

IN THE CIRCUIT COURT OF GREENE COUNTY, ARKANSAS

ST. FRANCIS RIVER REGIONAL WATER DISTRICT

PLAINTIFF

VS 2017-219

CITY OF MARMADUKE, ARKANSAS

DEFENDANT

TRANSCRIPTS OF MOTIONS HEARINGS

JUNE 7, 2018

APRIL 8, 2019

* * * * *

Came on for hearing before the Honorable Melissa B. Richardson, Circuit Judge, in Paragould, Arkansas.

* * * * *

Dana Beck, CCR
Certified Court Reporter
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APPEARANCES:

ON BEHALF OF THE PLAINTIFF

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ON BEHALF OF THE DEFENDANT

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PROCEEDINGS

(COURT REPORTER'S NOTE: Court convened on June 7, 2018, in Paragould, Arkansas, at 9:30 a.m.

THE COURT: I have reviewed the pleadings that have been submitted to me as well as the exhibits that were attached to the motion and the reply to the motion, so I will hear oral argument at this point, Mr. Lyons, do you want to proceed?

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MR. LYONS: Thank you, Your Honor. Your Honor, Jim Lyons on behalf of St. Francis River Regional Water District. We filed a motion for summary judgment in this case. We've tried this same case before in regard to this, not in regard to water, but in regard to electricity, but that case was tried in front of the Public Service Commission, so that's the reason we're in court here. St. Francis River Regional Water District, I'll call them St. Francis from now on if that's all right with the court, is a regional water district with an exclusive service territory. Marmaduke is a municipal corporation. St. Francis and

1 Marmaduke each supply water in their
2 respective territories, plus Marmaduke is
3 serving in our territory at this time.

4 American Railcar, right outside of
5 Marmaduke, is a foreign corporation located --
6 part of it's in Marmaduke, part of it's outside
7 Marmaduke, from my understanding. ARI's campus
8 is located with a portion of the service area in
9 Marmaduke and a portion of the service area of
10 St. Francis outside of Marmaduke. Essentially,
11 the dividing line between Marmaduke's territory
12 and St. Francis' territory is between two
13 separate buildings shown on Exhibit C, which is
14 an aerial map of plat, I have one blown up, I'm
15 not sure if the one that we filed was blown up
16 or not, but this is a copy of the same map about
17 the lines and all that.

18 This is Exhibit C to our motion. Your
19 Honor, if you see the road that comes from the
20 south, north is up at the top where it says
21 legend, and then titled map. That is the
22 dividing line that runs between the sections,
23 and St. Francis has everything on this side of
24 the dividing line. Excuse me. And that's a
25 section line. And as a result, they are supposed

1 to be the exclusive provider for water in the
2 area. The buildings that are located on the ARI
3 campus were built at various times. Originally,
4 they started with just this area right here,
5 that was the original plant, then they added
6 this building, which is attached to this
7 building. Then they added a separate building,
8 which is not attached in any form, shape, or
9 fashion between the original building, the first
10 additional building, and then the third building
11 that was added at a later point in time.

12 Marmaduke is providing water to the portion
13 of ARI both in their service territory as well
14 as in St. Francis' territory. St. Francis has
15 made demand upon Marmaduke to cease providing
16 the water so that St. Francis may begin to
17 provide the water to them. The Arkansas Natural
18 Resources Commission is a commission that is in
19 charge of water generally, and they have not
20 approved or authorized Marmaduke to provide
21 service in St. Francis' territory. ARI's east
22 plant, which is the portion that we're concerned
23 with, and then they've added this little
24 building at the top and this over here, and I
25 think they call that the refurb plant. But

1 anyway, it's essentially the entire east
2 building, which includes what they call the
3 refurb plant.

4 All of that is located in St. Francis'
5 territory. That's an undisputed fact. Marmaduke,
6 the city of Marmaduke, admitted that in their
7 answer. St. Francis has received financial
8 assistance from the Arkansas Natural Resources
9 Commission and has pledged its resources from
10 that to repay the loan to the Arkansas Natural
11 Resources Commission. All of those facts have
12 been admitted by Marmaduke in its complaint. The
13 issue before the court is simply whether St.
14 Francis has the exclusive right to provide the
15 water service to customers in its service
16 territory and to provide, in particular, ARI's
17 east plant and the refurb plant, and we believe
18 that this can be decided as a matter of law. St.
19 Francis claims that based on Arkansas Code
20 Annotated section 15-22-223 that it is entitled
21 to provide water to the portion of ARI which is
22 located in St. Francis' territory. This is
23 simply incorrect.

24 Marmaduke also claims that St. Francis does
25 not have exclusive rights to provide water

1 service to ARI, and Marmaduke also claims that
2 it is providing water to longtime customer ARI,
3 which they have been a longtime customer, but it
4 was originally, as I said, for this part of the
5 plant, then later when this was added, and then
6 finally, when this was added, and then they
7 added the refurb plant. So this has been over a
8 period of a number of years. Marmaduke argues
9 that there are many unknown material facts.
10 There are no unknown material facts at issue.
11 They have admitted everything that is material
12 to this and therefore, this is right for some
13 summary judgment.

14 All of Marmaduke's arguments fail. They
15 claim that we don't have pipes in the ground.
16 Well, we have pipes nearby, and there's nothing
17 in the rules, nothing in the law that says you
18 have to have pipes in the ground up to the plant
19 at the time that you make demands upon them to
20 serve a particular territory. Because St.
21 Francis is indebted to the Arkansas Natural
22 Resources Commission, by virtue of the loan and
23 the income derived there from is pledged or
24 utilized by St. Francis to repay that loan, then
25 the Arkansas Natural Resources Commission has

1 the ability to control this from a standpoint of
2 allowing Marmaduke to provide water if they
3 chose to do so, and Marmaduke has not done that.
4 Marmaduke has not obtained any permission from
5 them and has not even sought it, to our
6 knowledge. But regardless, they've not obtained
7 any permission. So the Arkansas Natural
8 Resources Commission controls and therefore,
9 since there is no water plan for Marmaduke to
10 provide water to the area in our exclusive
11 territory, then the law says that we are the
12 exclusive provider and we should get to provide
13 that.

14 The fact that Marmaduke has provided water
15 service for a number of years has nothing to do
16 with the case. The beginning and the end of the
17 inquiry as to summary judgment is simply who has
18 the authority to serve customers in St. Francis'
19 service area. Arkansas Code Annotated
20 15-22-223(a) is the main section of the law that
21 Marmaduke relies upon. 15-22-223(a) provides,
22 "It is unlawful for a person to provide water or
23 wastewater services to an area where such
24 services are being provided by the current
25 provider that is pledged or utilizes revenue

1 derived from services within the area to repay
2 financial assistance provided to the Arkansas
3 Natural Resources Commission unless approval of
4 such activity has been given by the commission
5 and the new provider has received approval under
6 the Arkansas Water Plan established in ACA
7 15-22-503."

8 They simply have not done that. They have
9 not gotten the permission necessary to do that,
10 and therefore, under 15-22-223(a), it is
11 unlawful for them to continue to provide that.
12 Marmaduke wants to read Arkansas Code Annotated
13 15-22-223(a) as if the words to an area are
14 removed from the statute, however, as the Court
15 is well aware, when the language of a statute is
16 plain and unambiguous, Court must determine the
17 legislative intent from the ordinary meaning of
18 the language that is used and you're to construe
19 it just as it reads, giving the words their
20 ordinary and usually accepted meaning in common
21 language. They construe the statute so that no
22 word is left void, superfluous, or
23 insignificant, and we give meaning and effect to
24 every word in the statute if possible. It is
25 completely possible in this particular case

1 because it says, "It's unlawful for a person to
2 provide water or wastewater service to an area
3 where services are being provided by the current
4 provider." We are providing services in the
5 area. We've made demand to attach to the ARI
6 plant, ARI says no, and Marmaduke says, no,
7 we're going to continue to do that.

8 Maramduke focuses on the words, "Where such
9 services are being provided by the current
10 provider." Judge, if that is construed the way
11 that Marmaduke wants to construe it, all that
12 would have to happen is there would be a race to
13 provide water, and if you wanted water and I was
14 providing water and Ms. LaFever was providing
15 water, the first one to get to your house would
16 win. That's not the way the law works. The law
17 provides exclusive territories for the provision
18 of water, and there's a specific method by which
19 Marmaduke could have, had they sought to, get
20 permission of the Arkansas Natural Resources
21 Commission, but they've chosen not to do that.
22 Therefore, under that statute, they are not
23 allowed to provide water to the ARI plant. They
24 are unlawfully providing that water, and
25 Marmaduke simply wants the Court to believe that

1 ACA 15-22-223(a) is a curtailment statute and
2 compares it to 7-USC-1926(b), and cites the case
3 of public water supply district number three of
4 Laclede City, Missouri, versus the City of
5 Lebanon as support for Marmaduke that it should
6 be able to continue to intrude upon St. Francis'
7 exclusive territory.

8 First, 1926(b) provides that a rural
9 district service shall not be curtailed and
10 limited, and conversely, Arkansas Code Annotated
11 15-22-223(a) does not use the word curtail, does
12 not use the word limited, in fact, it provides
13 that, had Marmaduke wanted to provide water in
14 this area, there's a method by which they can go
15 about that, but they have chosen not to do that
16 and simply said, we got there first, therefore
17 you guys don't get to do it. And that is simply
18 not what the law provides.

19 So it is our position that at this point in
20 time, that the Court should rule that St.
21 Francis is entitled to provide the water to the
22 ARI plant. They've not presented any evidence
23 that St. Francis cannot provide water supply.
24 They have an affidavit, but the affidavit simply
25 says that, I believe it's the mayor who signed

1 it, may have been someone else, but the mayor of
2 Marmaduke says, I don't know if they can provide
3 it or not. Well, he doesn't know, he admits that
4 he doesn't know, and that's not meeting proof
5 with proof, as is required. So there are no
6 factual issues in this case. They've admitted
7 that this is in our exclusive territory, they've
8 admitted that 15-22-223(a) applies, and it
9 clearly says it's unlawful for Marmaduke to do
10 this unless they jump through the hoops to
11 provide the water. They did not jump through the
12 hoops. We've made demand on them to disconnect,
13 allow us to connect, but they simply refuse to
14 do that, and that is what brings us here today.

15 And it's simply a case that there's no
16 reason we should have to go through a trial
17 because a trial will simply be a reiteration of
18 the arguments made today because there's
19 virtually no factual dispute at all, and
20 certainly no material facts in dispute that
21 would change the outcome of this. So when
22 there's a statute which clearly says it's
23 unlawful for someone to provide water outside of
24 their service territory, then that's exactly
25 what it means, and had they gone to the Arkansas

1 Natural Resources Commission, they might have
2 gotten permission, they might not have. But the
3 statute says you have to do that, and they have
4 not done that. And it's not something, oh well,
5 now we can rush out and do that. They've waited
6 too long. We're in court, we're ready for a
7 hearing, and the Court should rule today that
8 St. Francis is entitled to provide water to the
9 eastern portion of this plant, which is in St.
10 Francis' exclusive territory. Thank you.

11 THE COURT: Mr. Lyons, I want to ask a
12 couple of questions.

13 MR. LYONS: Okay.

14 THE COURT: In reading all of this, the
15 issue of administrative relief or
16 administrative remedies jumped out at me, and
17 at the outset of your oral argument, you
18 mentioned that this had been litigated with
19 respect to electricity.

