

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Ross County Water Company,

Plaintiff,

-v-

Case No. 2:08-cv-735

City of Chillicothe,

Judge Michael H. Watson

Defendant.

ORDER

Plaintiff, Ross County Water Company, Inc. ("Plaintiff" or "RCWC"), asserts claims under 7 U.S.C. § 1926(b), alleging, *inter alia*, that Defendant, the City of Chillicothe ("Defendant" or "Chillicothe"), is curtailing Plaintiff's ability to provide water services by installing a competing waterline in Plaintiff's territory. Plaintiff seeks declaratory and injunctive relief. Defendant, the City of Chillicothe, counterclaims stating, *inter alia*, that under Ohio Constitution Article XVIII §§ 4 & 6 and Ohio Revised Code § 711.09 Plaintiff is encroaching on its territory by installing waterlines. Both Plaintiff and Defendant seek a preliminary injunction enjoining the other from taking any further action to supply water to the disputed area. For the reasons that follow the Court **GRANTS** Plaintiff's Motion for Preliminary Injunction (Doc. 3) and **DENIES** Defendant's Motion for Preliminary Injunction (Doc. 13).¹

¹The parties asked the Court to deem their motions for a temporary restraining order to be preliminary injunction motions. In its August 20, 2008 order, the Court instructed that the next scheduled hearing would proceed as a preliminary injunction hearing. As such, the Court **GRANTS** Plaintiff's Motion for Temporary Restraining Order as a Preliminary Injunction.

I. Background

A. Parties

RCWC is a not for profit water company organized in 1970 under Ohio Revised Code § 1702 *et seq.* to provide water to members of the corporation. From its inception, RCWC has provided water to residents and businesses in the unincorporated areas of Ross County, Ohio. To finance the development of this water distribution system, RCWC borrowed several million dollars from the United States of America, Department of Agriculture, Rural Economic and Community Development Service ("RECDS"), formerly the Farmers Home Administration ("FmHA"), pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1926. RCWC presently has outstanding loans of over \$10 million. See Hr'g Tr. 52, Aug. 4, 2008.

The City of Chillicothe is an Ohio municipal corporation governed by the Ohio Constitution and the Ohio Revised Code.

B. Disputed Area

The area in dispute ("disputed area") is in Green Township in an unincorporated area of Ross County, approximately two miles north of and thus outside of Chillicothe's municipal boundaries. The disputed area consists of the east side of Hospital Road south of Delano Road to a property known as Classic Brands ("Classic Brands") and the east side of Hospital Road north of Delano Road approximately 1,500 feet.² Within the disputed area and the surrounding area lay the following parcels of land:

- Classic Brands, located at the southern most point of the disputed area.

²Plaintiff's Exhibit 10 (PX 10) provides or consists of or contains a colored map of the area in discussion.

Originally, this parcel of land was known as the Colomet industrial site ("Colomet"). Chillicothe has and continues to provide water service to Classic Brands; this is not in dispute.

- An abandoned freight company adjacent to and immediately north of Classic Brands.
- A small parcel of land immediately north of the abandoned freight company owned by Dr. Cosenza.
- The Warner property ("Warner property"), bisected by Route 23 and therefore laying on both the west and the east side of Route 23 and Route 23's parallel road, Hospital Road. The Warner property runs from south to north along Hospital Road to Delano Road.
- The Cloverleaf property ("Cloverleaf property") consisting of four parcels along Hospital Road north of Delano Road. Part of the Cloverleaf property is a parcel formerly known as the Tecumseh Home Center ("Tecumseh").

A document has been produced in this case which purports to be a contract between RCWC and Chillicothe titled Water Service Agreement ("contract" or "agreement") and dated June 29, 1971. The contract allocates to Chillicothe the right, duty, and obligation to provide water to the proposed hospital site (now the Adena Regional Medical Center ("Adena")) and Colomet (now Classic Brands) and allocates to RCWC the right, duty, and obligation to provide water to the remaining areas of unincorporated Ross County until such time as any part of the aforementioned lands become annexed to the city. See Pl.'s Ex. 12 (PX 12). Notwithstanding a lengthy history whereby the parties have operated in a manner consistent with the terms of this

agreement, Chillicothe now disputes the validity of this document and asserts that a search of the city's records indicates the city council never adopted an ordinance authorizing the mayor to execute such an agreement. See Hr'g Tr. 50-51, Sept. 4, 2008.

