

MINUTES OF THE HOUSE ENERGY AND UTILITIES COMMITTEE

The meeting was called to order by Vice-Chair Rob Olson at 9:15 A.M. on February 21, 2008 in Room 783 of the Docking State Office Building.

All members were present except:

Carl Holmes- excused
Tom Hawk- excused
Annie Kuether- excused
Tom Sloan- excused
Vaughn Flora-excused
Judy Morrison-excused

Committee staff present:

Mary Galligan, Kansas Legislative Research
Carol Toland, Kansas Legislative Research
Melissa Doeblin, Revisor's Office
Renaë Hansen, Committee Administrative Assistant

Conferees appearing before the committee:

Doug Moshier, Attorney, Park City, Kansas
Cheryl Beatty, City of Eudora administrator
Tom Pyle, Mayor of Eudora
Doug Garber, Developer
John Nitcher, RWD #4
Steven M. Harris, Tulsa, RWD #4 outside litigation council
Gary Hanson, Hanson/Stumbo Law
Dennis Schwartz, Kansas Rural Water Association
Ray Connell, Sedgewick Rural H2O District #2

Others attending:

Thirty seven including the attached list.

Hearing on:

HB 2807-Defining participating member of a rural water district; requirements on water districts.

Proponents:

Doug Moshier, Attorney, Park City, Kansas, (Attachment 1), presented testimony in support of **HB 2807**.

Cheryl Beatty, City of Eudora Administrator, (Attachment 2), presented testimony in support of **HB 2807** noting that the rural water districts are created to provide water "to such lands that are without an adequate water supply" and "that such improvement or works will be conducive to and will promote the public health, convenience and welfare (KSA 82a-602)."

Tom Pyle, Mayor of Eudora, spoke to the committee in favor of **HB 2807**.

Doug Garber, Developer, spoke to the committee in favor of **HB 2807**.

Written Proponents:

City of Baldwin, (Attachment 3), presented written testimony in support of **HB 2807**.

Kansas Municipal Utilities, (Attachment 4), offered written testimony in support of **HB 2807**.

CONTINUATION SHEET

MINUTES OF THE House Energy and Utilities Committee at 9:15 A.M. on February 21, 2008 in Room 783 of the Docking State Office Building.

Opponents:

John Nitcher, RWD #4, (Attachment 5), offered testimony in opposition of **HB 2807**.

Steven M. Harris, Tulsa, Douglas County Rural Water District #4 outside litigation council, (Attachment 6), presented testimony in opposition of **HB 2807**.

Gary Hanson, Hanson/Stumbo Law, General Council, Douglas County Rural Water District #4, (Attachment 7), presented testimony in opposition of **HB 2807**.

Dennis Schwartz, Kansas Rural Water Association, (Attachment 8), offered testimony in opposition of **HB 2807**. He also noted a resolution that was adopted at the Kansas Rural Water Association at the November 2, 2007 meeting.

Ray Connell, Sedgewick Rural H2O District #2, (Attachment 9), presented testimony in opposition to **HB 2807**.

Questions were asked and comments made by Representatives: Cindy Neighbor, Rob Olson, and Tom Moxley.

Hearing on **HB 2807** was closed.

Hearing on:

HB 2808-Use of eminent domain by public wholesale water supply districts.

Proponents:

Mark Neis, Farmer, (Attachment 10), presented testimony in support of **HB 2808**.

Greg Shipe, Citizen, (Attachment 11), offered testimony in support of **HB 2808**.

John Pendleton, Citizen, (Attachment 12), presented testimony in support of **HB 2808**,

Kevin Barrone, (Attachment 13), offered testimony in support of **HB 2808**, adding comments to the written testimony of Burke Griggs.

Written Proponents:

Burke Griggs, Lawyer, Kansas Kaw River Growers, offered written testimony, (Attachment 13), in support of **HB 2808**.

Opponents:

Elmer Ronnebaum, Kansas Rural Water Office, (Attachment 14), offered testimony in opposition to **HB 2808**.

Questions were asked and comments made by Representatives: Tom Moxley, and Forrest Knox.

Hearing on **HB 2808** was closed.

The next meeting is scheduled for February 22, 2008.

The meeting was adjourned at 10:53 a.m.



For a day, a week, a lifetime.

6110 North Hydraulic
Park City, KS 67214-2499
Tel 316-744-2026
Fax 316-744-3865

**TESTIMONY OF THE CITY OF PARK CITY, ON BEHALF OF HUNDREDS OF
ITS RESIDENTS, IN SUPPORT OF HOUSE BILL NO. 2807**

February 21, 2008

Chairman
House Committee on Energy and Utilities
Statehouse
Topeka, Kansas

Mr. Chairman:

There are 250 residents of the City of Park City who receive municipal water service from the City and who are required to pay a franchise fee to Sedgwick County Rural Water District No. 2 solely on account of their property being within the boundaries of that district. These residents receive no service or benefit from the RWD and, yet, they are required to pay 17% more than other residents receiving the same water service but who are not living within the boundaries of the RWD. In addition, there are 13 businesses that are billed an 8.5% franchise fee on their water bills. Included in this group is the land that was developed as Wild West World Amusement Park, the Hayes Company and Foley Company.

This burden was imposed on these citizens in 1997 as a result of a compromise of a legal dispute between the City of Park City, the Rural Water District and the developer of several residential subdivisions in the northern portion of the City. In 1996, the developer sought consensual annexation of his lands by the City of Park City. He designed his residential development and anticipated special assessment bond financing of the infrastructure. In addition, he anticipated the receipt of water and sewer service from the City of Park City with the knowledge of the quality and sufficiency of such service. His desire to be in Park City and to receive municipal services from Park City were based on economic considerations that he believed made this development viable.

When a dispute arose with the RWD as to who had the right to serve this land with water, the developer sought information from the RWD concerning financing of infrastructure extensions that would be necessary in order for such service to be provided

ENERGY AND HOUSE UTILITIES

DATE: 2/21/08

ATTACHMENT 1-1

and concerning the quality and sufficiency of the water service. He found both to be inferior to the City of Park City. In fact, the RWD either could not or would not allow special assessment bond financing of infrastructure improvements that served specially benefited properties. While the RWD could have provided water service to the first phase of the developer's planned development, he did not believe it could do so for the entire development. The size of the RWD lines and the system pressures available in this part of the district also would not support fire hydrants so as to provide fire protection that would impact the residents fire insurance rating.