20 MR. LYONS: Right.

21 THE COURT: But that had been done in the
22 administrative realm, with respect to it
23 before the commission.

24 MR. LYONS: Right.

25 THE COURT: All right. Educate me about

1 whether there are any administrative remedies
2 that St. Francis could pursue with respect to
3 this scenario, where Marmaduke has, as you put
4 it, is unlawfully providing water to an area
5 that is outside of where they are allowed to
6 do so for your theory of the case.

7 MR. LYONS: Right. The Arkansas Natural
8 Resources Commission is not set up like the
9 Public Service Commission. Public Service
10 Commission controls electricity --

11 THE COURT: Right.

12 MR. LYONS: -- it does not control water.
13 The Arkansas Natural Resources Commission does
14 not have a commission which has hearings, and
15 you go to them, and you have a hearing to
16 determine who gets to provide the water. They
17 have an application process for the City of
18 Marmaduke, who can make that, but then that
19 goes to court. They've chosen not to do that.

20 THE COURT: The case that you cited, the
21 Arkansas Supreme Court case, which I did find
22 very helpful, instructive, Arkansas Soil and
23 Water Conservation Commission versus City of
24 Bentonville, which was a Supreme Court case
25 from 2002. That one developed in a different

1 procedural fashion clearly, given that one of
2 the parties was Arkansas Soil and Water
3 Conservation Commission.

4 MR. LYONS: Right.

5 THE COURT: And the position in that case
6 by the City of Bentonville is that the
7 decision of the commission was not right, and
8 that's what ultimately went up on appeal to
9 the Arkansas Supreme Court. Why could there
10 not be a similar administrative pursuit in
11 front of the Arkansas Soil and Water
12 Conservation Commission as what occurred in
13 the Bentonville case?

14 MR. LYONS: The only one that can pursue
15 that is for them to seek that relief, Your
16 Honor.

17 THE COURT: Okay.

18 MR. LYONS: We can't seek that relief.

19 THE COURT: So your position is that St.
20 Francis has no remedy administratively
21 whatsoever.

22 MR. LYONS: That is correct. The statute
23 is clear, it says it's unlawful to do this,
24 there's no administrative remedy set out for
25 us to go before the Arkansas Natural Resources

1 Commission. They had the opportunity to do
2 this when they first began providing water,
3 they chose not to, and they did so at their
4 own peril. Had they done that, the commission
5 might have said okay. And then that gets
6 appealed to the Supreme Court ultimately, or
7 Court of Appeals, as it may be now, but
8 they've chosen not to do that.

9 So we don't have an administrative remedy,
10 we're required to come to court, and that's
11 where we would have been in the other case with
12 Craighead Electric fighting with Entergy, but
13 for the fact that all electrical matters are
14 governed by the Arkansas Public Service
15 Commission, so they have a specific procedure
16 for filing a petition before the Public Service
17 Commission, you have a hearing, they have a
18 commission which hears it, they have attorneys
19 which work on that, but the Arkansas Natural
20 Resources Commission is not set up for hearings
21 where they have rate hearings and that sort of
22 thing, so the administrative procedure before
23 them is nonexistent in this particular instance.

24 THE COURT: Right. All right, thank you.
25 All right. Ms. LaFever.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY**JUDGMENT**

MS. LAFEVER: Thank you, Your Honor. Good morning. My name is Amanda LaFever, I am here on behalf of my client, the City of Marmaduke. If I may, Your Honor, I'd like to address the question that you posed to Mr. Lyons just before he sat down, and that is the authority of the Arkansas Natural Resources Commission as a regulatory agency to, I guess, wade in, and Mr. Lyons' position on behalf of his client was that, unlike the Public Service Commission, the Arkansas Natural Resources Commission is not set up in a similar fashion. However, under section 801.1 of the Arkansas Natural Resources Commission rules governing water rights investigation, the authority granted to the commission, it states, "The commission is the state's chief water quantity agency, has the authority to investigate and assist in the resolution of water rights complaints that deal with flooding, surface water availability and use, and groundwater availability and use."

Section 802.1, Applications, "Persons

1 wishing the commission staff to investigate
2 water rights issues shall submit a request in
3 writing to the commission office. The request
4 must clearly state the issue they wish
5 investigated, identify the location of the issue
6 on appropriate maps if possible, identify the
7 persons involved, including the person making
8 the request, stating complete address and
9 telephone numbers of each." So the idea that the
10 commission doesn't have any sort of procedures
11 or processes in place to review complaints, I
12 don't think that's correct, and the position
13 that it must necessarily be the City of
14 Marmaduke under 223, it must be the City of
15 Marmaduke that approaches the commission with
16 the issue, I don't think that's correct either.
17 If St. Francis, the district is how I've been
18 referring to them in my briefs, had wished the
19 commission to weigh in, I've not seen or read,
20 and I don't think that the plaintiff has
21 presented anything that would prevent them from
22 doing so.

23 Furthermore, Mr. Lyons indicated that --
24 seems to be making the argument that the city
25 has somehow waived its rights under 223 to go to

1 the commission, and I see no law indicating that
2 or any sort of limitations period that would
3 prevent us from leaving here today and going to
4 the commission and saying, "Hey, we want you to
5 look at this before we get to the courthouse
6 doors." Or, "Look at this in lieu of
7 adjudication of the matter before the court."
8 And I don't think the plaintiff has presented
9 that. It's the city's position that under 223
10 that the scope of that statute, it's to protect
11 the stream of revenue, it's to protect the
12 state's investment of taxpayer dollars in water
13 projects within the state. Mr. Lyons attempts to
14 make hay with the fact that certain words are
15 missing from that statute, but what I find
16 interesting is that the word exclusivity is
17 nowhere in that statute.

18 If you look at the plain language of the
19 statute, it talks about the current provider
20 versus a new provider. Well, the City of
21 Marmaduke has been the only provider to ARI,
22 American Railroad Industries, since ARI came to
23 town. ARI came to the City of Marmaduke, I
24 believe in '99, built the western portion of the
25 plant. The district, excuse me, could not

1 provide water to them at that point in time,
2 even though the district existed at that point
3 in time. ARI was annexed into the city and we
4 began providing water to them. The eastern
5 portion of the plant, that was built by ARI in
6 2005, I believe. So it's not -- it was 13 years
7 ago, it wasn't a recent build. The most recent
8 build was the refurb plant, I think it was built
9 in 2015, and water began -- we began serving
10 them with water in 2016, late 2016, very
11 beginning of 2017.

12 Problematic to me with this is that the
13 statute is meant to provide protection to an
14 entity or to a district who has borrowed money.
15 Essentially the service is the collateral for
16 the loan made by the State. At the time that the
17 city began providing water services to the
18 western district, the eastern district, and the
19 refurb plant, I don't believe they were indebted
20 to the Natural Resources Commission. And they
21 acknowledged that. There was a city council
22 meeting at Marmaduke where one of their
23 representatives said, this shouldn't be about
24 who you borrow money from. But the purpose and
25 scope of that statute, even though the word

1 anti-curtailement doesn't appear in it, it is an
2 anti-curtailement statute, but the scope of it is
3 to protect that revenue stream, but that revenue
4 stream did not exist at the time. And the
5 statute, like I said, does not say exclusivity.

6 Mr. Lyons talks about the statute and says
7 that the City of Marmaduke wants to read it as
8 though certain words aren't there, but it's our
9 position that the district wants to read the
10 statute as though certain words are there. Ark.
11 Code Annotated 15-22-223(a), "It is unlawful for
12 a person to run water or wastewater services to
13 an area where such services are being provided
14 by the current provider." The City of Marmaduke
15 is the current provider. The general assembly
16 could have written that to say it is unlawful
17 for a person to provide water, wastewater
18 services to a service area. And then maybe we
19 would be closer to what the district is arguing.

20 The new provider, we read that as the new
21 provider is the district. They have never --
22 they're not currently providing water services
23 to the city, they've never provided water
24 services to the city. So by virtue of going out
25 and obtaining this loan, their argument is that

1 that unilateral action by the district can
2 somehow create illegal action on the part of the
3 city. As I was going back and reading this,
4 while it's not in the criminal context, it
5 almost reads to be as sort of an ex post facto
6 law. I mean, the city has been providing these
7 water services to its customer, ARI, for some
8 length of time to various portions of that
9 campus, and their argument is that -- the
10 statute doesn't come into play unless there's
11 money owed to the Arkansas Natural Resources
12 Commission.

13 When we first began doing this and up and
14 until they went out and got their loan through
15 the commission after having paid off their
16 federal debt -- I believe they refinanced their
17 federal debt through a local bank, so they lost
18 the protection of the federal anti-curtailment
19 statute, were made aware of that fact, and then
20 went out and borrowed money from the Arkansas
21 Natural Commission to, I feel, sort of rally the
22 troops and regain that protection. And in doing
23 so, that puts us in a position where having only
24 continued to provide water to an existing
25 customer, we're now in a position of, according

1 to them, committing an illegal act, and I don't
2 think that's what the general assembly intended.
3 The district comes to the table late and says oh
4 yeah, we do want to provide water to this entity
5 that's in the geographical territory. All we
6 have to do is go out and borrow money, whether
7 we need it or not.

8 As far as their ability to connect, all we
9 have is the affidavit, I believe, from Ms.
10 Thompson, which I found interesting in the sense
11 that, I mean, if there's pipes in the ground,
12 and they're ready and able, and willing to
13 connect, I'd love to see a map or a schematic or
14 something to that effect. Something more than
15 just a bare statement that they're ready to go
16 within whatever a reasonable amount of time is,
17 and it begs the question, how does that affect
18 ARI's business, to some degree? I don't
19 represent ARI, but it does make me wonder. I
20 mean, is the city to continue providing water
21 services for the next two weeks, three weeks, a
22 month, six months, a year? We don't know how
23 long it would take the district to get its ducks
24 in a row. We don't know that we still can't go
25 to the commission. We don't know, really, the

1 minutia of the financing that they received from
2 the Arkansas Natural Resources Commission, and
3 at this point, Your Honor, we think that those
4 are material issues of fact that need further
5 exploring during the course of discovery.

6 The defendants are not asking for a year or
7 two years to conduct discovery. We would like to
8 take the deposition of a 30(b)(6) witness, send
9 some interrogatory requests for production, that
10 sort of thing. And I think we can do that fairly
11 quickly, but we do not think this is right at
12 this moment. Particularly in light of the fact
13 that the Plaintiff has presented no proof that
14 we still can't go to the commission, and he's
15 admitted here today that perhaps if we go to the
16 commission and they say it's okay, then there's
17 no issue for the Court to adjudicate.

18 I don't disagree with Mr. Lyons that, as he
19 said, that words should be given their ordinary
20 and usual meaning. I do think when you read the
21 statute, the 15-22-223(a), excuse me, that when
22 you do that, the city is the current provider,
23 the district is the new provider. Let's see.
24 It's the city's position -- I mean, this
25 statute, it's meant to be a shield, not a sword,

1 and we feel like the district is coming in and
2 attempting to use the statute as a sword. It's
3 meant to protect them during the period of the
4 financing. There's no exclusivity provided by
5 that statute for the entirety of the existence
6 of the regional water district.

7 Mr. Lyons, on behalf of the plaintiff,
8 represented to the Court that the Defendants had
9 admitted that the district has an exclusive
10 territory. We admitted that the portions of the
11 ARI plant, the eastern plant, and the refurb
12 plant, are within the geographical territory
13 contemplated at the inception of the water
14 district, but nowhere did we admit the right to
15 exclusivity, and I want to make that clear.

