

# Legally (Relevant



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## Water Service Territory Conflicts Revisited (Part I)

**N**ot that many years ago conflicts over water service territory, usually between a city and a rural water district, were among the most contentious topics we faced. Lawsuits were filed, legislation was introduced, study groups were formed and numerous forums and conference programs were held in an effort to educate both cities and RWDs about the issues and to try to resolve the problems that were occurring.

Then two things happened:

1. The housing market crash of 2008 severely reduced residential development that had been occurring on the fringe areas of cities and RWDs where these service area conflicts were occurring.

2. Word spread that one of those lawsuits over territory cost the city and RWD involved in that dispute over \$2 million in combined legal fees and expenses, an amount that has frightened others into trying to avoid being caught up in similar, expensive disputes.

In the meantime, state law has been amended to prescribe a more deliberate, better defined process to be followed in cases of annexation of RWD territory by a city. And, equally important, federal courts have clarified the rules that apply when that territory is in an RWD that has a direct or guaranteed USDA loan. Given these changes and clarifications, and with a resurgence in development underway, now is a good time to review these rules and discuss how to avoid these conflicts in the future. That is the purpose of this article, Part I. A second article, Part II, will consider how cities and RWDs (or cities and cities or RWDs and RWDs) can avoid these conflicts by cooperating in providing water service to unserved land.

One of the primary causes of service territory conflicts between cities and RWDs has been the speed with which consensual annexations of land by cities could occur. Under state law, specifically K.S.A. §12-520 and 12-520a(f), a landowner could call the city the day of a council meeting and have that landowner's land annexed to the city by ordinance adopted at the meeting later that night. This can, and on occasion still does happen. But if that land lies within the territory of an RWD, the city will have violated another state law, K.S.A. § 12-539, and may have unwittingly exposed the city to state

or federal law liability, as well as upsetting a developer's plans and financial obligations in the process.

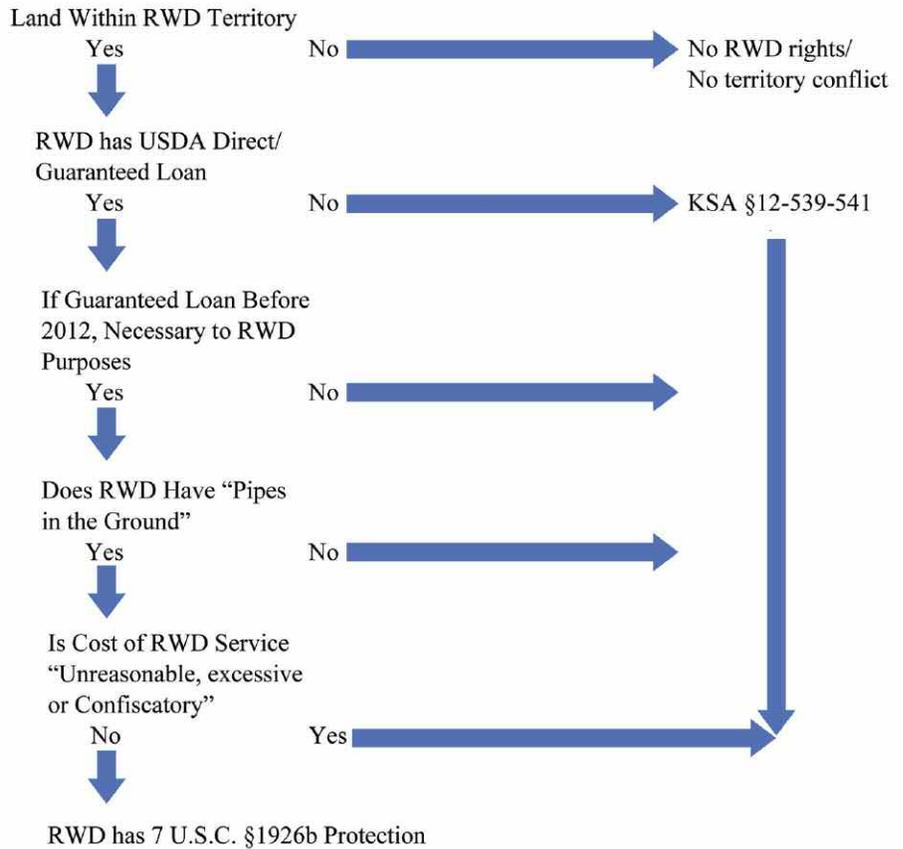
So what is the city to do before acting on an annexation ordinance to keep this from happening? The city's attorney needs to be directly involved in this process every step of the way. The rules that apply to annexations are far too complex to ever try to accomplish without legal counsel. With the city attorney's participation, the next step is to find out if the land proposed to be annexed is within the legal territory of any RWD. This is not always as easy as it sounds. Begin by calling neighboring water districts and ask if this land is in their territory. If nothing else, this will alert the city to whether one or more RWDs think the land may be in RWD territory. But because the only way for land to be in the "legal territory" of an RWD is the result of order by the Board of County Commissioners of the county having jurisdiction over the RWD (which may or may not be the BOCC of the county in which the land in question is located!), this ultimately requires a search of the county clerk's records for the relevant order. This search can be tedious, to say the least, but in many counties it is the only way to insure the status of the land in question.