After almost two years of litigation in both state and federal court and thousands of dollars of attorney fees all around, the City of Park City and the RWD reached an agreement imposing the franchise fee discussed above. I was not involved as the city attorney for Park City at that time. Likewise, half of the current governing body of the City of Park City were not serving as elected officials at that time. The entire city council and I agree that this compromise agreement was ill-advised and for several years they have been asking legal counsel and staff to explore ways to find some relief for Park City citizens who have had to bear the burden of this problem for over 10 years and for those who, in the future, will have to bear the burden. The compromise that is reflected in a journal entry of judgment of the state district court obligates the City of Park City to collect a franchise fee of 17% on all gross water sales to single family residential customers and 8.5% on gross water sales to any commercial customers. There is also a provision for a \$250 hook up fee to be collected by the City of Park City and paid to the RWD. This agreement applies to all lands within the boundaries of the Rural Water District and is triggered when the City of Park City annexes any future properties into the City that are within those boundaries. The agreement is PERPETUAL.

The fees currently paid by the citizens of Park City as franchise and hook up fees to the RWD are approximately \$26,000 per year. From the inception of the fees in late 1997, the total payments to the RWD by these citizens have exceeded \$130,000. The RWD is required to do nothing in order to receive these payments. The average monthly cost of water service for a single-family resident of Park City is \$37.00. With the franchise fee added this totals just over \$43.00. For similar water service from the RWD the monthly cost is about \$78.00.

Looking to the future, there are currently 760 platted, single-family residential lots in four subdivision developments that are within the boundaries of the RWD. That means that there are 510 lots remaining to be completed as platted. This would generate a little less than \$130,000 in hook up fees to be paid to the RWD if all the lots are built on and completed. Similarly, the 17% franchise fee on an average home's monthly water bill is about \$6.00. If all these remaining 510 lots are completed and occupied, the monthly franchise fee to be paid to the RWD would be over \$3,000 per month and over \$36,000 per year FOREVER. The total for these 760 residences would be over \$4,500 per month and over \$54,000 per year FOREVER. In addition, while the Wild West World Amusement Park was open only a short period of time, there are several future users of the lands that the Park occupied who are looking to redevelop or develop this land. The City continues to encourage commercial development along the I-135 corridor

as it passes through Park City and much of this area is within the boundaries of the RWD. There is significant potential for substantial additional payments for the commercial water use franchise fee over the next several years.

There is nothing rural about the citizens of Park City who are paying this fee. They all live in urban residential subdivisions that are like those that exist all over the state. There is nothing rural about the commercial development that is within the RWD boundaries that is obligated to pay the RWD for the privilege of receiving water from Park City. It is telling that the audited financial report of RWD #2 for 2004 and 2005 provides a description of the district's operations that reads as follows:

The District provides water to farms and rural residents of Sedgwick County within the District. The District extends credit to customers, substantially all of who are local residents. There were 466 and 458 customers receiving services from the District at December 31, 2005.

The City of Park City has attempted to mediate with the RWD to see if there is some way the City can compensate the RWD so that the franchise fee payments can be ended. The City has also discussed lowering the fees and setting a determinate period of time over which the fees are paid to the RWD. These mediations have not been successful as the RWD has taken the position that the fees need to be paid forever.

It is important to note that when the legal dispute arose in 1996 the City of Park City was attempting to follow the provisions of K.S.A. 12-527 that would have required the City of Park City to pay the RWD the value of the interest it was losing when the City annexed property within its boundaries. The RWD resisted participating in this statutory process and removed the matter to federal court relying on the provisions of federal law that gives protection to RWD's who have federal loans against intrusions into their service areas by other municipalities. The Legislature has long recognized in K.S.A. 12-527 that there is a financial interest that cities should be required to pay when they annex property that is within the boundaries of a rural water district. The insistence by this RWD (and several others in the state) on hiding behind federal law to perpetuate what has ceased to exist; i.e., cities annex urbanized or urbanizing properties and RWD's serve rural or agrarian properties that have no other manner of obtaining water service, should not be permitted to continue if the cost is the imposition on citizens of unrealistic fees that are paid for absolutely no service or benefit from the payee.

The proposed provisions of this bill would permit these citizens entry into the process by which rural water districts are governed. It permits them to vote on board matters and seek representation on the board. This is all they ask. There have been attempts to tinker with the processes for removing property from the boundaries of a RWD but that has been seen as too broad an approach to this relatively local problem in Sedgwick County and Park City. This amendment to the definitional section of K.S.A. 2007 Supp. 82a-612 is one that Park City believes its citizens can make use of to seek the relief they believe they are entitled to through the democratic process.

The second revision which obligates a RWD to accept an offered payoff of its federal loan(s) by a city or county is helpful going forward in offering an annexing city some method of trying to prevent the sorts of legal posturing that has occurred with some districts recently that has resulted in the essential nullification of the method this Legislature has established for compensating RWD's for the financial loss they suffer when parts of their district are annexed into adjoining municipalities.

The City of Park City and hundreds of its residents wish to make known their complete support of House Bill No. 2807.

Thank you.



Douglas J. Moshier, City Attorney,
City of Park City, Kansas



City of Eudora

Testimony for HB2807

City of Eudora

Cheryl S. Beatty
City Administrator

The City of Eudora has a multi-year story to tell in a brief review. It is a very important story that this Legislative Committee should hear.

We all know that rural water districts are created to provide water “to such lands that are without an adequate water supply” and “that such improvement or works will be conducive to and will promote the public health, convenience and welfare (KSA 82a-602).”

In addition, rural water districts generally serve very low density areas and district boundaries are normally far and away from city’s boundaries. That is not the case, however, as a City begins to grow. In recent years, a problem has occurred when some rural water districts believe that as a city grows, a city with municipal water service may never serve rural water district customers even upon city boundary expansion at the request of the property owner and even if a customer doesn’t want to be served by the rural water district.

First, municipally owned water services will generally have ‘more than adequate’ water supplies to serve its customers. As a city grows with consent or planned annexation, a city must show that all utility services are adequate before land is incorporated into the city. Logically then, the rural water district purpose for serving a property that is newly incorporated is no longer valid. An adequate water supply is now available through a municipal service that will likely provide a higher quality service at a significantly lower cost. The City of Eudora and other cities agree that we MUST pay for the rural water districts infrastructure that is in place; just as they do for electric lines service territory changes. A City must pay for the rural water district infrastructure at a fair market value as well as pay for any portion of an outstanding loan that the customers of the district are responsible for or make the rural water district ‘financially whole’ as part of this transition.