16 Finally, Your Honor, the idea that the city
17 does not have the authority to provide water
18 services to -- well, I think there's no
19 question, the city has the authority to provide
20 water services to those within the
21 jurisdictional limits of the city, however,
22 statutory law, and forgive me, I do not have the
23 cite, allows for us to provide water to
24 customers outside of our jurisdictional limit.
25 So it's the city's position that we have not

1 committed any unlawful acts by continuing to
2 serve a longstanding customer in the form of
3 ARI. Thank you, Your Honor.

4 THE COURT: All right. Mr. Lyons?

5 **PLAINTIFF'S RESPONSE**

6 MR. LYONS: Thank you, Your Honor. Ms.
7 LaFever claims that 801.1 provides that there
8 is some sort of administrative remedy. 801.1
9 simply says that they can do a water rights
10 investigation, it doesn't say that you can go
11 to them and you can have a hearing, it doesn't
12 provide -- there's no method set out under the
13 Arkansas Natural Resources Commission for a
14 hearing before them. There has to be an
15 administrative remedy set out in their rules
16 and regulations. She cited you to none. She's
17 saying that someone can ask you today or we
18 could say we'd like you to investigate this.
19 There's nothing to investigate, Judge, because
20 what she read to you was, we can investigate
21 location, we can investigate the sections, we
22 can investigate that sort of thing. They have
23 admitted that this is in the territory of St.
24 Francis, so there's nothing for the Arkansas
25 Natural Resources Commission to investigate

1 because they have admitted that.

2 They want to claim that to an area means to
3 a particular company. In the statute, the
4 statute says, "It's unlawful for a person to
5 provide water or wastewater services to an
6 area." Not to a customer, but to an area, "where
7 such services are being provided by the current
8 provider that is pledged or utilizes revenue
9 derived from services within the area to repay
10 financial assistance provided by the Arkansas
11 Natural Resources Commission." They don't fit
12 within that at all. One, it doesn't say to a
13 current provider to this particular person. It
14 says it's unlawful for them if we're providing
15 services in the area. We are providing them in
16 the area and we have an affidavit to that
17 effect.

18 She says oh, I'd like to see a map. I'd
19 like to see where they have their lines. I would
20 like to see how long it's going to take them.
21 Judge, this case was filed on June the 21st of
22 2017. The only discovery that has been sent was
23 sent by us, which they haven't even responded to
24 except by objection, and Ms. LaFever apologized
25 today because she said she thought she'd done

1 that we can't provide that, then we're
2 getting what we want.

3 And now she says Oh, let's prolong it even
4 more because we need to go out and rush out now
5 after a motion for summary judgment has been
6 filed. The motion for summary judgment was filed
7 in this case in February. So for four months,
8 since February, they haven't said we want to
9 take a deposition. We want to do any discovery.
10 We want to find out where your lines are. We
11 want to do anything. They say we want to go
12 before the Arkansas Natural Resources Commission
13 and ask them to investigate. I don't know what
14 they're going to investigate because all the
15 facts are admitted in their complaint. But if
16 they really wanted to do that, they have known
17 since June of 2017 that we were demanding the
18 right to serve this territory.

19 We're the only person, the only entity in
20 this case that has filed any discovery, and we
21 haven't even gotten a response. So now they say
22 oh wait, Judge. Don't rule. They never, before
23 today, said this matter wasn't right for
24 adjudication. They didn't say oh well, we get to
25 go before them and ask for an investigation.

1 They get to do anything. We need to take
2 discovery. They've never called me and said we
3 want to take a deposition. They've never sent me
4 a request for deposition dates, they've never
5 sent any written discovery. All they want to do
6 now is prolong this and say oh, Judge, put this
7 off for a while. So now we can go do some
8 discovery because now our backs are against the
9 wall. Well, we filed this motion four months
10 ago. If they needed to take discovery before the
11 motion for summary judgment was heard, there's a
12 method. It's called filing a response and
13 saying, Judge, we need to do discovery. This is
14 not right.

15 I've got a case in South Arkansas right now
16 where the case is brand new, and they've already
17 filed a motion for summary judgment. And our
18 response was, it's not right for summary
19 judgment because of the fact that we have taken
20 no discovery. So we've spent the last two days
21 in Little Rock taking discovery in order to
22 prepare for that. But we immediately sought the
23 discovery right after they filed their motion
24 for summary judgment.

25 They've done absolutely, positively nothing

1 in four months and nothing in a year to take any
2 discovery. So it's a situation where now they
3 see, oh wait, we might lose because the court
4 realizes, all that the Arkansas Natural
5 Resources Commission can do is investigate this,
6 and all they're going to investigate, from what
7 she says is that they're going to investigate
8 where the lines are, the dividing line is here.
9 But they've admitted that. So it's quite clear
10 under this particular situation, there's nothing
11 for the Arkansas Natural Resources Commission to
12 investigate. There's no administrative remedy
13 before them because all an investigation would
14 prove is that, yeah, what Jim Lyons has told you
15 is correct because they're not even disputing
16 it. So we'd be right back here in two months, or
17 three months, or four months, or however long it
18 took to do this with the facts having not been
19 changed a bit. And where their lines are, if
20 that was so important to them, why didn't they
21 send us some discovery? In a year?

22 So this is simply a situation where they're
23 asking the court to stay this, don't do anything
24 on it because we need to rush out and do
25 discovery. If they needed to rush out and do

1 discovery, the time to do that is after the suit
2 is filed. You don't wait a year, you don't wait
3 until after motion for summary judgment is
4 filed, a response is filed, a reply is filed,
5 the matter is set for court, and walk in the
6 court and say oh, judge, we're not ready for a
7 hearing. Never having even raised that in the
8 pleadings. So this matter is right. It is
9 unlawful for them to be providing this water to
10 ARI, and the statute says that. So it is a
11 situation where there is no administrative
12 remedy. The only thing that the Arkansas Natural
13 Resources Commission can do would be
14 investigate. There's nothing to investigate
15 about where the dividing line is, they've
16 admitted that in their answer to the complaint.
17 They waited a year to tell this Court wait, we
18 need discovery. They have done nothing to
19 prepare for this hearing if they felt like
20 discover was necessary.

21 If they had called me and said, we need to
22 take depositions sometime. I would have gladly
23 worked with Ms. LaFever in order to do that. We
24 worked out the dates. She had a conflict on
25 another date, we worked those out, so it's not a

1 situation where we're saying, Oh no, you can't
2 take any discovery. It's a situation where
3 they've just chosen not to, and the reason
4 they've chosen not to is because they're getting
5 what they want. Every day of delay works in
6 their favor, and it's time for the delay to end.
7 It's clear that we are correct. They're in our
8 territory, and it is improper for them to come
9 in and say, wait, we should get to do discovery
10 before the court rules on this. Because the
11 facts aren't going to change.

12 The territory, the dividing line is going
13 to be the same. They haven't disputed that we
14 can provide that. They say, well, we'd like to
15 take some discovery. But they didn't ever do
16 that before. So it is simply a situation where
17 this matter is ripe for decision today. There
18 are no factual issues before this court that are
19 material, and it's proper for this court to
20 declare that St. Francis is entitled to provide
21 water to any buildings which are located in
22 their territory because Marmaduke has chosen not
23 to do anything about it in a year, so it's
24 proper at this time to grant the motion for
25 summary judgment. Thank you.

1 THE COURT: Thank you. All right.

2 Anything further?

3 MR. LYONS: Nothing on behalf of the
4 plaintiff, Your Honor.

5 MS. LAFEVER: No, Your Honor.

6 **JUDGE'S RULING**

7 THE COURT: All right. Well, I do want to
8 thank those attorneys for thorough briefing of
9 this issue. I am sympathetic with Mr. Lyons'
10 position about the delay and whether it is
11 justified in this circumstance. Certainly,
12 from the face of the file, I cannot, and by
13 that I mean the bare bones of the pleadings, I
14 don't see any explanation as to why discovery
15 had not been done prior to the motion for
16 summary judgment having been filed or after
17 the motion for summary judgment having been
18 filed. I do note that in the defendant's
19 response to plaintiff's motion for summary
20 judgment, in paragraph 15, the city did
21 affirmatively state that the motion for
22 summary judgment is premature and that issues
23 needed to be explored during the discovery
24 process. So I do think the city had raised the
25 aspect of needing to do discovery before the

1 issues raised by the summary judgment motion
2 were finally adjudicated, having been set out
3 in the motion. I don't know why the discovery
4 hasn't occurred, that the city would not have
5 pursued that.

6 Here, there are certain issues that the
7 court finds problematic from a summary judgment
8 standpoint at this juncture. I've heard that
9 essentially what we have here is a circumstance
10 where ARI, which is indisputably a large
11 industry, probably the primary industry in
12 Marmaduke, is situated and their campus is set
13 out in such a fashion that the initial building
14 at the ARI campus had been in the City of
15 Marmaduke's territory with respect to water. The
16 argument today has developed that about 13 years
17 ago, ARI expanded and built this third building,
18 which is on the east side of this line, which
19 would be in the St. Francis territory with
20 respect to water. And then more recently has
21 built the refurb building, which also would be
22 in the St. Francis territory.

23 The statute at issue is 15-22-223(a), which
24 states, "It is unlawful for a person to provide
25 water services to an area where such services

1 are being provided by the current provider that
2 has pledged or utilizes revenue derived from
3 services within the area to repay financial
4 assistance provided by the Arkansas Natural
5 Resources Commission unless approval for such
6 activity has been given by the commission and
7 the new provider has received approval under the
8 Arkansas water plan, established in 15-22-503,
9 if applicable."

10 I referenced at one point in the argument
11 the case cited by Mr. Lyons in his reply brief.
12 Arkansas Soil and Water Conservation Commission
13 versus City of Bentonville, 361 Ark 289, 92 S.W.
14 3d 47 (2002). That case, in its holding,
15 indicates that 15-22-503(e) clearly grants the
16 Arkansas Soil and Water Conservation Commission
17 power over other political subdivisions, such as
18 municipalities, to approve any water development
19 project for compliance with the state water
20 plan. The Court, in reviewing the briefs and in
21 reviewing this case, as I indicated in my
22 questioning, Mr. Lyons was initially concerned
23 with the intersection with any administrative
24 remedies. Here, counsel has disputed the answer
25 to that question essentially. Mr. Lyons says

1 that there is no remedy whatsoever for St.
2 Francis administratively and that only the City
3 of Marmaduke would be in a position to pursue
4 any type of relief from the Arkansas Soil and
5 Water Conservation or the Arkansas Natural
6 Resources Commission.

7 Ms. LaFever has cited a rule indicating
8 that any person could seek an investigation. Mr.
9 Lyons rejoins that that is all it would be, is
10 an investigation. Going back to the statute, the
11 issue that the parties are arguing is, Mr. Lyons
12 is saying that St. Francis, the district, has
13 exclusive rights to provide services to an area.
14 Ms. LaFever rejoins that the full context of the
15 statute clearly contemplates that it is to an
16 area where such services are being provided by
17 the current provider that has pledged or
18 utilizes revenue derived from services within
19 that area.