The Ross County Board of Commissioners, in a document dated February 14, 1972, and titled "Resolution" ("resolution"), gave RCWC an easement granting the right to lay its water lines within Ross County in return for saving the county the expense of creating its own water district to serve the rural inhabitants. See Pl.'s Ex. 13 (PX 13).

C. RCWC's Waterlines

RCWC installed a six inch water line ("the six inch line") on the west side of Route 23 in 1975 which runs in a north-south direction and extends as far south as the emergency connection to the City of Chillicothe. RCWC makes water available to the western portion of the Warner property (i.e. the portion of the Warner property west of Route 23) via the six inch water line.

In 1974, RCWC also constructed a ten inch water line ("the ten inch line") running in an east-west direction parallel to and just north of Delano Road. The ten inch line originally served the Tecumseh property. After the property was sold to Cloverleaf, however, Cloverleaf granted RCWC an easement for an additional sixteen inch line ("the sixteen inch line"). The easement, recorded August 22, 2003, also included permission for a waterline that would run north-south along Hospital Road north of Delano. At that time, that portion of Hospital Road had not been built. See Pl.'s Ex. 56 (PX56). In accordance with the easement, the ten inch line was supplemented in 2003 with the sixteen inch line running parallel to it as a back-up system.

Next, in April and June 2008, RCWC constructed an eight inch water line ("the eight inch line") running south from the ten inch line on Delano Road. The eight inch water line runs north-south along Hospital Road to the southernmost boundary of the abandoned freight company (and thus ends immediately north of the abutting Classic Brands property).

Finally, Cloverleaf also granted an additional easement to RCWC on July 16, 2008, for the construction of additional water lines through its property. After RCWC received this final easement from Cloverleaf, it began constructing an eight inch line from Delano Road north along Hospital Road. Pursuant to the Court's August 20, 2008 status quo order (Doc. 11), RCWC stopped the construction and tapping of this line; however, the Court later permitted RCWC to complete the tapping³ and construction of this line (Doc. 17). Work on the line has since been completed.

D. Chillicothe's Waterlines

Chillicothe maintains water lines servicing both Adena and Classic Brands. The Classic Brands line ends at the northernmost point of the Classic Brands property. Chillicothe passed ordinances in April 2008 to construct water and sewer lines from Classic Brands to north of Delano Road. After submitting its plans to the Ohio Environmental Protection Agency ("Ohio EPA"), Chillicothe received approval to extend its water line to a point 1,500 feet north of Delano Road. In August 2008, Chillicothe began construction of the northerly extension of the Classic Brands line. The Court

³ In Plaintiff's Post Hearing Brief in Support of Motion for TRO, Plaintiff states the tap is "well beyond the 1500 feet north along Hospital Road from Delano Road" identified as the disputed area. See Pl.'s Post Hr'g Br. in Supp. of Mot. for TRO 6 n.2 (Doc. 24).

ordered Chillicothe to stop work on this line on July 31, 2008 (Doc. 6) in its status quo order. The Court then permitted Chillicothe to complete the laying of the line immediately in front of Classic Brands (see Order, Doc. 11) and also allowed Chillicothe to complete the laying of a lateral east-west line on its easement directly north of Classic Brands in order to continue its water service to Adena (see Order, Doc. 17).

E. Relief Sought

RCWC seeks a preliminary injunction that would include the following:

1. An order prohibiting Chillicothe from taking any further action to supply water to the subject territory; and
2. An order prohibiting Chillicothe from taking any further action which would serve to curtail or limit water service provided by Plaintiff to the subject territory in violation of 7 U.S.C. § 1926(b).

Chillicothe seeks a preliminary injunction that would include the following:

1. An order prohibiting RCWC from taking any further action to supply water to the subject territory; and
2. An order prohibiting RCWC from taking any further action which would serve to curtail or limit water service provided by Defendant to the subject territory in violation of 7 U.S.C. § 1926(b).