In recent years some rural water districts have come under the influence of specialized, greedy attorneys that have uprooted the process as set up by Kansas Statue for dealing with property or area growth and service transitions. They have sought questionable protection under 1926B federal legislation by simply attaining a federal loan whether they need the funds or not.

So, WHY is all of this relevant to the City of Eudora? First, the City of Eudora is a growing community, which is good for the community, Douglas County, and the State of Kansas. We work hard to provide high quality utility services such as our municipally owned water service. In 1999, the City started growing south of K-10 Highway. The City knew that a few rural water

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

district customers existed near city limits, but RWD #4 did *not* object to city growth at any public meetings regarding these consent annexations.

It wasn't until 2003 that RWD #4 approached the City about setting specific district boundaries near the City. They claimed that they needed to do so because they wanted to obtain a much needed federal loan for a water line project that they wanted to build to connect to Johnson County RWD #6. KDHE had already said they would provide 100% of the funding for this project at approximately one-half the interest rate of a federal loan. In the process to obtain the loan, they purposely misled the city to expand their territory boundaries to 'qualify' for a federal loan that they didn't need.

When the annexations were completed, the City began to negotiate with RWD#4 in order to arrive at a purchase price for water district assets pursuant to K.S.A. 12-527. Initial communications from the water district indicated a sincere desire to negotiate a reasonable price for the sale of water district assets. As time passed, however, it became less and less clear whether RWD#4 was really motivated to enter an agreement with the City. The intentions of RWD #4 became even more cloudy when correspondence from a new attorney for the water district began to claim exclusive rights to serve the annexed territory under federal law.

Because developers needed to plan for their water service, the City could not wait indefinitely for an agreement with RWD #4. After a year of unsuccessful negotiations, the City finally demanded the appointment of appraisers in compliance with K.S.A. 12-527. In response, RWD#4 filed a pre-emptory lawsuit finally admitting, for the first time, that it does not intend to sell any assets pursuant to Kansas law. In the lawsuit, RWD #4 claims that federal law grants RWD #4 a water service "monopoly" in the annexed territory.

The federal law, referred to as section 1926(b), prohibits the city from the limitation or curtailment of water district service if the water district is indebted to the federal government. Through discovery, the City has learned that the RWD #4 actually sought an otherwise unnecessary federal loan for the specific purpose of preventing city growth into its territory. Nevertheless, the City of Eudora has offered to pay off the entire the entire federal debt in order to make sure that RWD #4 is not financially injured by the annexations. RWD #4 has refused, instead claiming the right to serve new water customers inside the City of Eudora with inferior service at unreasonably high prices.

The City of Eudora does not believe that either Kansas law or federal law should ever permit the type of conduct engaged in by RWD #4. An unnecessary federal loan should never trigger monopoly rights which will inflict injury upon cities, their residents, land owners or developers.

So, the problems began. The city thought all was well when an agreement was reached to allow the territory boundary changes with conditions as recorded in the Douglas County Commission minutes. But not so! The City has documentation that specifically shows that RWD #4 intentionally misled the City of Eudora on their boundary change request. The documentation states they didn't need the loan but only wanted it so they could have 'federal monopoly protection.' So, even though they agreed with the Douglas County Commission to not fight Eudora annexations and city's right to serve customers within the 'newly attached land, they have sued the City to do the opposite. They now claim the 'federal loan' protects them and they are 'thumbing' the Kansas and Douglas County legislative processes regarding settlement of such issues. They claim that the City may not service this area unless it wishes to pay RWD #4 \$6.5 million dollars for the approximately 153 acres within the 'newly attached lands'.

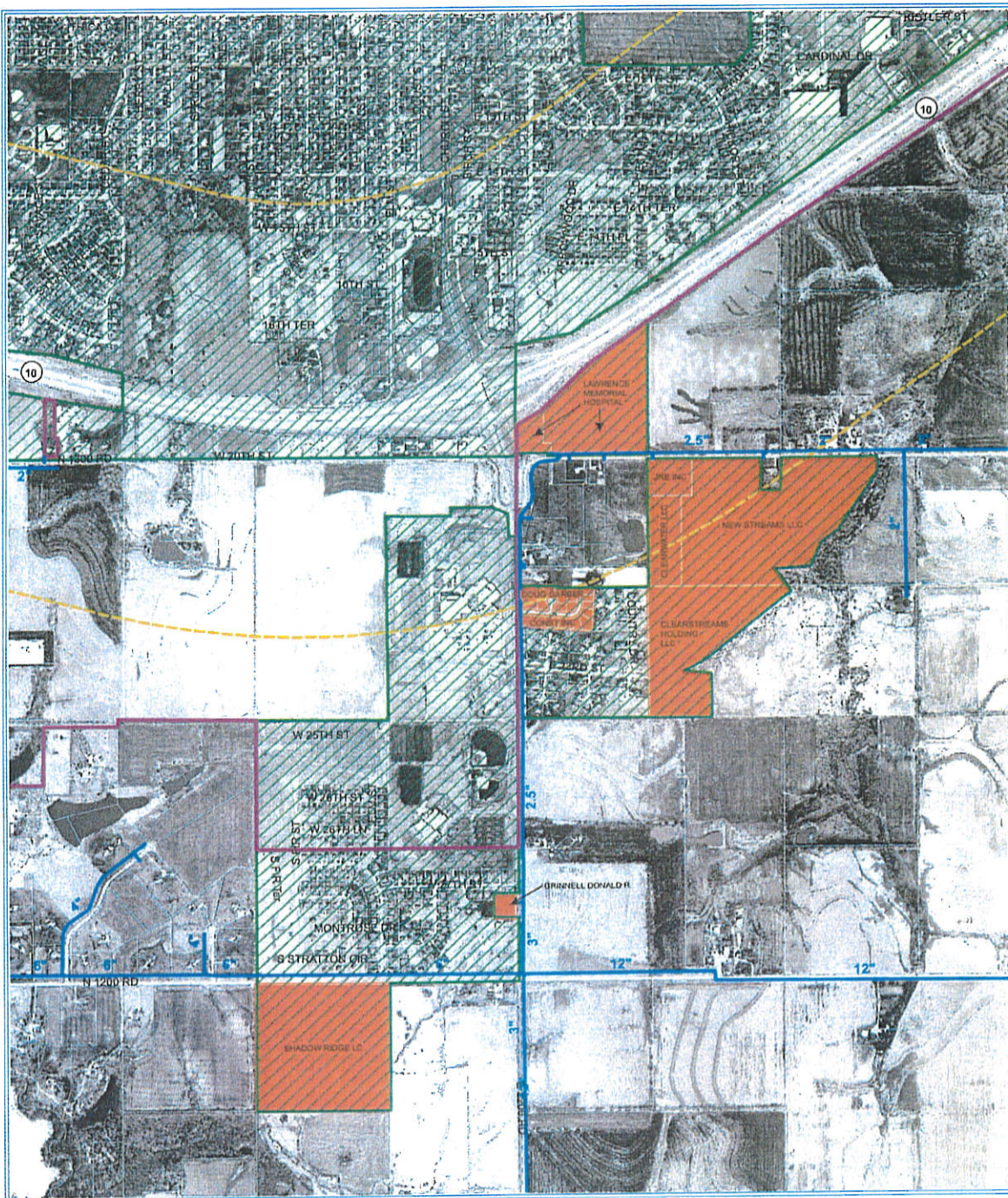
Outrageous! The City of Eudora faces a very costly lawsuit to protect its' right to service all citizens within its city limits. We fight for the right for all the citizens of Eudora to have more effective and lower cost water service. We fight for the right for all our citizens to have adequate fire protection and affordable fire insurance. We fight for the right to provide for the health and well being of the entire community.