20 So clearly, there is conflict in how
21 counsel is reading that statute and there is
22 precious little insight from precedent that I
23 have been able to find with respect to that
24 statute, other than this Bentonville case that
25 did address 15-22-503. The Court at this time is

1 also concerned from a factual standpoint about
2 the specifics of the district's ability to
3 connect, I understand that that was addressed in
4 the affidavit, but there are public policy
5 considerations with respect to ARI. ARI is not
6 seated at the table, they're not a party to this
7 lawsuit. Clearly, they are going to be impacted
8 given what my decision would be in this case.
9 There are public policy concerns with respect to
10 the potential adverse economic development
11 impacts there that I just don't know the answer
12 to. There may not be any, but there may be some.
13 And again, ARI is not here to have weighed in on
14 that or for me to have any evidence before me
15 whatsoever with respect to whether that is a
16 viable concern or consideration or not.

17 I also am not reading any time limitation
18 with respect to 15-22-223 that would allow or
19 prohibit the Arkansas Natural Resources
20 Commission from granting approval within a
21 certain timeframe, that after a certain amount
22 of time goes by or after a lawsuit is filed,
23 they can't do that. And again, this is just
24 another aspect that I think should be
25 discovered. For those reasons, I am denying the

1 motion for summary judgment at this time. I do
2 think Mr. Lyons has raised some extremely
3 persuasive points that may ultimately carry the
4 day, but I do think it would be error on my part
5 to rule on this case without allowing or
6 instructing that these issues that I have
7 identified as well as any others that counsel
8 may want to pursue in discovery, be evaluated
9 and investigated.

10 Therefore, I am denying the motion, but I
11 am going to set a discovery deadline within 90
12 days of today's date. That will be the discovery
13 deadline in this case. At the conclusion of that
14 discovery deadline, Mr. Lyons, if you want to
15 refile or resubmit your motion for summary
16 judgment, you may do so, and you may respond to
17 it, Ms. LaFever, at that point. If counsel wants
18 to go ahead and request a hearing date from my
19 office outside that 90 days, you may do so, so
20 you can be sure and have this on the calendar
21 because I am sympathetic with the fact that this
22 has been pending for just under a year at this
23 point without resolution, and I do think that
24 the plaintiff, as any plaintiff, is entitled to
25 quick adjudication of the matter, and Mr. Lyons

1 has certainly pursued that for his client in an
2 expeditious fashion, and I am going to impose
3 that discovery deadline in order to ensure that
4 there is no further unwarranted delay in this
5 matter.

6 So, Mr. Lyons, if you will prepare a
7 precedent that reflects my decision here today,
8 that I am denying the motion for summary
9 judgment at this time to allow discovery to
10 proceed and conclude as Ms. LaFever has
11 requested, but that I am curtailing that
12 discovery and putting that deadline to occur
13 within 90 days.

14 MR. LYONS: Your Honor, should I indicate
15 that that denial is without prejudice?

16 THE COURT: That's correct. To be clear,
17 that is without prejudice, meaning that you
18 may absolutely refile or reference in a new
19 filing your briefing from earlier this year
20 that has been submitted and argued. But I want
21 to provide that opportunity so that
22 essentially the defendant has 90 days to
23 explore these issues that they say need to be
24 explored prior to the Court issuing an
25 adjudication on the merits of the summary

1 judgment motion.

2 THE COURT: All right. I will return the
3 blow up exhibit to Mr. Lyons, and that will
4 conclude this matter.

5 MR. LYONS: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 (COURT REPORTER'S NOTE: Off the record.)

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IN THE CIRCUIT COURT OF GREENE COUNTY, ARKANSAS

ST. FRANCIS RIVER REGIONAL WATER DISTRICT

PLAINTIFF

VS 2017-219

CITY OF MARMADUKE, ARKANSAS

DEFENDANT

TRANSCRIPT OF MOTIONS HEARING

APRIL 8, 2019

* * * * *

Came on for hearing before the Honorable Melissa B. Richardson, Circuit Judge, in Paragould, Arkansas.

* * * * *

Dana Beck, CCR
Certified Court Reporter
291 County Road 312
Jonesboro, AR 72401

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APPEARANCES:

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ON BEHALF OF THE DEFENDANT

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PROCEEDINGS

(COURT REPORTER'S NOTE: Court convened on April 8, 2019, in Paragould, Arkansas, at 9:30 a.m.

THE COURT: All right. Please be seated. All right. Good morning. We're down to two cases remaining on the civil docket this morning. I have a criminal docket this afternoon, but I don't see any of those attorneys here. I'm gonna take them up a little out of order, and we will start with St. Francis versus City of Marmaduke. I'm gonna first ask the attorneys to please identify themselves for purposes of the record. Mr. Nadzam, you're here on behalf of St. Francis?

MR. NADZAM: Yes, Your Honor.

THE COURT: Okay. All right. And if I could have defense counsel each identify yourselves for purposes of the record please.

MS. LAFEVER: Amanda LaFever, Your Honor, just appearing today especially. I've already been relieved as counsel for the case.

THE COURT: Yes.

MS. LAFEVER: In lieu of Mr. Mann who had

1 an unavoidable conflict.

2 THE COURT: Understood. Yes. Okay.

3 MS. GIBSON: Gabrielle Gibson on behalf
4 of the City of Marmaduke.

5 THE COURT: All right. I had reviewed the
6 pleadings in this matter. I know that we
7 initially had a hearing last year with respect
8 to St. Francis' motion for summary judgment.
9 An order was being circulated with respect to
10 the findings of that hearing. I understand
11 that a transcript was requested from my court
12 reporter with regard to that decision. Has
13 counsel been able to have any meeting of the
14 minds with regard to the order?

15 MR. NADZAM: Your Honor, we have not been
16 able to have. There's only a few small issues.
17 I think most of the order we agree on. It's
18 just a couple of small details.

19 THE COURT: Okay.

20 MR. NADZAM: And we have been able to
21 reach an agreement on that.

22 THE COURT: All right. The substance of
23 what I recall is that I denied the motion for
24 summary judgment without prejudice,
25 essentially indicating that it could be

1 represented. And my understanding from an
2 email sent to my trial court administrator is
3 that the -- that St. Francis does intend to
4 renew that motion today. Is that accurate?

5 MR. NADZAM: Yes, Your Honor.

6 THE COURT: Okay. I think the purpose of
7 that ruling was to allow discovery to proceed
8 and development of certain issues that I felt
9 like needed to be flushed out. So, in addition
10 to that pending motion for summary judgment,
11 we also have the City of Marmaduke's motion
12 for summary judgment that I have been provided
13 with.

14 MS. LAFEVER: Yes, Your Honor.

15 THE COURT: Okay. And then we have I
16 think one motion in limine that had a few
17 subparts. Is that accurate?

18 MS. GIBSON: Yes, Your Honor.

19 THE COURT: Okay. That you all had filed.
20 I don't recall any that the plaintiff had
21 filed.

22 MR. NADZAM: Your Honor, we haven't filed
23 any.

24 THE COURT: Okay. All right. Well then, I
25 will start today with the motions for summary

1 judgment then. Counsel have a preference as to
2 who proceeds?

3 MS. GIBSON: No, Your Honor.

4 MS. LAFEVER: No, Your Honor.

5 THE COURT: Okay. All right. Mr. Nadzam.

6 MR. NADZAM: Your Honor, we would like to
7 address the order first.

8 THE COURT: Okay.

9 MR. NADZAM: Because the order does give
10 us the explicit right to renew our motion for
11 summary judgment.

12 THE COURT: Okay.

13 MR. NADZAM: So, we would like to take
14 care of that. And then we don't have a
15 preference on which side goes.

16 THE COURT: Okay. All right. Well and is
17 that the argument? That there was a dispute
18 about whether they had the right to file to
19 renew?

20 MS. LAFEVER: No, Your Honor. In the
21 proposed order that I believe Mr. Lyons
22 circulated, it was my belief I was here at the
23 hearing and I reviewed the transcript that it
24 just sort of contained some -- some language
25 that indicated you had made specific findings

1 on the record about the implacable law and
2 that my recollection and my reading of the
3 transcript was that your finding, your holding
4 that day was that there were issues of fact
5 remaining that need flushing out. And then it
6 was a denial without prejudice. We are not
7 disputing that the denial of the summary
8 judgment by the District was without
9 prejudice.

10 THE COURT: Okay. Well, I will confirm
11 for clarity and the record that I denied the
12 motion for summary judgment without prejudice.
13 It is certainly right to be presented today if
14 you wish to proceed on that. And so, I will
15 hear from you if you want to make argument on
16 that again, Mr. Nadzam.

17 MR. NADZAM: Okay.

18 THE COURT: And you don't have to make
19 additional argument if you don't want. It's
20 just your call.

21 MR. NADZAM: I'll briefly --

22 THE COURT: Okay.

23 MR. NADZAM: -- Your Honor, just as a
24 refresher on where we are.

25 THE COURT: Yes.

PLAINTIFF'S RENEWING MOTION FOR SUMMARY JUDGMENT

1
2 MR. NADZAM: And this is just to clarify
3 that we are renewing our previously denied
4 motion for summary judgment which was denied
5 without prejudice. As you know, St. Francis
6 River Regional Water District I'll refer to as
7 the District from here on is a regional water
8 distribution District subject to the Regional
9 Water Distribution District Act and it was
10 formed on July 27, 1987. And at that time,
11 this Court approved certain lands as to its
12 geographical service territory which included
13 the lands at issue today where the what's
14 called the East Plant and the Refurbishing
15 Plant of American Railcar Industries
16 Incorporated reside. And those two buildings
17 are located in St. Francis' water service
18 territory. And the City of Marmaduke is
19 providing water service to the buildings to
20 the building known as East Plant and
21 Refurbishing Plant even though it is outside
22 the City of Marmaduke's service territory and
23 within the District's service territory.

24 And the District has requested that the
25 City of Marmaduke to discontinue water service

1 to ARI for the East Plant and the Refurbishing
2 Plant to which they have failed and refuse to do
3 so. The Arkansas Natural Resources Commission
4 has authority over water service projects and
5 territories, and they have not approved or
6 otherwise authorized the City of Marmaduke to
7 provide water service in St. Francis' territory.
8 And City of Marmaduke has not filed anything
9 with the Arkansas ARNC -- excuse me -- the ANRC.
10 And they are required to do so in order to
11 invade St. Francis' territory. St. Francis has
12 received financial assistance from the
13 commission. And the statute at issue is Arkansas
14 Code Annotated 15-22-2-23 and in additionally
15 section 605.1 of the Arkansas Natural Resources
16 Commission water plan compliance review
17 procedures.

18 The City of Marmaduke is not entitled to
19 provide water to the portion of ARI which is
20 located in the District's territory. That being
21 the East Plant and the Refurbishing Plant.
22 Further, the City of Marmaduke has not received
23 approval to provide water to the East Plant or
24 the Refurbishing Plant pursuant to permission or
25 under any applicable legal authority, law, or

1 regulation including those listed above.

2 As a result, the District is entitled to
3 summary judgment in this matter. I know at the
4 prior hearing, there was some concern about the
5 capability of the District to provide water
6 service to the East Plant and the Refurbishing
7 Plant. However, testimony from multiple board
8 members of the District have shown that the --
9 that the District does have the capability to
10 provide ARI with its required water service.

11 Additionally, the mayor -- Mayor Dixon's
12 affidavit stated that he believed that the
13 District could not provide service to ARI. And
14 in his deposition, Mr. -- Mayor Dixon admitted
15 to not knowing anything about the capability of
16 the District and whether it could or could not
17 provide service to the East Plant and the
18 Refurbishing Plant. And so, I believe that's one
19 fact question that is no longer applicable
20 because Mayor Dixon has no knowledge of the
21 District's capabilities.