II. STANDARD OF REVIEW

The Court considers four factors to determine whether to issue a temporary restraining order (TRO) or preliminary injunction:

- (1) whether the movant has a strong likelihood of success on the merits;
- (2) whether the movant would suffer irreparable injury without the injunction;
- (3) whether issuance of the injunction would cause substantial harm to others; and

(4) whether the public interest would be served by the issuance of the injunction. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). The four considerations are “factors to be balanced, not prerequisites that must be met.” *Jones v. City of Monroe, MI*, 341 F.3d 474, 476 (6th Cir. 2003) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir.1985)).

“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Given this limited purpose, “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Id.* Accordingly, a party “is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits.” *Id.* (citations omitted).

III. DISCUSSION

A. Likelihood of Success on the Merits

RCWC argues 7 U.S.C. § 1926(b) (“Section 1926(b)”) prohibits Chillicothe from curtailing water services provided or made available by RCWC during the term of RCWC’s indebtedness to RECDS. Chillicothe argues RCWC is not entitled to Section 1926(b) protection and instead Chillicothe is entitled to install waterlines in the disputed area pursuant to Ohio Constitution Article XVIII §§ 4 & 6 and Ohio Revised Code § 711.09.

1. 7 U.S.C. § 1926(b) Protection

RCWC argues it is entitled to protection against curtailment because it meets the

three criteria for Section 1926(b) protection. Specifically, RCWC contends that Chillicothe's expansion of water services north of Classic Brands violates the anti-curtailment provision of Section 1926(b). Chillicothe counters, however, that RCWC does not qualify as an association under Section 1926, nor has it provided or made service available in the disputed area, and therefore RCWC is not entitled to Section 1926(b) protection.

Title 7 of the United States Code § 1926, titled "Water and waste facility loans and grants," regulates loans allocated by RECDS to associations for the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities. 7 U.S.C. § 1926(a). In furtherance of this objective, 7 U.S.C. § 1926(b) reads as follows:

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

Congress enacted Section 1926(b) to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and [RECDS] loans." *Lexington-South Elkhorn Water District v. City of Wilmore, Kentucky*, 93 F.3d 230, 233 (6th Cir. 1996); see also *City of Madison v. Bear*

Creek Water Assoc., 816 F.2d 1057, 1060 (5th Cir. 1987) (citing S.Rep. No. 566, 87th Cong., 1st Sess.). In interpreting the scope of Section 1926(b) protection, the provision "should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment." *Lexington-South*, 93 F.3d at 235 (quoting *Wayne v. Village of Sebring*, 36 F.3d 517, 527 (6th Cir. 1994) (citations omitted)).

The Sixth Circuit has held the statute's purpose is defensive; it is meant to protect rural water associations from the outside threat of local governments taking their customers - not as a weapon for water associations to recruit new users outside of their boundaries. *Le-Ax Water Dist. v. City of Athens, Ohio*, 346 F.3d 701, 708 (6th Cir. 2003). The statute protects rural water associations from encroachment by a local government when the local government "is attempting to provide water service to a rural water association's users or within its boundary." *Id.* at 709. See also *Lexington-South*, 93 F.3d at 237 (finding "water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.").

To prevail in a Section 1926(b) claim, a party must demonstrate that it is entitled to Section 1926(b) protection by establishing: 1) it is an "association" within the meaning of the Act; 2) it has an outstanding FmHA loan obligation; and 3) it has provided or made service available in the disputed area. *Le-Ax*, 346 F.3d at 705 (citation omitted); *Lexington-South*, 93 F.3d at 234.

The first prong of the test requires RCWC to establish it is an association within the meaning of the Act. Title 7 U.S.C. §1926(a) in relevant part states that associations

include “corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies.” 7 U.S.C. §1926(a) (emphasis added); *Lexington-South*, 93 F.3d at 234.

It is undisputed that RCWC is a corporation not for profit established under Ohio Revised Code § 1702.01 *et seq.* The current record includes both the Articles of Incorporation and the Bylaws of RCWC from 1970, which establish RCWC as a not for profit corporation established under Ohio law. See Pl.’s Ex. 1 & 2 (PX 1, 2). Furthermore, all documents filed in this case by both parties state RCWC is a not for profit corporation established in the State of Ohio. See, e.g., Pl.’s Compl. ¶ 1 (Doc. 1), Def.’s Countercl. ¶ 6 (Doc. 22).

