

8. Acquisition of properties, facilities, or customers belonging to another system; or

9. Proposal of a master plan for water plan compliance certification. **(RP656).**

In her deposition, ANRC counsel Crystal Phelps was examined on Section 601.4 and how it would apply, if at all, to the City's water and wastewater service to the ARI East Plant and Refurb Plant.

Q Okay. Would you agree with me that one of the purposes of forming a nonprofit water district, is to furnish water to persons who desire it?

A Yes.

Q If an entity is serving an existing customer, such as in this case ARI, and ARI then expands its operation across city limits, is it your – based upon your earlier testimony to Mr. Lyons, is it your testimony that in order for – in order for Marmaduke to serve this new area at ARI, they've got to come the ANRC and get some approval?

A It would depend upon whether service to this new entity increased their water usage by more than 20 percent, Marmaduke's water usage. I would have to defer to the Title 6 rules for projects. **(RP610-611).**

***

Q . . . And what I'm placing in front of you – I'm not going to made an exhibit, but it's – if you read along with me, it's entitled:

Arkansas Natural Resources Commission Water Plan Compliance Review Procedures, Title 6, Effective 2012?

A Yes.

Q If you can find that for me, I would appreciate it.

A All right. What I was talking about is Section 602.4 [sic], Applicability.

Q Okay.

A And this concerns the definition of project.

Q Okay.

A And a project is a system expansion that would result in an increase of more than 20 percent of the current average water usage or treatment capacity.

And I think that is the particular definition that would most likely apply to Marmaduke. Because I don't – think that the ARI expansion would have been a use of water exceeding 80 percent of Marmaduke's capacity to produce drinking water.

Q All right.

A So, if one of those were to apply, I think that would be the one.

Q Okay, so you're saying then, if providing service to an existing customer, such as ARI, would require an increase of more than 20 percent of the current average water usage or treatment capacity, they would need to come and – to the ANRC?

A Yes.

Q And what would they need to do?

A They would need to apply for Water Plan Compliance approval. **(RP611-612).**

Based on Ms. Phelps's testimony, pursuant to 601.4(b)(4)(c), the City would have been required to obtain water plan compliance approval before providing services to the East and Refurb Plants only *if* service to the plants increased the City's water usage by more than twenty percent.

As reflected in the affidavit from Veneta Hargrove, the City's water usage never increased by more than 20% when it initially began supplying either the East Plant or the Refurb Plant. **(RP537-544).** In fact, in 2006, when the City began serving the East Plant, there was a decrease in water sales. The same is true when the City began serving the Refurb Plant. Thus, the City's provision of service to the ARI East and Refurb Plants does not meet the definition of a project for which the City needed to seek permission from the ANRC. The District had no response to this undisputed proof submitted to the trial court. As such, the trial court correctly held that the City's provision of water to the East and Refurb Plants does not constitute a water development project.

Despite Ms. Phelps's testimony, the District has also attempted to classify the City's provision of water to ARI as a water project under another subsection of Section 604.1. Section 604.1(B)(7) defines a project as "[t]ransfer of a service area

not yet receiving service from a utility but included within another political subdivision's approved service area or within another entity's application for water plan compliance approval." The District's argument is that the City "transferred" the service of ARI from the District without receiving permission of the ANRC.

During his deposition of Ms. Phelps , counsel for the District asked if Section 604.1(B)(7) was the exact situation involved here with the City serving the ARI facilities that have been annexed into the City's limits but lie within the geographical boundaries of the District. She responded that she was not sure the two situations were the same. **(RP617).** The District's counsel then pressed Ms. Phelps to agree that there is no difference between the terms "geographic boundaries" and "service area," but Ms. Phelps would not agree with this argument:

> Q (By Mr. Lyons) Okay. Well, before – when ARI built its plan and it didn't have any water yet – it built the East Plant and it didn't have any water yet, and you agreed with me, based on the earlier review of the letter, the East Plant is in the Water District's – St. Francis Water District's service territory; correct?
>
> A It's definitely within the geographic boundaries of the District.
>
> Q Okay. Well, that – you said – and you said geographic boundaries meant service area?

A I didn't say that.

Q Well, when you were asked for the definition, it says service geographic – service area. And then, there was another definition that had –

A Geographic.

Q Geographic in it. And the service area is the geographic boundary; isn't it?

A No, not necessarily.

Q Okay. So, tell me what the difference between the geographic area granted to a water district is and the service area is?

A Service area has to the with areas that have been approved by the Commission for the provision of water or wastewater service. Its – not the legal boundaries of a particular water provider but it is the boundaries that have been approved for service by the Commission.

* * *

Q Do you consider them to be different?

A Yes. **(RP617-619).**

The City's provision of water to ARI's East and Refurb Plants does *not* constitute a project under *any* section of the Arkansas Water Plan. Ms. Phelps' deposition testimony is significant on this point. As cited earlier, she testified that

the City had not undertaken any action that she would conclude violated the section of the ANRC regulations that relate to the protection of service areas. **(RP614).**

The City was not required to seek approval from the ANRC before providing water service to the East Plant and Refurb Plant. The trial court correctly granted summary judgment in favor of the City.