22 The Judge also indicated that the there was
23 concern about the impact potentially on ARI.
24 However, additional time has passed, and ARI has
25 had the right to intervene in this matter and

1 has not filed anything or sought intervention
2 from this Court beyond I believe just filling
3 out one affidavit. And so, ARI has had plenty of
4 notice on this suit and has not sought to
5 intervene in this matter for any reason. And so,
6 I know the Court was concerned about the public
7 policy with the ARI. And so that that is why the
8 District feels entitled to summary judgment
9 based on Arkansas Code Annotated 15-22-2-23 and
10 that section 605.1 of the regulations I
11 referenced as well as the prior -- the case we
12 cited in our earlier hearing that being I
13 believe it was the City of Bentonville, Your
14 Honor. And I can get that cite if I need to but
15 it's the only case that's been discussed which
16 analyzes that statute.

17 THE COURT: I think there's just about no
18 case law in Arkansas.

19 MR. NADZAM: Your Honor, there's not a
20 lot of authority on this issue either way.

21 THE COURT: Right. Okay. Okay. Anything
22 further?

23 MR. NADZAM: No, Your Honor.

24 THE COURT: Okay. All right. I will hear
25 from defense counsel in response.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY**JUDGMENT**

MS. LAFEVER: Your Honor, just briefly given that the posture of the case currently is that there are competing motions for summary judgment, I do want to take the time to I guess renew the City's response in brief and support to the District's original summary judgment motion with a caveat that as set forth in our motion for summary judgment, we no longer believe that there are issues of disputed material fact. And I did want to draw the Court's attention to that because the District is simultaneously moving for summary judgment here today by renewing their motion which would necessarily mean that they're claiming there's no issue of disputed material fact. However, in response to the City's motion for summary judgment, I believe there's an argument made that there is an issue of disputed material fact such that we should be denied summary judgment. And Ms. Gibson my co-counsel, will address the -- the substance of our motion our competing motion for summary judgment shortly. With --

1 THE COURT: You make a good point and let
2 me clarify to Mr. Nadzam first. I recognized
3 that as well when I was reading the motions
4 and part of it is that there has been a period
5 of months that have lapsed since the first
6 motion was filed and now this motion and
7 certainly has been renewed. And I'm
8 recognizing that and allowing that to go
9 forward. But just to clarify, I have both
10 parties asserting that there are no issues, no
11 genuine issues of material fact and that each
12 is entitled to judgment as a matter of law.
13 That's what I have pending before me. And so,
14 Mr. Nadzam, does that -- I recognize that your
15 briefing or your office's briefing in response
16 to their motion for summary judgment is
17 asserting there are genuine issues such that
18 it should be denied. Is that accurate?

19 MR. NADZAM: Your Honor, we -- If our
20 interpretation of the facts is correct, we do
21 not believe that there are general -- that
22 there are material issues of fact. But
23 especially in regard to their claim defenses
24 dealing with times and waiver and that those
25 sorts of things. We do believe there are

1 material issues of facts on those defenses
2 especially and several other instances, but
3 especially the defenses.

4 THE COURT: Okay. Okay. All right. Thank
5 you.

6 MS. LAFEVER: With respect to the impact
7 on ARI, plaintiff's counsel mentioned that or
8 asserted to the Court that ARI has had the
9 right to intervene and has not. However,
10 that's sort of blabs the evidence in record,
11 which is that, you know, ARI has been
12 participating by providing affidavits.
13 Plaintiff could have taken any depositions
14 that they wanted to and did not. In addition
15 to which, the City has been in communication
16 with ARI both as an entity and their legal
17 counsel. And while I clearly do not represent
18 ARI, they have made clear to my client that
19 they wish to proceed to receive water services
20 from the City of Marmaduke and do not wish to
21 receive water services from the District. And
22 I believe that's set forth in Mr. Bresney's --
23 his affidavit.

24 As far as the District's argument that the
25 City has not received approval from the Arkansas

1 Natural Resources Commission. Again, I think Ms.
2 Gibson will address that in the argument on
3 behalf of our competing motion for summary
4 judgment. But the long and the short of it is
5 that given what has occurred, it's our belief
6 that we are not required to do so. And that is
7 based on communications with the general counsel
8 for ANRC as well as in depositions that have
9 occurred in this matter. And that is all I have
10 in response, Your Honor. Do you want would --
11 the Court for Ms. Gibson to come up and address?

12 THE COURT: Let me -- Let me inquire Mr.
13 Nadzam. Do you want to say anything further in
14 response to their response to your motion?

15 MR. NADZAM: Your Honor, ARI has not
16 intervened at any matter. More importantly,
17 the law does not provide where ARI's opinion
18 carries weight in this decision. It's a
19 statutory interpretation. If customers could
20 pick and choose who they received service
21 from, it would destroy the whole water plan
22 system that the state of Arkansas has in
23 place. Because the whole purpose is that
24 service area is entitled to be served by St.
25 Francis. If customers in their base could pick

1 and choose who had the lower rates and who to
2 use, it would destroy the purpose of the water
3 plan and the ANRC.

4 The ANRC seeks to govern in a uniform
5 manner and oversees everything like you saw in
6 the City of Bentonville case that cities can't
7 just willy-nilly do what they want and service
8 customers in other's service territory. There's
9 a prescribed system to go through, and that is
10 going to the Arkansas Natural Resources
11 Commission and the City of Marmaduke has not
12 done that. It's already laid out in their
13 regulations and in Mrs. Phelps' testimony
14 general counsel for the ANRC that the proper
15 procedure of a city or an entity wanting to
16 invade another service territory is to seek
17 approval from the ANRC who would then decide.

18 The City has never done that in this case
19 or at any point. And so, ARI's -- we can
20 sympathize with their position, but they can't
21 pick and choose and determine the outcome of
22 this case and who they want to purchase water
23 from because there's a process. And the ANRC is
24 supposed to do that or this circuit court if the
25 service territory is invaded like plaintiffs

1 have now been annexed into the city. Second
2 point is that the District does not have the
3 exclusive right to sell water within its
4 geographical boundaries. Third, the City is
5 not required to seek approval from the ANRC to
6 supply water to the East and Refurb Plants.
7 And lastly, ARI desires to continue to
8 purchase water from the City.

9 As to the first point, the East and Refurb
10 Plants have now been annexed into the City.
11 Pursuant to Arkansas Code Annotated 14-40-604,
12 the District could have filed a complaint in an
13 attempt to prevent the annexation. The District
14 did not do so. On June 19th, 2018, the
15 resolution confirming the annexation was
16 adopted. Pursuant to Arkansas Code Annotated
17 14-40-606, as soon as that resolution was
18 adopted, ARI is entitled to enjoy the rights and
19 privileges of those inhabitants that were in the
20 original city limits before those that piece of
21 land was annexed into the city. For that reason,
22 the City is entitled to summary judgment.

23 As to the second point, Your Honor, the
24 District only points to the 1987 order for
25 reference to its claim of exclusivity. However,

1 that 1987 order does not mention exclusivity in
2 the four corners of that document. Also, the --
3 the statute that delineates that powers of the
4 District under the Regional Water Distribution
5 Act, the specific statute is 14-116-402. That
6 does not -- that also does not provide for
7 exclusivity. Ms. Phelps, the general counsel of
8 the Arkansas Natural Resources Commission,
9 stated in her deposition that she's unaware of
10 any document whatsoever that gives the District
11 the right -- the alleged right of exclusivity.
12 Ms. Phelps also states that she's unaware of
13 anything that the City has done that would be
14 considered to be unlawful. And for that reason,
15 the City is entitled to summary judgment.

16 As to the third point, Your Honor. The City
17 would only need approval from the ANRC if its
18 provision of water to the East and Refurb Plants
19 were to constitute a project under the ANRC's
20 rules. Ms. Phelps stated in her deposition that
21 the -- the only definition of a project that
22 this scenario would fit under would be Section
23 601.4 subsection B(4)C. And that subsection
24 states that if your -- if the current water
25 usage is going to increase by more than twenty

1 percent, then that would be considered a project
2 and that would need to have approval from the
3 ANRC.

4 The City has provided undisputed evidence
5 that its provision of water to the East and
6 Refurb Plants did not constitute a project
7 because their current water usage did not
8 increase by twenty percent or more.

9 Ms. Phelps also stated during her
10 deposition that there's no reason for the ANRC
11 to have taken any enforcement action against the
12 City. And for that reason, the City is entitled
13 to summary judgment.

14 Lastly, Your Honor, the City is entitled to
15 summary judgment because ARI desires to continue
16 to buy water from the City. And as the plaintiff
17 has pointed out, he says that that the law
18 doesn't -- doesn't give any deference as to the
19 customer's desires. But the City would say that
20 that's incorrect. The Regional Water
21 Distribution Act specifically Statute 14-116-102
22 subsection 4 provides that one of the purposes
23 that districts are organized is to furnish water
24 to persons desiring it. Clearly, the customer's
25 desires are significant because the legislature

1 made sure to put "to persons desiring it" in
2 that statute. ARI has mentioned that it has had
3 concerns with the District providing water.
4 Those concerns are listed out in Mr. Bresney's
5 affidavit. It's paragraph 13. The District
6 doesn't provide sewer services. The District's
7 cost would be more than three times more than
8 the City's. The District or -- the ARI was also
9 concerned with fire protection as far as the
10 amount of water goes that the District would be
11 able to provide. Also, the District talked about
12 having to build a new well which would be around
13 \$700,000 that of course ARI would have to pay
14 some if not all of that cost. And ARI would also
15 have to pay a \$6,000 minimum purchase charge
16 despite how much water they used. So, with all
17 of the -- thank you. With all of those concerns
18 that the -- that ARI has with the District, ARI
19 has made it abundantly clear that it continues
20 to desire to purchase water from the City.

21 THE COURT: I find your brief with
22 respect to your arguments on the statute of
23 limitations. Do you wanna speak to that on the
24 record?

25 MS. GIBSON: Sure, Your Honor. With

1 respect to the East Plant, the East Plant was
2 built, or it was -- the construction began in
3 2006 and the District did not make a demand on
4 the City to stop providing water until 2015.
5 And it was actually not until they weren't
6 indebted to the USDA nor the ANRC.

7 So, they weren't indebted, and they made
8 the demand in 2015 and then they filed the
9 lawsuit I believe in 2017. So, they waited at
10 the most the maximum amount a statute of
11 limitations would've been five years and they
12 exceeded that at least by four years when they
13 first made the demand. And so, the City takes
14 the position that at least with respect to the
15 East Plant that the District is -- their claims
16 are barred with respect to the East Plant due to
17 the statute of limitations. And then as far as
18 the Refurb Plant, although the statute of limit
19 the five-year statute of limitations, they are
20 still within that period. The East Plant and the
21 Refurb Plant. They both have been annexed into
22 the City now. And according to that statute, the
23 14-40-606 that about the annexation, it says as
24 soon the resolution is adopted that the
25 inhabitants of the land that's being annexed,

1 they shall have and enjoy the rights and
2 privileges of the inhabitants of the original
3 city limits.

4 And so, that's why I think in the -- in the
5 statute that gives a party the right to file a
6 complaint to prevent the annexation. It is in
7 there that they have that thirty days after the
8 order of annexation is entered before the
9 resolution is adopted. They have thirty days to
10 file a complaint to attempt to prevent the
11 annexation and the District didn't do that here.
12 And so, the City would -- would argue that the
13 Refurb Plant -- the District's claims are also
14 barred as far as the Refurb Plant is concerned
15 due to the annexation.