Chillicothe would have this Court read §1926(a) & (b) as requiring an association to be established under the specific section of the Ohio Revised Code regulating Regional Water and Sewer Districts. See Ohio Rev. Code § 6119 *et seq.* The plain meaning of the federal statute, however, does not require an association to be created under Ohio Revised Code § 6119⁴ to be granted Section 1926(b) protection. Instead, the statute states that an association includes a corporation not operated for profit. RCWC, as a not for profit corporation established to provide water to rural Ross County, qualifies as an association within the meaning of the Act under Section 1926(a) thus fulfilling the first prong of the test.

The second prong of the test to establish protection under Section 1926(b) is

⁴The Court notes that sections of the Ohio Revised Code recognize operators of a water supply or waterworks established as either not for profit corporations organized under Ohio Rev. Code § 1702 or regional water districts organized under Ohio Rev. Code § 6119. See, e.g., Ohio Rev. Code § 2305.34.

that the association, RCWC, must have an outstanding FmHA loan obligation.

Testimony was presented establishing RCWC indebtedness to RECDS, formerly FmHA, along with several exhibits of promissory notes, security agreements, and balance statements establishing RCWC's outstanding obligations to RECDS.

Furthermore, Chillicothe has not attempted to contest such evidence, nor has it argued in its briefs that RCWC does not have outstanding loans to RECDS. As such, the Court will find on the existing evidence and testimony that RCWC has qualifying, outstanding RECDS loans fulfilling the second prong of the test.

The third and final prong requires RCWC to establish it has provided or made service available in the disputed area. *Le-Ax*, 346 F.3d at 705-06. In this circuit, a two-part approach is taken to analyze whether service is provided or made available in the disputed area. *Lexington-South*, 93 F.3d at 237. The first requirement is that a water association have "pipes in the ground", meaning it must already have service in existence or water lines must be within or adjacent to the property claimed to be protected by Section 1926(b). *Id.* The second requirement is that the water district has the legal right under state law to serve the area in question. *See, e.g., Le-Ax*, 346 F.3d at 706-07 (finding a water district had the right pursuant to Ohio Revised Code § 6119 to provide service inside and outside its boundaries); *Lexington-South*, 93 F.3d at 235-36 (stating that Lexington-South had not obtained the legal right under state law from the Kentucky Public Services Commission to construct facilities or to serve customers within portions of the disputed area).

A key factor in determining whether an association made service available is determined by "pipes in the ground", meaning the existence of facilities on, or in the

proximity of, the location to be served. *Lexington-South*, 93 F.3d at 237. The Sixth Circuit has "plainly stated that "[i]f an association does not already have service in existence, *water lines must either be within or adjacent to the property* claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection." *Le-Ax*, 346 F.3d at 706 (citing *Lexington-South*, 93 F.3d at 237) (emphasis added by *Le-Ax* court).

In this case, Chillicothe asserts RCWC began expanding into the disputed area after Chillicothe's plans to provide water for the disputed area were disclosed during a city council meeting on March 24, 2008. Defendant maintains that RCWC did not have lines in the disputed area for which it seeks Section 1926(b) protection prior to the time Chillicothe began constructing its allegedly encroaching lines for service. RCWC, however, counters that substantial water lines have existed surrounding the disputed area that could quickly be tapped to provide service for any new customers.

The disputed area is bounded on the west by the six inch line which lays adjacent to and immediately west of Route 23 and runs north-south. The six inch line has been in existence since 1975 and the line terminates at the emergency hook-up supplied by RCWC for the City of Chillicothe (which the Court notes has been accessed before by the City of Chillicothe in an emergency). At the hearings, testimony was offered establishing RCWC's longstanding plans to serve the properties on the east side of Route 23 (including the only portion of the Warner property⁵ falling on the east

⁵As previously mentioned above, the Warner property is traversed down the middle by Route 23. The property consists of parcels on the west side of Route 23, and a parcel on the east side.

side of Route 23) by boring under the highway from the six-inch line on the west side of Route 23. See Hr'g Tr. 25, Aug. 4, 2008. Through the middle of the disputed area, the ten inch line and the sixteen inch line both run west-east along Delano Road. The ten inch line and the sixteen inch line were installed in 1974 and 2003, respectively.