Does it matter if the land is not legally located in the territory of the RWD but has water lines located on the land? In short – no. One thing is clear, unless the land is within the legal territory of an RWD, regardless of what facilities may be located on the land being annexed, if it is not in the legal territory of the district then state law procedures for



annexation of RWD territory do not apply (K.S.A. §82a-639-41), and neither does any federal law protection exist if that district has a USDA loan.

#### ANNEXATION/SERVICE AREA EXTENSION CHART



## State Law

So assume that it has been positively confirmed that the land being considered for annexation is in the territory of an RWD. This means that the provisions of state law, K.S.A. §82a-639-41, apply to any

annexation. There are very specific requirements that must be met and steps that must be taken *before* any annexation ordinance is adopted. These measures are there for the very purpose of slowing down the annexation process, alerting the affected RWD of the proposal to annex, and forcing the city and the RWD to consider the plan for future water service to the area.

If that review results in the city deciding that it, and not the RWD, will be designated to provide water service following annexation, the RWD may be entitled to payment for the loss of that right to serve. Again, a very specific process is prescribed for how this valuation is to occur and the factors to be considered in arriving at value. This statute should be reviewed carefully with counsel before an annexation ordinance is adopted in order to avoid an unpleasant surprise.

## Federal Law

Recent litigation has accomplished one thing of value to cities and RWDs (in addition to delivering the lesson of how frightfully expensive these cases can be): the courts have provided clear guidance about when federal law will provide protection to an RWD against loss of service territory.

We now know that there are a series of questions to be asked to determine whether federal law, specifically 7 U.S.C. §1926(b) will provide service area protection:

1. Is the RWD indebted on a loan from the USDA, or on a loan guaranteed by the USDA?
2. If indebted on a loan guaranteed before 2012, was the guarantee necessary for the lawful purposes of the district?
3. Does the district have “pipes in the ground” in or near the land in question?

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4. Would water service from the district be so expensive as to be “unreasonable, excessive or confiscatory”?

If the answer to questions 1, 2 or 3 is “no”, or the answer to question 4 is “yes”, then there will be no service area protection under federal law and the matter will be governed by state law as described above.