16 THE COURT: So, educate me on the
17 annexation. Are we in conflict then now that
18 the City of Marmaduke has annexed the area in
19 question with respect to the East Plant and
20 the Refurb Plant? Are we in conflict with the
21 1987 order with respect to what the St.
22 Francis District's geographical area is given
23 the annexation and it is the City's position
24 that the more recent annexation is what should
25 control? Am I understanding that to be your

1 position? Or educate me if I am wrong.

2 MS. GIBSON: Well so, I don't think that
3 there's a conflict between the 1987 order
4 because the 1987 order that established the
5 District's existence and location. And then
6 this -- the annexation merely brought in the
7 piece -- the pieces of land that the East and
8 the Refurb Plant are sitting on. It annexed
9 those -- that land into the City's limits. And
10 I don't think that there's a conflict because
11 the District had ample opportunity within
12 those thirty days to file a complaint and to
13 attempt to prevent the annexation saying look
14 you know whatever, you know, their position is
15 look this is our land that we're supposed
16 serve this but they didn't do that. And so,
17 they didn't do that, and they had that
18 thirty-day window to do that and they didn't.
19 And then, the resolution was adopted June
20 19th, 2018. And so, as soon as that resolution
21 was adopted, there is statutory authority that
22 says that the inhabitants of that annexed land
23 now share the same rights and privileges as
24 the inhabitants of the original city limits.
25 So, I don't that there's a conflict between

1 the two especially given the amount -- the
2 thirty days that the District had to file a
3 complaint and they didn't.

4 THE COURT: I guess my question is if --
5 Let's assume that if the annexation had
6 occurred well before this suit had ever been
7 filed. The annexation had been filed, or the
8 annexation had occurred prior to the time that
9 ARI expanded way back ten, twelve years ago.
10 Is it the City's position that at that point
11 only the City or that St. Francis would not
12 have had any argument or any claim once that
13 has been annexed into the City that the St.
14 Francis Water District would not have any
15 claim to provide water to any of that annexed
16 land? That's what I'm -- that's what I'm
17 asking.

18 MS. GIBSON: To be truthful, that
19 situation didn't happen. So, I haven't really
20 thought through that as far as that.

21 THE COURT: Then I guess I'm getting at
22 is it seems to me that the annexation is a
23 pretty significant event in the context of
24 this lawsuit.

25 MS. GIBSON: Uh huh.

1 THE COURT: And so, I'm asking to put it
2 another way if you can educate me as to why
3 that is true or not true. Why has the
4 annexation changed the complexion of this
5 lawsuit? It was filed before the annexation
6 occurred. This motion for summary judgment
7 that had been filed by the plaintiff occurred
8 before the annexation occurred. And so, it
9 seems to me particularly -- for example, the
10 plaintiff's original lawsuit has sought
11 injunctive relief.

12 MS. GIBSON: Uh huh.

13 THE COURT: Can you speak to the impact
14 that the annexation would have on the
15 plaintiff's claim for injunctive relief?

16 MS. GIBSON: I think that at that point
17 the plaintiff's claim would be moot because of
18 the annexation. If the annexation would have
19 occurred, you know, depending on the timeline
20 of when everything happened. If the annexation
21 of June 19th, 2018, was before -- well, no, it
22 was after the complaint was filed. Yeah. It
23 would've -- I -- it would be the City's
24 position that the injunctive relief claim
25 would have been -- would have been moot at

1 that point.

2 MS. LAFEVER: Your Honor, may I --

3 THE COURT: You may.

4 MS. LAFEVER: -- speak to this as well?

5 THE COURT: Yeah.

6 MS. LAFEVER: With respect to the, so,
7 with respect to the annexation pursuant to the
8 statute Ms. Gibson has been citing. I'm sorry
9 I don't have book and chapter. You know the
10 ARI is entitled to the rights and privileges
11 of those who are already within the
12 inhabitants of the municipality. So, in part,
13 the connection I believe the plaintiff has
14 sort of argued both sides of it essentially.
15 But that ARI's wishes don't really play into
16 it at all as to who they wish to receive water
17 service from. The City's wishes as far as you
18 know who they choose to continue providing
19 water services to because I do think it's
20 important to restate for the record all the
21 City has done is continue to provide water
22 service to a pre-existing customer. You know
23 if ARI is entitled to enjoy the benefits of
24 the -- as a resident as it were of the City of
25 Marmaduke, then yes. I think as far as

1 injunctive relief goes that the plaintiff
2 would not be entitled to injunctive relief. I
3 mean at that point; the City would be being
4 told -- ordered to stop providing water
5 service to one of its citizens. And so, I
6 think with respect to injunctive relief, the
7 answer to your -- I hope I'm answering your
8 question which is that no they would not be
9 entitled to injunctive relief especially when
10 you the -- the compilation of those two the
11 body of those statutes.

12 THE COURT: And so, if they are not
13 entitled to injunctive relief, if that is the
14 City's position because the annexation has
15 rendered any such request moot.

16 MS. LAFEVER: Yes, Your Honor.

17 THE COURT: All right. So, at that point,
18 the plaintiff would be seeking solely damages
19 for the amount of time that the City had been
20 providing to a customer that the District
21 should have been providing to. Is that how you
22 would characterize what remains?

23 MS. LAFEVER: Yes, Your Honor, with the
24 caveat that based on the arguments that we've
25 made. We don't think they're entitled to the

1 damages either.

2 THE COURT: Right. But you would agree
3 that the annexation -- is that the position
4 that the City is taking then with regard to
5 the annexation shifting the character of the
6 lawsuit?

7 MS. LAFEVER: Yes, Your Honor.

8 THE COURT: Okay. All right. Do you have
9 any further statements that you wish to make,
10 Ms. Gibson?

11 MS. GIBSON: No, Your Honor.

12 **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY**

13 **JUDGMENT**

14 THE COURT: All right. Thank you. Mr.
15 Nadzam, and I'll certainly give you the
16 opportunity to respond to those questions
17 about annexation that I had offered as well,
18 but you may respond on behalf of the plaintiff
19 to the motion for summary judgment.

20 MR. NADZAM: Your Honor, I would just
21 like to go ahead and start with --

22 THE COURT: Okay.

23 MR. NADZAM: -- addressing those
24 annexation questions. Under the City's theory
25 then anytime there's a dispute between a water

1 district and a city all the city has to do to
2 make the problem -- the violation of state law
3 go away is to annex it and take away power
4 from the circuit courts to hear this and to
5 determine this. Under their theory, it sounds
6 to me; if I'm hearing it right; once you annex
7 them in, then the water districts have no
8 remedy for that violation. I just don't think
9 that's a proper interpretation. I think that's
10 argument's taking away power from the courts
11 to determine these issues. And so, I think
12 that in general about annexation but
13 especially in the middle of litigation after
14 plaintiffs have already filed a motion for
15 summary judgment. Then they just think
16 annexing this okay the problem goes away. But
17 Your Honor, we didn't -- our position is that
18 that's simply not correct and not true because
19 annexation doesn't change anything about the
20 service territory of plaintiff. The annexing
21 doesn't change anything about the service
22 territory. The proper way to do that is to go
23 to the ANRC which they did not do. And, Your
24 Honor, I've got the case I've been referring
25 to. The only one we know of interpreting this

1 and that is Arkansas Soil and Water
2 Conversation Commission versus City of
3 Bentonville. That cite is 351.Ark.289 and the
4 issues aren't exactly the same but there's
5 language in there to help illustrate the
6 situation. Bentonville overstates the power
7 granted to them by section 14-56-413. First
8 section 15-22-503(E) clearly grants ASWCC now
9 the ANRC power over other political
10 subdivisions such as municipalities to approve
11 any water development project for compliance
12 with the state water plan. Your Honor, the
13 ANRC is the body that the legislature has
14 determined to have authority if you want to
15 invade someone's service territory. And so,
16 annexing it's plaintiff's position doesn't
17 change anything about this case about
18 determining that ARI's East Plant and
19 Refurbishing Plant are in the service
20 territory of plaintiff.

21 THE COURT: Can you speak to your -- I
22 mean the motion, or the original complaint
23 indicated a request for injunctive relief. And
24 so, is it plaintiff's position that you are
25 still seeking injunctive relief even

1 post-annexation?

2 MR. NADZAM: Absolutely, Your Honor.

3 THE COURT: Okay.

4 MR. NADZAM: I mean because there's --

5 THE COURT: When I was asking, I think
6 Ms. Gibson earlier is there a conflict between
7 what the District's service area is and what
8 the City of Marmaduke would include, you agree
9 that your District includes the East Plant and
10 Refurb Plant even though that has been
11 annexed?

12 MR. NADZAM: Absolutely, Your Honor,
13 because currently the East Plant and the
14 Refurbishing Plant it's my understanding are
15 in the city limits of Marmaduke. However,
16 they're still in the service area of St.
17 Francis because as Mrs. Phelps testified in
18 her deposition the proper procedure if you
19 want to change the service areas of water
20 districts is to petition the ANRC. So,
21 annexing doesn't change anything because
22 otherwise cities would just annex more and
23 more territory or if there's an issue and
24 flaunt the jurisdiction of the ANRC. It would
25 just -- the cities would have complete control

1 and the purpose of the ANRC as one of the
2 purposes of the ANRC and the water development
3 plan as Mrs. Phelps stated was the purpose of
4 these rules is to provide for the orderly
5 development of water resources. Yes. Orderly
6 development management. That's why the system
7 is in place for orderly development. The City
8 had a procedure if they wish to change service
9 territory. They simply chose not to follow it.
10 And so, plaintiff's position is the annexation
11 doesn't change anything in regard to
12 injunctive relief.

13 THE COURT: Because the petition to ANRC
14 didn't occur? The request to ANRC?

15 MR. NADZAM: Correct, Your Honor. And we
16 don't know what ANRC would've decided that
17 the, or the City chose not to do that.

18 THE COURT: And so, plaintiff's position
19 is that the annexation can not be an end-road
20 around the ANRC authority to approve or
21 disapprove a change of district.

22 MR. NADZAM: That is correct, Your Honor.
23 As that case I cited states the ANRC has
24 power. Yeah.

25 THE COURT: Okay. All right.

1 MR. NADZAM: And so, I'd like to respond
2 to the other merits, Your Honor. The District
3 does have exclusive right to serve both the
4 East Plant and the Refurbishing Plant. Both
5 under the original order creating the
6 District. It doesn't say exclusive, Your
7 Honor, but it does give us the authority to
8 serve that area. That's undisputed that the
9 original order gives us the authority to serve
10 that. But also under Arkansas Code Annotated
11 15-22-223(A) the statute which governs, it is
12 unlawful for a person to provide water or
13 wastewater services to an area where such
14 services are being providing by the current
15 provider that has pledged or utilizes revenue
16 derived from services within the area to repay
17 financial assistance provided by the Arkansas
18 Natural Resources Commission unless approval
19 for such activity has been given by the
20 Commission and the new provider has received
21 approval under the Arkansas Water Plan
22 established in 15-22-503 if applicable. Now,
23 Your Honor, there's a lot going on in that
24 statute and it's not really well written. But
25 it's our contention that City is acting

1 unlawfully by providing this water services to
2 St. Francis' water district because St.
3 Francis is already providing water to their
4 district and it has pledged or utilized
5 revenue derived from services within the area
6 to repay financial assistance provided by the
7 ANRC. And as the prior hearing stated, I
8 believe The Court found based on reading the
9 transcript in part that there was no time
10 limit for when they had to pledge or utilize
11 revenue. That as long as they had pledged or
12 utilized revenue that there was no -- it was
13 an ongoing issue. There wasn't a moment in
14 time where that would not be an issue.