The City of Eudora requests your support for House Bill 2807.

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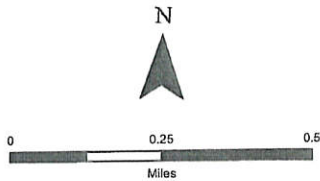
Water Fees/Rate Comparison
Douglas County RWD #4 vs. City of Eudora
 February 20, 2008

<u>Subject</u>	<u>RWD #4 Expense/Rate</u>	<u>City Expense/Rate</u>
8" Line to Fairfield Subdivision:		
Cost to RWD Customers	\$116,900	0
Cost to Developer	<u>\$10,000</u>	<u>\$25,000</u>
Total	\$126,900	\$25,000
Hook Up Fee:		
Full Rate	\$6,000 per household	\$2,000 per household
New Discount Rate**	\$4,000 per household	No Discount
Water Consumption Fees:		
Base Rate	\$24.50	\$10.20*
Price per 1,000 gallons	\$6.50	\$4.64
Cost/year based on 5,000 gal. Use per Month.	\$684.00	\$345.12
*First 1,000 gallons included in base rate - City of Eudora		
**1st time in history of RWD4 Offered new discount		
Fire Service per City Standards	Not Available	Available
Sustainable PSI for Service	30 psi	40-60 psi



Map Key

- Douglas Co. RWD 4 Waterlines
- Douglas Co. RWD 4 Boundary
- K-10 Corridor Boundary
- City of Eudora Incorp. Area (2006)
- City of Eudora Annexed Areas