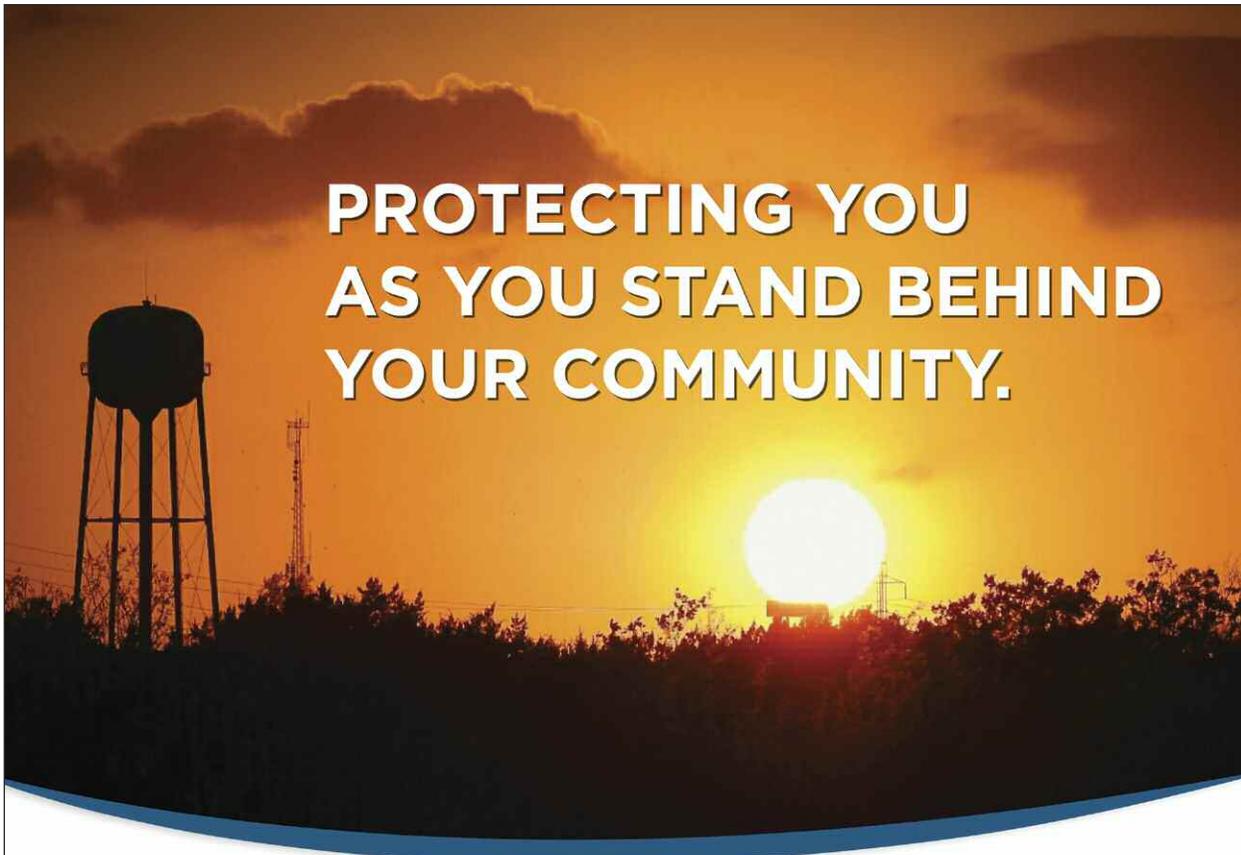
However, if the answers to 1, 2 or 3 are all “yes” and 4 is “no”, protection under §1926(b) applies, overriding state law, and the city may not be allowed to offer water service to the annexed area.

These questions are nuanced, so the answers may not be as obvious as they may first appear. Counsel will need to study the relevant court cases and advise the city accordingly.

It makes little sense to consider the applicability of federal law to a service area annexation or the affect under state law of such an annexation without involving the affected RWD in the process. Too often these investigations are conducted in secrecy, not engaging the RWD, and thereby running the risk of wrong or incomplete information, ultimately creating suspicion and distrust, if not bad decisions. In almost every case, open discussion with the RWD at the earliest stages of consideration of a proposed annexation of RWD territory is the best course to follow in order to avoid these problems.

## Conclusion

A lot has happened since 2008 concerning annexation of RWD territory by cities. Changes to state law require that any annexation of RWD territory include advance notice to the RWD whose land is being considered for annexation. There is often no easy way to verify RWD territory short of an exhaustive search of county commission records. Once that has been determined, the city needs to determine what state law will require, and if federal law will apply. The best way to do this is to engage the RWD in direct discussions as early as possible in order to make the best possible decisions. We will explore in Part II of this article some of the possibilities for cooperation that can avoid conflict, reduce expenses for the city and developers, and improve service to customers.



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