15 And then in the second half of the statute,
16 it states unless approval for such activity has
17 been given by the Commission. So, it tells you
18 in the statute what you have to do. You have to
19 get approval from the Commission in order for
20 them to promote an orderly water plan for the
21 state of Arkansas. And it's undisputed that the
22 plaintiff, the District, has been providing
23 water services to its water services territory.
24 That's not in dispute. And by supplying water to
25 the East Plant and the Refurb Plant the City is

1 engaging in a water development project and is
2 diminishing the District's benefits for its
3 water development project of providing water
4 services to customers in the service area.

5 Mrs. Phelps general counsel for the
6 Commission testified that the District was
7 properly formed and was allocated service
8 territory by court order and that the proper
9 thing for the City to have done was to petition
10 ANRC. And there was an argument made by defense
11 that this does not constitute a project under
12 the regulations. And Your Honor, it does
13 constitute a project under subsection 7 of that
14 regulation. Let me grab that.

15 THE COURT: Of the 601.4?

16 MR. NADZAM: Yes, Your Honor, point 7.
17 Let me -- and that one states that all
18 political subdivisions must obtain a water
19 plan. I'm sorry. This is section 601.4. All
20 political subdivisions must obtain water plan
21 compliance approval prior to construction of a
22 water development project. The term project,
23 as used in this title shall include the
24 following. Number 7 transfer of a service area
25 not yet receiving service from utility but

1 included within another political
2 subdivision's approved service area or within
3 another entity's application for water plan
4 compliance approval which this situation fits.
5 It's a project because it's transfer of
6 service area in St. Francis's Water District
7 or -- yes, Your Honor. And so, that's why we
8 believe it's a project under subsection 7 of
9 that regulation.

10 And the defense stated that one that we
11 should have filed a petition to oppose the
12 annexation. Well, it's my understanding that
13 plaintiff would not have the right to oppose the
14 annexation because none of our physical
15 territory was being annexed. Just our service
16 territory. And so, there was no opportunity for
17 plaintiff to file an opposition to the
18 annexation, especially with this lawsuit
19 currently pending when that occurred.

20 They also stated that plaintiff should have
21 gone to the ANRC. But the ANRC Mrs. Phelps in
22 her testimony said the most they could have done
23 was send a letter, and they didn't have any
24 enforcement authority. And there was no remedy
25 for plaintiff to seek declaratory judgment

1 except through circuit court.

2 Finally, the defenses that they have
3 raised. In regard to the East Plant, the
4 violation if plaintiff is correct. They are
5 still continuing to violate state law. So, it's
6 a continuing violation of state law, and so the
7 statute of limitations has never run because
8 they continue to violate state law. And if the
9 court did find statute of limitations had run,
10 in affect it would endorsing a continuing
11 violation of state law. It wouldn't solve the
12 problem of them violating state law. They also
13 tried to tie the time limit into the
14 Refurbishing Plant and the East Plant, but the
15 Refurbishing Plant wasn't built -- construction
16 wasn't started until 2015. Suit was filed in
17 2017. So regardless of the statute of
18 limitations, suit was filed properly in regard
19 to the Refurbishing Plant. And the plaintiff has
20 not waived their rights or -- waived their
21 rights in regard to either plant.

22 They also briefly raised the issue of
23 latches. But at most, the District has incurred
24 expenses. They installed a water meter I think
25 for five or six thousand dollars, and the other

1 cases finding latches involved hundreds of
2 thousands of dollars cause there must have been
3 a detrimental change in its position. And \$5,000
4 just is not that big of a detrimental change in
5 position, Your Honor. Especially compared to the
6 cases we cite in our brief finding a half a
7 million dollars being a detrimental change in
8 position.

9 Further, the City hasn't suffered a
10 detrimental change in position because it's made
11 money from this situation and continues to make
12 money from this situation. So, latches should
13 not apply regardless cause they are benefiting
14 from this not receiving a detriment, Your Honor.

15 Your Honor, I would like to add that ARI
16 was not receiving water in the Refurbishing
17 Plant at the time discussion between plaintiff
18 and ARI and the City began. And so, they knew
19 ARI or they, excuse me, both the City and ARI
20 was on notice that plaintiff wanted to service
21 its territory and desired to service its
22 territory. However, they chose to proceed anyway
23 unilaterally in violation of the state water
24 plan the orderly development.

25 And so, St. Francis has asserted its rights

1 continuously at least in regard to the
2 Refurbishing Plant since it first found out it
3 was going to be constructed.

4 THE COURT: And so, with respect to your
5 position about -- I believe that Ms. Gibson
6 indicated that there was a thirty-day window
7 where a challenge to the annexation could have
8 been lodged. And your position is that St.
9 Francis or the District would not have had
10 standing to pursue that because you had -- it
11 is a service territory rather than a physical
12 territory that was being annexed.

13 MR. NADZAM: Your Honor, I believe that's
14 correct. I am not positive on that. But the
15 bigger concern on one is just -- One, this
16 litigation was already ongoing, and so
17 plaintiff was asserting its rights to that
18 territory. And two, the proper way for -- the
19 only the entity that should determine a
20 transfer of service territory is the ANRC.

21 THE COURT: And so, it is plaintiff's
22 position that irrespective of the annexation
23 that the City still is in violation of the
24 statute, still is in violation of the law
25 because they have not sought approval from the

1 ANRC to include this specific land that they
2 annexed as part of their service territory for
3 water provision?

4 MR. NADZAM: Yes, Your Honor, and
5 defendants have cited no law stating that
6 annexing a geographical area automatically
7 gives you the service territory of a water
8 district. I mean there's a process to go
9 through.

10 THE COURT: And so, you know the
11 plaintiff -- I mean, excuse me, the defendants
12 cited the statute with regard to the ARI's
13 rights to enjoy the privileges and benefits of
14 citizenship of the city of Marmaduke just as
15 would the existing customers of the existing
16 area would have. Can you speak to that?

17 MR. NADZAM: Your Honor, I can because
18 the Arkansas Soil and Water Conservation
19 Commission case. It clearly states section
20 15-22-503E clearly grants ASWCC now the ANRC
21 power over other political subdivisions such
22 as municipalities to approve any water
23 development project for compliance with the
24 state water plan. If defendant's theory was
25 correct, then cities could do whatever they

1 wanted and annex that territory and would
2 immediately take it away from the water
3 district. There would be no point in having a
4 water plan because cities could just do
5 whatever they wanted and unilaterally take
6 service territory that didn't belong to them
7 simply by annexing that territory and that's
8 not allowed by state law.

9 THE COURT: All right. All right. Thank
10 you. All right. Any response, Ms. Gibson or
11 Ms. LaFever?

12 MS. LAFEVER: Yes, Your Honor, if I may
13 address a few points and then allow co-counsel
14 to address a few points as well. With respect
15 to the annexation issue, plaintiff's counsel
16 has initially, in response to that, stated
17 something along the lines of, you know, it's
18 usurping the authority of the court. But that
19 the annexation procedure itself can involve a
20 court if somebody does intervene and objects
21 to it. Now like opposing counsel, I am not
22 sure that given that it's -- there they don't
23 physically own the property that was at issue
24 as far as standing goes. However, the idea
25 that the City annexing the ARI property into

1 the city limits somehow you search the role of
2 the judiciary that that belies the actual
3 annexation process. If some -- assuming
4 standing, if someone wishes to oppose an
5 annexation, there is a judicial route for
6 doing so and it would go first through the
7 local county quorum court. And then if
8 somebody was still dissatisfied, the County
9 Judge's determination regarding the annexation
10 as to whether or not it was proper. It can --
11 there are a number of methods in the Arkansas
12 District Court rules that provide a method of
13 getting to the Circuit Court. So, I think
14 ultimately had there been some sort of
15 intervention by the District, it would've
16 likely, perhaps not in this court, but in a
17 court a circuit court in this county. The --
18 there was some discussion about the annexation
19 being a sort of end road around the arguments
20 that were being made by the plaintiff with
21 respect to the exclusivity. But I like the
22 phrase "sauce for the goose, sauce for the
23 gander." At the time that these discussions
24 were occurring with respect to the ARI or the
25 District's ability to service the East or the

1 Refurb Plant, there was no indebtedness. And
2 in fact, the District had been indebted to the
3 USDA and by virtue of the Federal Anti
4 Curtailment Statute, did some have pretty
5 specific protections to their service area
6 which there is an abundance of case law on.
7 However, they had refinanced those loans
8 through a local bank and they the District's
9 representatives have recognized that they lost
10 that protection. So, they did unilaterally
11 themselves go out and seek the financing with
12 the ANRC which to some degree brings us into
13 the statute with respects to the protection of
14 the revenues. And so, you know it's oh it's
15 been the City's argument to some extent well
16 that's sort of an end road around the statute.
17 I mean we've been providing water to our
18 customer for almost twenty years, and it took
19 fifteen for the -- approximately fifteen for
20 the District to sit up and say oh wait we want
21 to start doing this. We want them for our
22 customer.

23 As far as the actual logistics of the East
24 Plant and the Refurb Plant, I do want to make
25 clear for the record that these aren't two

1 separate buildings. The Refurb Plant was built
2 in 2015, but it was an extension of a
3 pre-existing building, so it's not as though
4 it's a standalone entity. So, there's I think
5 some logistical issues in play with turning off
6 water service in one part and the City
7 continuing to provide service in those in
8 certain areas of the building versus the
9 District.

10 As far as whether or not the City was
11 required to seek approval from the ANRC, again
12 we have Crystal Phelps' testimony. She's legal
13 counsel for the ANRC. And I believe her
14 testimony was that that the City has done
15 nothing unlawful. And I think that holds quite a
16 bit of weight. I mean if she's general counsel
17 for the organization that's charged with
18 interpreting -- I mean they interpret their own
19 regulations, and she has testified that the City
20 did not do anything unlawful.

21 Let's see. Mr. Nadzam discussed the
22 transfer of a service area, but the District has
23 never provided water services to ARI. They
24 discussed in their brief giving words their
25 plain and ordinary meaning. Transfer to me

1 indicates, you know, that it's going from you
2 know one provider to another. ARI or -- I'm
3 sorry. The District has never actually provided
4 any services to ARI.

5 THE COURT: Is that your response to the
6 601.47?

7 MS. LAFEVER: Yes, Your Honor.

8 THE COURT: Regulation argument?

9 MS. LAFEVER: Ms. Gibson may have a
10 little to add to that as well. And with that,
11 I'm gonna hand the podium over to.