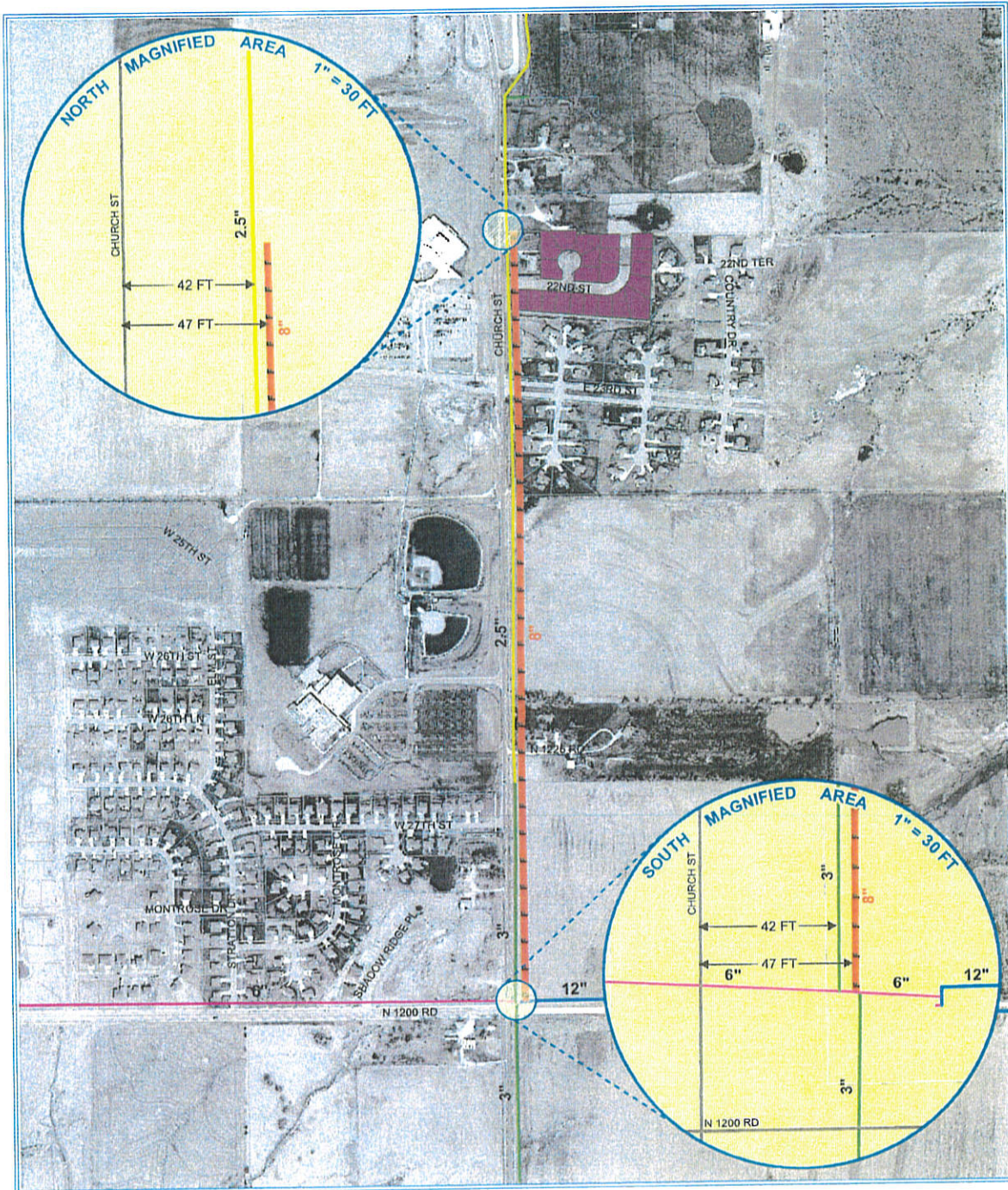
1 inch equals 1,000 feet

City of Eudora Annexed Areas
INCLUDING
City of Eudora Current Service Area
AND
2006 Aerial Imagery

Notes:
 *Data Source: Douglas County, Kansas
 Aerial Imagery: Douglas County LIDAR color imagery (2009)
 converted to grayscale.

Created: Jan 17, 2009
 Jason Deane, Deane Geomatics, LLC

EXHIBIT
C



Map Key

- RWD 4 Waterlines**
- 1" (dashed green line)
 - 1.5" (dashed blue line)
 - 2" (solid yellow line)
 - 2.5" (solid orange line)
 - 3" (solid green line)
 - 4" (dashed red line)
 - 5" (dashed pink line)
 - 6" (solid pink line)
 - 8" (solid blue line)
 - 12" (solid purple line)
- Proposed 8" Waterline to Provide Fire Protection to Garber Properties (red zigzag line)
 - Road Centerlines * (grey line)
 - Garber Property Lots (purple shaded area)
 - Property Parcels * (black outline)
 - Magnified Areas (yellow circle)

Notes:
 *Data Source: Douglas County, Kansas
 Aerial Imagery: Douglas County LIDAR color imagery (2005) converted to greyscale.

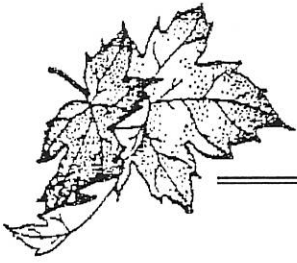
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0 250 500 1,000
 Feet

1 inch equals 500 feet

Douglas Co. RWD 4
Proposed 8" Waterline to Provide
Fire Protection to Garber Properties

EXHIBIT
 F



City of Baldwin City

P.O. Box 86, 803 Eighth St., Baldwin City, KS 66006 (785) 594-6427 FAX: 594-6586

February 19, 2008

Chairman Holmes & Members of the Committee:

The City of Baldwin City is a retail supplier of potable water to our residents, as well as a wholesale supplier to several customers. We work with rural water districts in Douglas County.

The City of Baldwin City supports House Bill 2807, specifically authorizing units of government to satisfy federal loans from the Department of Agriculture for rural water districts in the interests of annexing property and serving that property with water.

As rural communities grow, it is inevitable that they will cross paths with rural water districts in terms of who is to provide service to a given area. It is important that local governments have mechanisms in place to facilitate the satisfactory transfer of service areas. HB 2807 has the potential to help ease conflicts among neighbors and community members when competing interests arise in providing efficient water service to a formerly rural, but now urbanizing area.

We encourage passage of this Bill by the Kansas Legislature in 2008 in the interest of assisting local governments provide an efficient water system to all properties within its corporate limits.

Sincerely,

Jeff Dingman
City Administrator

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 3



Written Testimony Provided the

House Energy & Utilities Committee

February 21, 2008

*Brad Mears, Government Relations Director
Kansas Municipal Utilities*

House Bill 2807

Chairman Holmes and Members of the Committee:

On behalf of Kansas Municipal Utilities (KMU), we appreciate the opportunity to submit written testimony to the committee regarding House Bill 2807.

Formed in 1928, Kansas Municipal Utilities (KMU) is the statewide association that represents the interests of 170 municipal electric, natural gas, water and wastewater utilities across the state. KMU's members that serve as public water suppliers provide safe, reliable drinking water to over 452,000 customer accounts with the largest serving 135,000 meters and the smallest 67 meters.

KMU supports the language and intent of HB 2807. We understand that there are city water systems attempting to work with rural water districts to resolve service territory and boundary issues. In these negotiations, rural water districts often claim that their service territory cannot be annexed and assumed by another water system as long as it continues to have outstanding federal debt. These water district assertions are made based upon federal law 7 USCA 1926(b), commonly referred to as just 1926(b). However, there are instances when certain rural water districts intentionally maintain some level of outstanding federal development loans in order to keep the exclusive right to serve within their territorial boundaries and keep from having to negotiate territory issues as developing areas are annexed by municipal water suppliers.

The proposed legislation would require a water district to accept an offer from a city or county to pay off the federal debt if the city or county believed that it would be in the best interest of their constituents. We believe that the passage of this legislation would provide a reasonable approach to eliminating one of the obstacles between cities and rural water districts in their attempt to reach agreement on service territory issues.

Again, thank you for the opportunity to present this written testimony to the Committee.

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 4

RILING, BURKHEAD & NITCHER

Chartered

Established 1900
808 Massachusetts Street
Post Office Box B
Lawrence, Kansas 66044-8996
785-841-4700
Fax 785-843-0161
Web Site Rilinglaw.com

EDWARD T. RILING (1875-1946)
JOHN J. RILING (1885-1971)
GEORGE K. MELVIN (1898-1982)
JAMES L. POSTMA (1916-1998)
EUGENE C. RILING (1929-2002)

MICHAEL P. DREILING
MICHAEL BARBARA*
OF COUNSEL

*Located in Wichita Office

JOHN W. NITCHER
MICHAEL E. RILING
DIANE M. BRINGUS
LORI L. HEASTY
DOROTHY J. WATERS
LISA D. MONTGOMERY
CATHERINE BARKER
JULIA V. BUTLER
STEVE MOORE
STEVE METZLER
MUNEER UDDIN AHMAD

February 21, 2008

Representative Carl Holmes, Chairperson
Members of the House Committee on Energy and Utilities
State House
300 Southwest Tenth Avenue
Topeka, Kansas 66612

Re: House Bill No. 2807
Testimony concerning Subsection 2(b)

Dear Friends:

Rural Water District No. 4, Douglas County, Kansas lies in the eastern part of Douglas County entirely east of Highway 59, almost entirely north of Highway 56 and entirely south of the Wakarusa River. The City of Lawrence is a little ways off to its northwest; Baldwin City makes up part of its southern border; and the City of Eudora is at its northeast corner. The District was founded in the mid-1970's with the statutory charge that it install pipelines, pumps, and storage facilities for the delivery of potable water throughout its District territory. (K.S.A. 82a-619(a)(5).)