Chillicothe alleges that the eight inch line dropped south off the ten inch line along Delano Road and installed by RCWC in June 2008 proves RCWC did not have lines in the disputed area. The Court disagrees.

The Court is unpersuaded that the business decision to run the eight inch line south off the ten inch line instead of bore under the highway from the six inch line is evidence of RCWC's lack of lines in the disputed area. Testimony was presented that RCWC's long range plan was to bore under Route 23. With the expected growth in the area, however, RCWC decided it was better to run the new eight inch line down from the ten inch line instead of repeatedly boring under Route 23. See Hr'g Tr. 25-27, Aug. 4, 2008. The fact that new lines have been laid in the disputed area is not dispositive of the question whether pipes were in the ground. Lines already existed in and were immediately adjacent to the disputed area since the 1970's; new lines were installed to upgrade the system and to continue to serve an area already served by RCWC.

The Court will not tie the hands of the water association in such a way as to prevent it from making rational business decisions in an effort to remain protected from encroachment under Section 1926(b). To do so would not be prudent nor consistent with the water association's history of providing water to underserved rural areas in Ross County nor to the congressional intent to protect such water associations from encroachment. RCWC has had water lines since the 1970's both immediately west and

immediately north (the six and ten inch lines) of the disputed area, essentially creating a border around the southern portion of the disputed area. In fact, the Plaintiff's water distribution lines that make service available to the disputed area were already in place, and have been for over 35 years - long before the City of Chillicothe became interested in serving the needs of folks in the disputed area. RCWC fulfills the first requirement that a water association have pipes in the ground.

The second requirement is that the water district has the legal right under state law to serve the area in question. The legal right of RCWC to serve the disputed area derives from the "disputed" contractual right conferred on it by Chillicothe to serve the entire unincorporated area of Ross County and the blanket easement granted to RCWC by the Ross County Board of Commissioners to lay pipes in unincorporated Ross County in furtherance of the objective to provide unserved rural inhabitants with water. In this case, a contract signed by the then mayor between the City of Chillicothe and RCWC was entered into on June 29, 1971, to establish a non-competitive water service. This contract specifically delineates that Chillicothe is to serve the proposed hospital site (now Adena) and the Colomet Industrial site (now Classic Brands), while RCWC shall provide service to the remaining areas designated as the unincorporated area of Ross County. The contract states that besides the purpose of establishing a "non-competitive water service" between RCWC and Chillicothe, the contract satisfies the requests of the Ohio Planning and Development Department (presumably to delineate the territories of the competing water companies).

In furtherance of this agreement, RCWC also sought and received a resolution for a blanket easement throughout unincorporated Ross County from the Ross County

Board of Commissioners. The Ross County Board of Commissioners' resolution states that in an attempt to improve the inadequate water supply in rural Ross County, RCWC established itself and obtained a FmHA loan to construct a water treatment and distribution system which in return "sav[ed] this county the expense of creating a water district for said rural inhabitants in dire need of water, and in the interest of public health, safety, welfare and to supply water for fire protection, and to promote the economic development and growth, thus creating additional jobs within the area" See Pl.'s Ex. 13 (PX13).

Under this contract and easement, RCWC laid pipes and provided service to rural inhabitants of unincorporated Ross County. RCWC and Chillicothe have operated under the terms of the contract for more than 35 years; RCWC maintains extensive water lines throughout unincorporated Ross County and Chillicothe serves Classic Brands (formerly the Colomet industrial site) and Adena (the creation on the proposed hospital site).

Chillicothe through its then mayor's assent, contractually agreed to relinquish any rights it might have had to serve the disputed area and is estopped from now claiming a right to the disputed area under Ohio Constitution Article XVIII §§ 4 & 6. It would be unjust to allow Chillicothe to dispute the validity of a contract it has operated in accordance with for over 35 years or deny RCWC Section 1926(b) protection.