II. THE TRIAL COURT CORRECTLY DENIED THE DISTRICT'S MOTION FOR SUMMARY JUDGMENT.

The District contends that the trial court erred in denying its motion for summary judgment and then proceeds to largely repeat the arguments advanced under the first point for reversal. Of course, it is well-settled that a denial of summary judgment is not appealable. *BPS, Inc. v. Parker*, 345 Ark. 381, 388, 47 S.W.3d 858, 864 (2001). However, since both parties agree there are no material facts in dispute, and the City's motion for summary judgment was granted, the Court must simply determine whether the City was entitled to judgment as a matter of law under the undisputed facts. *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844.

The City has addressed most of the District's arguments under the first point and will not burden the record by repeating them. The only additional argument under this point concerns two cases cited by the District which are inapposite to the case at hand.

The first case is *City of Fort Smith v. River Valley Regional Water Dist.,* 344 Ark. 57, 37 S.W.3d 631 (2001). This case is cited in response to the fact that the City

annexed the land on which the East Plant and Refurb Plant lie. The District contends that these facilities remain in the District, and are the District's rightful customers, despite the annexation.

In *City of Fort Smith*, the circuit court entered an order creating the River Valley Regional Water District, and the city appealed. One of the arguments made by Fort Smith was that the RWDA did not apply to political subdivisions or lands owned by such entities, citing Ark. Code Ann. § 14-116-107. The city argued that this meant that municipalities may not be contained within a regional water district. The water district maintained that this statute only meant that municipalities are not required to follow the provisions of the RWDA before they take action to provide water to their citizens. The Court rejected the city's argument on appeal and found the RWDA does not prohibit municipalities from being contained within the boundary of a regional water district. *Id.* at 37 S.W.3d at 638.

The District does not take issue with this decision, but it is of no relevance to this case. As noted previously, "[a]ny municipality in the State of Arkansas owning and operating a municipal waterworks system or a municipal sewer system or both may extend its service lines beyond its corporate limits for the purpose of giving water service, sewer service, or both, to adjacent areas where the demand for service is sufficient to produce revenues that will retire the cost of the service lines." Ark. Code Ann. § 14-234-111(a).

Indeed, *City of Fort Smith* refutes the District's position that establishing the geographical boundaries of a water district does not confer upon it the exclusive right to serve a person or entity located within the boundaries at the time the district is formed or that may later be located within the district boundaries. Rather, it reinforces the point that water districts and municipalities can coexist in the provision of water to customers.

The District also argues that *Arkansas Soil and Water Conservation Commission v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002) supports its position that the City needed prior approval from the ANRC before extending service to the new ARI plants. In *City of Bentonville*, the Arkansas Soil and Water Conservation Commission ("ASWCC"), the predecessor of the ANRC, approved a water project proposed by the City of Centerton. The approval excluded any areas that Bentonville had annexed prior to the final decision to approve.

Bentonville appealed to circuit court and argued that it had exclusive jurisdiction over water projects within its five-mile extraterritorial planning area that surrounded the city pursuant to Ark. Code Ann. § 14-56-413. The circuit court agreed with Bentonville and the ASWCC appealed the decision. The Supreme Court reversed. The Court gave significant weight to the annexation that occurred prior to the ASWCC adopting the project approval. Centerton submitted its water development project for approval in early 2000. *Id.* at 294. In July of that year, the

director of the ASWCC approved Centerton's proposed project. *Id.* at 295. In April 2001, when the commission adopted the director's order approving the project, it excluded *any* areas that Bentonville previously annexed into its city limits prior to March 2001. *Id.*

The court also emphasized that ASWCC's approval of Centerton's water project did not deny Bentonville any powers to provide city services to its citizens because Bentonville did not provide the ASWCC with any plan to annex or otherwise provide water services to the residents who lived within the five-mile extraterritorial planning area. The Court observed that if it were to adopt the statutory interpretation Bentonville advocated "the residents of the disputed area would be denied potable water until such time, if ever, Bentonville decides to provide water, even then, a water project would still have to be approved by ASWCC." *Id.* at 300.

In contrast to *City of Bentonville*, as supported by Ms. Phelps's testimony and Ms. Hargrove's Affidavit, the City of Marmaduke did not engage or propose to engage in a water development project nor has it ever contended that its statutory rights trump the ANRC's authority under section 15-22-503. At no point did the City attempt to claim any sort of exclusive jurisdiction. The City simply continued serving an existing customer. Further, because the East and Refurb Plants have been annexed into the City, forcing ARI to purchase water from the District when it does

not desire to do so, would deny the City of its power to provide services to its citizens and deny ARI its right to enjoy the privileges it has a city citizen.

CONCLUSION

For all of the foregoing reasons, the City respectfully requests this Court to affirm the Circuit Court's entry of summary judgment in favor of the City.

Respectfully submitted,

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REQUEST FOR RELIEF

Appellee respectfully requests that this Court affirm the judgment of the trial court granting Appellee's Motion for Summary Judgment.

CERTIFICATE OF SERVICE

I, William C. Mann, III, do hereby certify that a copy of the above and foregoing was served upon the attorney of record listed below and Circuit Judge Melissa Richardson, on this 17th day of October 2019, via First Class Mail:

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CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD COUNT LIMITATIONS

I, William C. Mann, III, hereby certify that the attached Appellee's Brief Complies with Administrative Order No. 19. Further, the undersigned states that the foregoing Brief conforms to the word-count limitations contained in Rule 4-2(d). The Brief contains 8111 words.

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