The water district was empowered to enter into contracts and borrow money so that it could provide water to the property owners in the District. Pursuant to its statutory charge, RWD4 entered into a contract with the City of Lawrence in 1975 whereby Lawrence treated the district's water held in Clinton Reservoir. That contract limited the growth of the District to an initial 800 water meters with a 1% growth rate per year until the District "arranged for a supplemental water source" that could accommodate the demand for new water meters that exceeded the annual 1% growth.

By the late 1990's the District had a long list of property owners in the District who needed water meters. The District needed more water to meet its statutory charge of supplying water to those in the District. The District entered into a contract with the City of Baldwin, which helped, but could only provide water to the southern three miles of the District adjacent to Highway 56. That water could not be sold in the northern seven miles of the District.

The District tried to renegotiate with Lawrence, but Lawrence refused, so the District

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 5-1

began to negotiate with RWD6 of Johnson County, to provide the additional water to meet the District's needs. That water was more expensive than what Lawrence charged. Significantly, the District would have to build a twelve inch line and a pump station that would come into Douglas County just south of K-10 and on west and south into the District.

The District had the demand, in part because in 2002 and 2003 the City of Eudora was unable to provide needed water outside its city boundaries. In fact, its then-City Administrator, Michael Yanez convened a meeting of the RWD4's administrator, city engineers and others and asked that RWD4 provide water to two churches whose congregations were made up largely of Eudora citizens but who were building churches outside the city limits. Mr. Yanez very appropriately sought cooperation between City and water district to provide the water the City could not provide.

The District on the strength of the growing need for water in rural Douglas County and the desire of the City of Eudora to work with it to furnish that water, took on a capital construction project of 1.1 million dollars shortly thereafter. It also took on the obligation of more expensive water from Johnson County, so that it could serve and continue to serve the property owners in its territory. Part of that debt was taken in the form of a federally insured loan, so that the District would be protected from efforts on the part of Lawrence, Baldwin or Eudora to take the most lucrative parts of the District.

The federal protection is based upon 7 USC 1926(b) which gives water districts with federal loans and federally guaranteed loans the exclusive right to provide water within its territory. Even if a city annexes water district territory, the water district still has the federally protected right to provide water.

Water districts do not make a profit from water sales; they do not have big treasuries. In RWD4, all patrons pay the same for their water whether they live close by one another in a neighborhood or they are only house on a lonely stretch of road. Some RWD4 patrons' closest neighbors live three-quarters of a mile away. Water districts can provide water at affordable prices to all their patrons because the cost of delivering water to a residential neighborhood is less than farther out in the country. This cost shifting allows the most remote district patrons to have affordable safe water to drink.

In order to ensure that those more remote patrons will have safe drinking water, it is vital that RWD4 preserve that part of its territory where the more intensive growth will be. The more intensive growth will always be closer to the cities. That is why the District financed a part of its 1.1 million dollar project with federal debt: That federal debt was more expensive, but it protects the District from an involuntary take-over by a city. 1926(b) protects water districts from being cherry picked..

Representative Carl Holmes, Chairperson
Members of the House Committee on Energy and Utilities
February 21, 2008
Page 3

Recently Eudora annexed some 153 acres of RWD4 territory. Both Eudora and RWD4 consider the 153 acres to be worth 6 million dollars. If that territory is taken from the District with only \$235,000 in compensation, then the rest of the cost of the infrastructure that was intended to benefit the whole district will be borne by a smaller part of the District that is more expensive to administer. Additionally, the cost of water will be even higher for fewer patrons because the District will still have to honor its contract to purchase water from Johnson 6. This will impact the District's ability to safely provide water to rural patrons. This will violate the spirit of the federal statute, 1926(b) as well as the state statutes that govern water districts.


Eudora and RWD4 are engaged in litigation now, but they also are about to begin formal mediation to see if they can settle their differences. As K.S.A. 12-527 now reads, it is easy for the parties to understand their rights. In fact, previously RWD4 made four separate offers to the City to resolve their differences; interestingly, the single offer made by the City of Eudora is one of the proposed amendments to this statute.

If this proposed amendment is adopted, then the Legislature will have done real harm to the rural citizens of Kansas. It will have done real harm to the rural citizens of Douglas County. It will introduce uncertainty, more litigation costs and delays in the resolution of the District's battle with Eudora.

On behalf of RWD4 I urge you to reject House Bill No. 2807.

Thank you.

Very truly yours,



John W. Nitcher

JWN:lf

LAW OFFICES

DOYLE HARRIS DAVIS & HAUGHEY

A PROFESSIONAL CORPORATION

INTERNATIONAL PLAZA

1350 SOUTH BOULDER, SUITE 700

TULSA, OKLAHOMA 74119

steve.harris@1926blaw.com

MAILING ADDRESS

P.O. BOX 1679

TULSA, OK 74101-1679

TELEPHONE

(918) 592-1276

FAX

(918) 592-4389

www.1926blaw.com

FED. I.D. 73-1034582

STEVEN M. HARRIS

February 20, 2008

Representative Carl Holmes, Chairman
Committee on Energy and Utilities

Re: Testimony of Steven M. Harris (Legal counsel for Douglas County Rural Water District No. 4) in Opposition to House Bill No. 2807

Dear Chairman Holmes and Members of the Committee:

Over forty years ago, the U.S. Congress passed the Agricultural Act of 1961, Pub.L. No. 87-128, 75 Stat. 294, which sought to preserve and protect rural farm life. The Act is known as the Consolidated Farm and Rural Development Act. Section 306(a) of the Act, made federal loans available to rural water districts. Section 306(b), now codified at 7 U.S.C. § 1926(b), protected the borrowers of such loans from competition.