Chillicothe would have this Court believe RCWC is using Section 1926(b) protection as a sword, instead of a shield. In *Le-Ax*, the Sixth Circuit established the water association had the physical ability to serve the disputed area and a legal right to do so under state law. *Le-Ax*, 346 F.3d at 707. The court found, however, the water

association was not seeking to use Section 1926(b) to protect its territory from municipal encroachment. The court instead stated the water association was "seeking to use the statute to foist an incursion of its own on users outside its boundary that it has never served or made agreements to serve." *Id.* Thus, the Sixth Circuit held 1926(b) should not be used as a sword to carve out additional territory with new customers but instead a shield to defend against invasion. *Id.* at 707-08.

Here, RCWC made agreements to serve the disputed area not only with customers in the disputed area, but even more remarkably, it agreed with the entity (Chillicothe) which alleges RCWC is wielding a sword. Chillicothe has specifically allocated the entire area of unincorporated Ross County—not anything less—to RCWC. RCWC's infrastructure is expansively laid throughout the unincorporated area of Ross County. See Pl.'s Ex. 60 (PX60). It is not seeking to expand into additional territory, RCWC is instead protecting its territory from incursion. RCWC serves customers in the disputed area and has pipes in the ground. The Court finds, under the terms of the contract, that Chillicothe is encroaching into RCWC's boundary as it now finds some value in the disputed area.

2. *Ohio Constitution Article XVIII §§ 4 & 6 and Ohio Revised Code § 711.09*

Chillicothe argues that the Ohio Constitution and the Ohio Revised Code ("Ohio Rev. Code") provide it the right to serve the disputed area and that protection of Plaintiff under Section 1926(b) would violate the Tenth and Fourteenth Amendments of the United States Constitution. Chillicothe fails to offer any argument, analysis, or authority for these claims. Instead, throughout its briefing, Chillicothe merely states "RCWC's actions are in violation of 7 U.S.C. § 1926(b), Ohio Constitution Article XVIII §§ 4 & 6,

Ohio revised Code § 711.09, and the Tenth and Fourteenth Amendments to the U.S. Constitution." See, e.g., Def.'s Answer and Countercl., ¶18.

The Court finds Chillicothe has waived this argument for purposes of the preliminary injunction as Chillicothe neglected to cite any authority supporting its constitutional arguments nor did it do more than mention the Tenth and Fourteenth Amendments without any analysis or argument. As Chillicothe has made no cogent argument in support of these constitutional claims, the Court declines to further address them. *U.S. v. Cole*, 359 F.3d 420, 428 n.13 (6th Cir. 2004). Also see, e.g., *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed augmentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.") (quoting *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 293-94 (1st Cir.1995)). The weaving of the threads is as important as the threads themselves to craft the pattern of a tapestry. The Court will not be handed mere threads by the defendant and be left to weave the tapestry itself.

The Court offers no opinion as to whether Defendant has waived its Tenth Amendment argument for purposes of a permanent injunction. Nor does the Court reach the issue of whether Chillicothe waived its Tenth Amendment claim by virtue of its contract with RCWC.

Similar to its claims under the Ohio Constitution, Defendant asserts under Ohio Rev. Code § 711.09 Chillicothe is allocated a three-mile planning jurisdiction and a right to serve water to the disputed area, yet offers no support for this argument beyond

merely stating it.

The Ohio Rev. Code § 711.09 is titled "Planning commission or legislative approval of plat; petition for recording; refusal to approve; village subdivision regulation." The text of the accompanying statute does not even reference water. The Court has found no case in which Ohio Rev. Code § 711.09 is used to shelter a municipality from Section 1926(b) protection. Again, as counsel has failed to demonstrate through traditional means that it has faith in the argument it asserts, the Court declines to address this claim.

3. *Conclusion*

The Court finds RCWC is likely to succeed on the merits of a Section 1926(b) claim since it can establish it is an "association" within the meaning of the Act, it carries an outstanding FmHA loan obligation, and it has provided or made service available in, or in the proximity of, the disputed area since the 1970s and beyond.

B. Irreparable Harm

To obtain a preliminary injunction, the harm that would result in the absence of the injunction must be irreparable, not merely substantial. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Irreparable injury must include more than a determinable monetary loss. *Id.* The possibility that adequate relief will be available at a later point in the litigation weighs heavily against a claim of irreparable harm. *Id.* (citation omitted).