12 THE COURT: All right. Thank you. Ms.
13 Gibson?

14 MS GIBSON: Your Honor, with respect to
15 that section 601.4 subsection B7, when Ms.
16 Phelps was asked about that subsection in her
17 deposition, she was asked -- she was read that
18 that section and asked if that would
19 constitute a project also and she said yes.
20 And then, Question: "and that's exactly what
21 we have in this particular situation isn't
22 it." Answer: "I'm not sure that the two
23 situations are the same." So again, Ms. Phelps
24 stated in her deposition that this specific
25 scenario the only subsection that she could

1 see that this scenario would fall under would
2 be the subsection speaking of the 20% increase
3 from the current water usage. And because the
4 City has provided undisputed evidence that the
5 provision of water services to the East Plant
6 and the Refurb Plant did not constitute a 20%
7 or more increase in their current water usage
8 that thus this was not deemed a project under
9 the ANRC's rules, and they did not have to
10 seek approval. And again, Ms. Phelps stated
11 that she did not see any reason why the ANRC
12 would've taken an enforcement action against
13 the City. She stated that she's unaware of
14 anything that the City did that was unlawful.
15 And using that word unlawful because of the
16 15-22-223A statute and that's also synonymous
17 with the -- with a regulation in the title 6
18 of the ANRC's rules as well. So, Ms. Phelps is
19 very familiar with both because they're the
20 same.

21 THE COURT: Couldn't plaintiff had
22 pursued approval? I mean I know the position
23 is you didn't have to but is there something
24 that would have prohibited, excuse me, not
25 plaintiff. Is there something that would have

1 prohibited the City from seeking approval?

2 MS GIBSON: I don't believe.

3 THE COURT: And the plaintiff's position
4 is that that's what would have fixed it not
5 the annexation. That you had to have gotten
6 approval from the ANRC. That's what Mr. Nadzam
7 has articulated.

8 MS GIBSON: Right.

9 THE COURT: Why? Why didn't the City do
10 that?

11 MS. GIBSON: Well, Your Honor, quite
12 frankly, just because they weren't -- they
13 weren't required to. 15.22.223A at the end
14 cites -- it says if applicable. Seek approval,
15 you know, if applicable. And so, the City took
16 the position that because they aren't engaging
17 in a project that needed approval by the ANRC
18 that they didn't have to seek approval. And
19 so, if they weren't required to do so. That's
20 the reason why they didn't.

21 MS. LAFEVER: Your Honor.

22 THE COURT: Ms. LaFever, yes.

23 MS. LAFEVER: If I may briefly. Prior to
24 -- I don't know that it's part of the record
25 per se such that it would be part of the world

1 of information for summary judgment purposes
2 but just so that the record is clear that post
3 past summary judgment hearing. The mayor and I
4 did actually meet with Ms. Phelps and
5 discussed with her.

6 MR. NADZAM: Object, Your Honor. That's
7 not in the record. This conversation is going
8 to be hearsay. Plaintiff has not had notice of
9 this conversation to the best of my knowledge.

10 THE COURT: All right. Well, just for --
11 I'm gonna sustain that objection to supplement
12 the record with any additional information.
13 And to be fair, my question may have inspired
14 that information, and so I and I recognized
15 that as a valid objection. I'm sustaining it.
16 I guess a better way to phrase my question is
17 I understand that the defendant's argument the
18 City's argument is that we aren't required to
19 obtain permission. My question is: Are you
20 prohibited? Were you prohibited? Was there
21 -- it was just a judgment call or is there a
22 statute that prohibited the City from going
23 the route of ANR that of seeking permission
24 from Ms. Phelps's agency?

25 MS. LAFEVER: I don't think there's

1 anything that would necessarily have
2 prohibited us from going to ask them. Hence,
3 the meeting. But I can't speak to what the
4 ANRC would have done with that. But I believe
5 there is something in the record where the
6 District went to them at some point and asked
7 them to do something and they said --

8 THE COURT: And they could just do a
9 letter. There wasn't anything. That's what the
10 record reflects.

11 MS. LAFEVER: Right. I don't know that
12 given Ms. Phelps's testimony that the City
13 hasn't done anything unlawful that the only
14 sort of subsection of the regulation we would
15 fall under we don't. That I think it probably
16 would've been thanks no thanks. I mean that
17 there's nothing for them to approve under
18 their own regulations.

19 THE COURT: Okay. All right.

20 MS. GIBSON: A couple -- two more points,
21 Your Honor. First, plaintiff's counsel
22 mentioned that he didn't think that the
23 plaintiff would have like standing to file a
24 complaint to -- in an attempt to prevent the
25 annexation. But the statute reads that within

1 that timeframe that any person interested may
2 institute a proceeding in the circuit court.
3 So, if plaintiff is alleging that they are
4 likely to be affected by this annexation, you
5 know, in their alleged group an alleged
6 aggrieved party, then this statute absolutely
7 permits them to file a complaint to prevent
8 the annexation within that thirty days. And
9 the District did not do so. Lastly, the
10 plaintiff relies heavily on that City of
11 Bentonville case. And I kind of distinguished
12 the case in the reply brief but I just wanted
13 to kind of make that clear that the situation
14 that's happening in that case is factually
15 different than what's happening in this case.
16 The City of Bentonville argued that it had an
17 exclusive planning jurisdiction that was five
18 that span expanded five miles outside of their
19 city. And that's what this the City of
20 Bentonville argued. And the City of Centerton
21 sought approval from the ANRC to approval for
22 a water project that included a portion of
23 that alleged exclusive area. And the ANRC
24 awarded approval to the City of Centerton and
25 approved their water project. And the City of

1 Bentonville argued that the -- the authority
2 that it was given via statute trumped the
3 authority that the ANRC has in order to
4 approve or disprove a water project. In this
5 scenario, that's -- it's completely different.
6 The City is not arguing that the ANRC doesn't
7 have authority to approve or disapprove
8 projects whatsoever. The City is arguing that
9 they that their provision of water to the East
10 and the Refurb Plants do not constitute a
11 project under the ANRC's rules. And so thus we
12 didn't need to seek approval. And then, I
13 would like to also like to note in that City
14 of Bentonville case, its pinpoint page 300. It
15 says in the instant case, Bentonville did not
16 provide -- I'm gonna substitute the ANRC with
17 any plan to annex or otherwise provide water
18 services to the residents who live within its
19 five-mile extraterritorial planning area. So,
20 this case mentions annexation and what if, you
21 know, it just kind of throws the idea out
22 there well what if the City of Bentonville
23 that's claiming that they have this exclusive
24 jurisdiction of this five-mile expanded area
25 outside of their territory. Well, what if they

1 would have attempted to annex this -- this
2 land? Then would we be in a different -- a
3 different, you know, situation? And so, I'd
4 like to point that out that although The Court
5 doesn't say much, you know, much else on the
6 annexation issue, they do throw that idea out
7 there. So, I don't think that it's absurd to
8 think that the annexation doesn't conflict
9 with the 1987 order and that it given the
10 resolution was adopted that ARI shall have and
11 enjoy the rights and privileges of the
12 inhabitants that are within the original city
13 limits.

14 THE COURT: All right. Anything further?

15 MS. LAFEVER: No, Your Honor.

16 THE COURT: Okay. All right. Thank you.

17 MS. LAFEVER: Thank you.

18 THE COURT: Mr. Nadzam, Mr. Lyons,
19 anything further?

20 MR. NADZAM: Your Honor, in Mrs. Phelps
21 deposition, she was asked on page 74 that what
22 about regulation 601.4B7 transfer of service
23 area not receiving service from utility but
24 included within another political
25 subdivision's approved service area or within

1 another entity's application for water plan
2 compliance approval that would constitute a
3 project also. Wouldn't it? Yes. And then later
4 on page 78. Did Marmaduke do anything seeking
5 review of a proposed transfer of a service
6 area in which ARI's East Plant is located? No.
7 And there's a specific approval process for a
8 transfer of service area. Isn't there? Yes.
9 And that's contained in 605.3? Yes. Did
10 Marmaduke take any of the steps set forth in
11 section 605.3 of the rules of ANRC before it
12 began providing water to ARI's East Plant? No.
13 Not that I'm aware of. It says upon agreement,
14 the provider's exchange territory. Are you
15 aware of -- are you aware of an agreement
16 where the providers agreed to exchange this
17 territory where ARI's East Plant is located?
18 No. And, Your Honor, the plaintiff would still
19 argue that it did not have standing to contest
20 the -- the annexation because annexation does
21 not change the water rights. Only the ANRC can
22 do that as -- that as Mrs. Phelps's testimony
23 just stated. There's a process to transfer
24 those water rights. And defense -- defendant
25 discusses the Arkansas Soil and Water

1 Conservation Commission case by stating
2 Bentonville did not provide ASWCC with any
3 plan to annex or otherwise provide water
4 services to the residents who live within its
5 five-mile extraterritorial planning area. And
6 here, the City didn't give the ANRC tell it of
7 its plans to annex the area. They just went
8 ahead and did it unilaterally. And that's not
9 an orderly water plan. It's not how transfers
10 occur under the ANRC's regulations. Otherwise,
11 cities would just all the way -- otherwise,
12 cities would all the time eat into water
13 district's territory and be able to do that on
14 their own without input from the ANRC.

15 THE COURT: Anything further? No?

16 MR. NADZAM: No, Your Honor.

17 **JUDGE'S RULING TAKEN UNDER ADVISEMENT**

18 THE COURT: Okay. Anything from the
19 defense? Okay. All right. I want to thank you
20 both for your arguments here and your
21 briefing. I really have not heard a lot that
22 makes me believe that there are genuine issues
23 of material fact out here. I have heard a lot
24 with respect to argument with regard to
25 statutory interpretation, applicability of

1 certain regulations. And so, what I am going
2 to do is to take this under advisement and I'm
3 going to issue a written decision with regard
4 to this case with regard to the dueling
5 motions for summary judgment. I know that
6 there is an outstanding motion in limine. And
7 I am not ruling today that this will
8 definitively not go to jury trial. I am
9 stating for counsel's purposes that at this
10 point in my understanding of this process and
11 of the arguments that I would think it
12 unlikely that this will proceed to jury trial.
13 But I am not removing it from the docket at
14 this juncture and will get you a written
15 decision as -- as timely as I can with the
16 understanding that we are set in two weeks for
17 a jury trial. But that being said, there is a
18 pending motion in limine. In the event I
19 ultimately deny both motions for summary
20 judgment and this matter does proceed to
21 trial, I will take up those -- that motion in
22 limine the first day of trial. But my forecast
23 of this case for counsel is that I think it's
24 highly likely that this is a matter that The
25 Court will resolve by letter opinion. Again, I

1 will do my level best to be timely about that
2 process given that I am very aware of the time
3 limitations and constraints that counsel will
4 be under as you prepare this matter for trial.
5 And I hope that my forecast or foreshadowing
6 of The Court's decision might give you some
7 comfort with respect to that timeframe. But I
8 will provide a decision by letter opinion.
9 Anything further by any attorney before we
10 adjourn on this case today?

11 MS. LAFEVER: No, Your Honor.

12 MS. GIBSON: No, Your Honor.

13 MR. NADZAM: No, Your Honor.

14 THE COURT: No? Okay. Thank you all and
15 we will stand adjourned on that case.

16 (COURT REPORTER'S NOTE: Off the record.)

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C E R T I F I C A T E

I, Dana Beck, Official Court Reporter for the Ninth Division Circuit Court, Second Judicial District of Arkansas, certify that I have prepared the Record on Appeal as requested through the Notice of Appeal filed May 8, 2019, in the case of St. Francis River Regional Water District vs City of Marmaduke, Arkansas, before the HONORABLE MELISSA B. RICHARDSON, Circuit Judge thereof.

The cost incurred by Plaintiff for said record was \$259.30.

WITNESS my hand and seal as such Court Reporter on this 17th day of July, 2019.



Dana Beck
DANA BECK
CERTIFIED COURT REPORTER
ARKANSAS SUPREME COURT
NO. 746