The federal protection afforded rural water districts was intended to encourage rural development and insure a clean, safe and economical source of water for rural residents. This is accomplished through the “economy of scale” – expanding the number of customers so that fixed costs for water distribution can be spread among the largest possible number of users.

The 6th Circuit Court of Appeals stated in 2003, that “This provision¹ prevents local governments from expanding into a rural water association's area *and stealing its customers*; the legislative history states that the statutory provision was intended to protect “the territory served by such an association facility against [other] competitive facilities” such as local governments, as otherwise rural water service might be threatened by “the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.” S.Rep. No. 87-566, at 67 (1962),

¹ Refers to 7 U.S.C. § 1926(b)

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 6-1

reprinted in 1961 U.S.C.C.A.N. 2243, 2309. See *Le-Ax Water Dist. v. City of Athens, Ohio* 346 F.3d 701, 705 (C.A.6 (Ohio),2003)

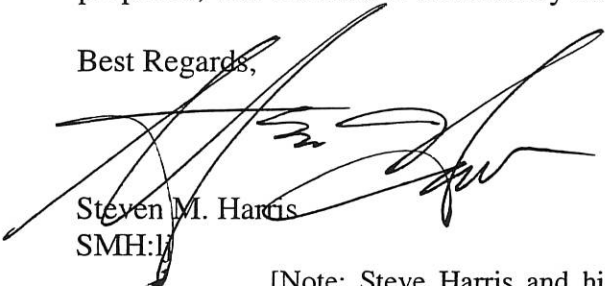
Bill No. 2807 as proposed, will (as explained below) work to frustrate the purpose of the federal statute by (1) “discouraging” rural development, and (2) driving up the cost of water to rural residents.

Bill No. 2807 in part proposes to compel a water district to accept an offer to pay off its federal loan. Once the federal loan is paid off, the rural water district loses the protection of the federal statute. Thereafter, municipalities in Kansas have the power to “cherry pick” areas from within a water district’s territory – which are likely to be profitable for the city. Rarely does a municipality annex sparsely populated areas which are unlikely to develop into densely populated areas. This acquisition process exercised by municipalities throws the “economy of scale” into reverse for water districts. Districts will have fewer new customers to bear the cost to maintain and operate facilities constructed with federal money. Facilities constructed may be rendered obsolete or useless, since the future or potential customers they were intended to serve may be taken by the neighboring municipality.

The 1926(b) federal protection only extends to the service made available by the water district. All other city services may be provided by the municipality. In most instances “potable water service” is the only service provided by a “water district”. Federal protection has never frustrated the right or ability of a municipality to expand its boundaries to make all other city services available (as well as expand its tax base). Municipalities and water districts can live comfortably side by side, with each accomplishing their intended purpose.

Without doubt, the committee is interested in “preserving and protecting rural farm life” – which was the original purpose of 7 U.S.C. § 1926(b) beginning over 40 years ago. Bill No. 2807 as proposed, will frustrate if not entirely obstruct, that noble objective.

Best Regards,


Steven M. Harris
SMH:l

[Note: Steve Harris and his firm have acted as legal counsel for over 50 rural water districts in the states of Oklahoma, Kansas, Missouri, Arkansas, North Dakota, Colorado, New Mexico and Ohio.]

1476-2.031:l



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FAX 785/336-2751 • <http://www.krwa.net>

February 21, 2008

Representative Carl Holmes, Chairman
Committee on Energy and Utilities

**RE: Testimony of the Kansas Rural Water Association on
House Bill No. 2807**

Dear Chairman Holmes and Members of the Committee:

The Kansas Rural Water Association welcomes the opportunity to testify on this Bill. House Bill No. 2807 proposes two changes to Kansas law concerning rural water districts. The first concerns a new definition of "participating member". For over 50 years, "participating member" of a rural water district has been defined to mean one who owns land located within the district who has subscribed to one or more benefit units (meters) in the system. The most important function performed by participating members is voting for and serving on the rural water district board, the governing body of the district.

The proposed amendment to K.S.A. 82a-612 adds to the definition of "participating member" those who are charged a franchise fee for water service paid "directly or indirectly through another water provider" to such rural water district. We believe that this is a rare occurrence, perhaps limited to one place in the state. KRWA opposes legislation targeted at local disputes but which is made generally applicable to all rural water districts in the state.

In addition, there are a number of other concerns about the Bill as proposed. As currently defined, participating members have a stake in the good and efficient operation of the district. That would appear to not be the case for those persons included within the new definition of "participating member", who by definition are not receiving water service from the district. Such persons' interest would seem to be limited to the reduction or elimination of their franchise fees. In addition, unlike those who qualify to vote under the current definition of "participating member", the rural water district will have no record to indicate who these newly defined participating members are in order to send them notice of meetings or ballots for voting. A request for this information could be denied under the KORA. Detail contained in the current statute concerning how participating members are counted for voting purposes would appear not to apply to these newly defined participating members, leaving questions about how they would be counted in an election.

The second change proposed by the Bill appears to provide for a different unit of government to have the right to pay off a loan payable by a rural water district to USDA. This change also seems

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 7-1

to be directed at a local issue, but would have statewide application, and KRWA opposes it for that reason.

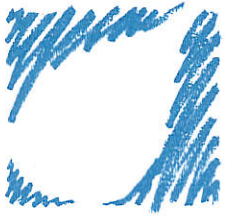
In addition, it is unclear how this is intended to operate. On one hand, it requires the rural water district to "accept the offer" that the other unit of government makes to pay off its loan, but then requires that the district "allow the governing body [of the other unit of government] to pay off the loan". It is our opinion that this legislation can not require the USDA to accept a payoff of the loan. The USDA's interest in assisting rural Kansans in obtaining a safe and reliable supply of drinking water extends beyond the pay off of a loan, and it may simply decline to accept payoff even its borrower offers the repayment, much less an offer from a third party. Perhaps it means that the rural water district must accept the payoff amount from the other governing body, but is not clear that the rural water district must then use that money to pay off USDA, or what it is to do with the money if USDA declines the payment. We also question whether this legislation can lawfully attempt to affect existing loan agreements, or whether it would apply only to those not yet in existence.