RCWC asserts Chillicothe's encroachment into its contractually mandated service area will irreparably harm it by threatening its income source and thus its ability to repay its RECDS loans. Also, RCWC argues Chillicothe's encroachment physically prevents RCWC from accessing its water lines due to Chillicothe's plans to bury its line

four feet from the existing lines. Furthermore, in the affidavit of William Neal, General Manager of RCWC, he states the diminution of service area would constitute a condition of default on the loans procured through RECDS, essentially jeopardizing RCWC's financial stability and development. See Neal Aff. ¶¶ 7, 8.

In its motion for preliminary injunction, Chillicothe asserts it has purchased a significant amount of piping, at a cost of approximately \$65,000.00, that will deteriorate if not placed in the ground. While the Court is sympathetic to the financial investment incurred by Chillicothe, Chillicothe voluntarily chose to pursue this course of action. The Court remains unpersuaded that Chillicothe is incapable of finding a suitable place to store the piping.

Chillicothe's actions of installing water lines in the same right-of-way as RCWC threatens substantial interference with RCWC's existing lines by eliminating RCWC's ability to place taps on its own lines. Thus, RCWC would be unable to serve customers adequately and efficiently. The Court finds that absent an injunction, RCWC will suffer not only monetary loss, but portions of business opportunity to which it is entitled by undertaking to serve the unincorporated area of Ross County when it was not lucrative or economical for Chillicothe or the County to do so.

Section 1926(b) protects RCWC's territory from encroachment. Unless Chillicothe is prevented from violating Section 1926(b), Chillicothe will construct a competing line that will adversely affect RCWC's ability to provide water to its customers within its service area. As a further result, RCWC would suffer irreparable damages by reason of jeopardizing its ability to pay the outstanding RECDS loans.

The Court finds that the encroachment by Chillicothe in this case constitutes

irreparable harm.⁶

C. Harm to Others

RCWC asserts that a preliminary injunction would not cause substantial harm to Chillicothe or those acting in concert with Chillicothe. Chillicothe maintains a preliminary injunction would not cause substantial harm to RCWC or those acting in concert with RCWC. Both RCWC and Chillicothe's request for injunctive relief are particularized to the disputed area. As such area is limited in its scope geographically, the Court does not find harm to others not privy to this lawsuit is a concern. Furthermore, as the requests for injunctive relief are specifically tailored to the parties involved and the disputed area, the Court finds granting RCWC's request for injunctive relief would not cause substantial harm to Chillicothe nor any other entity.

D. Public Interest

The Court finds that the public interest of the residents of rural Ross County and Chillicothe and the public at large are best served by facilitating the Congressional intent to interpret Section 1926(b) protection broadly to protect RCWC's ability to pay back its indebtedness of the government-issued RECDs loans. *Lexington-South*, 93 F.3d at 233; *see also City of Madison*, 816 F.2d at 1060 (citing S.Rep. No. 566, 87th Cong., 1st Sess.). Furthermore, the Court is of the opinion that granting the preliminary injunction will not disserve any public interest.

⁶ “[I]rreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of the legal remedy.” Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 2944 (2008).

IV. DISPOSITION

For the above reasons, the Court, having weighed the appropriate four factors, finds injunctive relief is warranted. Accordingly, the Court **GRANTS** RCWC's Motion for Preliminary Injunction and **DENIES** the City of Chillicothe's Motion for Preliminary Injunction.

The Court **PRELIMINARILY ENJOINS** the Defendant, Chillicothe, as follows:

1. The Court enjoins Chillicothe from taking any further action to supply water to the disputed area;
2. The Court enjoins Chillicothe from taking any further action which will serve to curtail or limit RCWC's ability to provide water service to the disputed area in violation of 7 U.S.C. § 1926(b).

The Court sets a telephone status conference for **Thursday, March 12, 2009, at 2:00 p.m.**, to discuss the need for further discovery, briefing, or an evidentiary hearing to expedite the disposition of this case.

IT IS SO ORDERED.

/s/ Michael H. Watson
Michael H. Watson, Judge
United States District Court