Finally, both of the provisions contained in this Bill appear to be directed toward changing the relative position of the parties to one or more local territorial disputes. The rules concerning these disputes are fairly well established, with the federal law concerning rights of borrowers under these USDA loans having been in effect for over 30 years and the Kansas law regarding the effect on rural water district territory as a result of annexation having been unchanged since 1987. Many cities and rural water districts have resolved these issues agreeably, in a manner that is in the best interest of their citizens and customers. Changes such as those proposed by this Bill will affect the balance and as a result, may make such agreements more difficult.

Respectfully,

A handwritten signature in black ink, appearing to read "Gary H. Hanson", written over a horizontal line.

GARY H. HANSON,
General Counsel



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P.O. Box 226 • Seneca, KS 66538 • 785/336-3760
FAX 785/336-2751 • <http://www.krwa.net>

**Comments on HB 2807
Before the House Utility and Energy Committee
February 21, 2008**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to provide comments on HB 2807. My name is Dennis Schwartz; I am manager of Shawnee County Rural Water District No. 8. I am also Chairman of the Management Committee of the Tri-District Facility at Clinton Reservoir. I have served as a member of the board of directors of the Kansas Rural Water Association and National Rural Water Association for the last 30 years. Kansas Rural Water has 425 municipal members, 261 public wholesale and rural water district members and 235 active Associate Members. The Kansas Rural Water Association opposes HB 2807.

This bill appears to be drafted to address two separate issues between two rural water districts and two cities. The Kansas Rural Water Association acknowledges that these are controversial territorial disputes. Most such disputes involve the application of state and federal law under circumstances unique to each situation. The Kansas Rural Water Association encourages the entities to resolve such disputes agreeably. Most systems are working constructively and cooperatively to resolve such local conflicts. Numerous neighboring rural water districts and cities have worked out "good neighbor" relationships through cooperative agreements that provide the highest quality of service to the public they serve.

The Kansas Rural Water Association adopted the following resolution at its meeting on November 2, 2007:

"The Kansas Legislature's ability to affect territorial disputes may be limited due to potential conflict with applicable federal law. The Association opposes legislative changes that cannot be enforced due to conflict with federal law.

"KRWA opposes legislation targeted at specific territorial disputes but which would have detrimental effects on rural water districts generally.

"The Association is committed to continuing its support of programming aimed at educating water suppliers about their rights and responsibilities, available options and opportunities for cooperation, to encourage the best possible water service for the people of Kansas. This programming consists of publications, seminars, on-site technical assistance and other means available."

Mr. Chairman and members of the Committee, we encourage your careful consideration of the limits that state law can have in addressing the types of disputes which have caused HB 2807 to be proposed.

Thank you for your consideration.

Respectfully,

Dennis Schwartz
Director, Kansas Rural Water Association

HOUSE ENERGY AND UTILITIES
DATE: 2/21/2008
ATTACHMENT B

OFFICES OF
CONNELL & CONNELL
AN ASSOCIATION OF ATTORNEYS
318 WEST CENTRAL, P. O. BOX 6
EL DORADO, KANSAS 67042

O. J. CONNELL, JR.
(1914-2000)

RAY L. CONNELL
RAY@CONNELLANDCONNELL.COM

February 20, 2008

TIM CONNELL
TIM@CONNELLANDCONNELL.COM

TEL: (316) 321-4300

FAX: (316) 321-1530

Representative Carl Holmes, Chairman
Committee on Energy and Utilities

Re: Testimony of the Rural Water District No. 2, Sedgwick County to Proposed
House Bill No. 2807

RESPONSE OF RURAL WATER DISTRICT NO. 2, SEDGWICK COUNTY

By way of introduction, I am Ray Connell, counsel for Rural Water District No. 2, Sedgwick County. My father, O.J. Connell, Jr. helped organize the first Water District in Kansas in the early 1950's and our firm over the past 55 years has provided for the organizations and continued legal representation of Sedgwick County Rural Water District No. 1 and No. 2, Butler County Rural Water Districts No. 1 through No. 8, and Greenwood County Rural Water Districts No. 1 and No. 2. The Board has asked I take a moment and explain how the current Agreement between Rural Water District #2 and Park City came to exist. It is our hope this history will assist the Legislative Committee in their decision to continue to honor the existing laws and realize an Agreement reached by both groups in "Good Faith" to resolve pending litigation is no reason to support any changes in K.S.A. 82a-612 and 619.

First and foremost, Park City in 1996 unilaterally annexed land already within Rural Water District #2's incorporated boundaries. RWD #2 has a prior legal right to provide water service to all property within its District. The Federal Government passed Regulations to protect the Water District from Municipal annexation with 7 United States Code 1926(b), and the transfer of FMHA loans pursuant to Section 1001 of the Omnibus Budget Reconciliation Act of 1986.

The Water District communicated with Park City and the property owner being annexed that the Water District was ready, willing and able to provide water service to the annexed area.

Park City unilaterally filed suit against Rural Water District #2 in Sedgwick County District Court on December 20, 1996.

The Water District responded with a lawsuit in Federal Court to enforce Federal Law 1926(b) prohibiting Municipal annexation and service in Water District territory without Water District consent.

HOUSE ENERGY AND UTILITIES
DATE: 2/21/2008
ATTACHMENT 9-1

The Developer / land owner filed a separate lawsuit against the Water District. The City was legally represented by two lawyers, Stan R. Singleton and Co-counsel Ray Simmons. The Developer was represented by the law firm of Martin, Pringle, Oliver, Wallace & Bauer. Extensive Discovery consisting of Interrogatories, Requests for Admissions and Depositions were taken of the Water District's Chairman and the District's Engineer, the Water Provider City Manager. The Water District expended a significant amount of money to defend its territory and legal right to serve.

The bottom line: the Water District felt it had, under Federal Law: 1926(b), the legal right to serve the area within its incorporated boundaries. The land owner / Developer's law firm and ultimately the City's legal Co-Counsel agreed and a compromise resolution was suggested and recommended to both the Water District and the City. The settlement proposal had the land being developed responsible for reimbursing the Water District for giving up its legal right to serve. The City nor the General Fund of the City had to pay any amount under the compromise.

A written Settlement was reached resolving all three lawsuits and that Agreement was reduced to writing and became an ORDER of the Court in the lawsuit filed by the City. That Agreed Upon Order has the new lot owner paying a modest fee and a modest percentage of their water bill to reimburse the Water District for not requiring all the water be purchased from the Water District.

It should be noted, these new lot owners pay less in fees and water rate charges than if they were served directly by the Water District (District Application fees \$2,250 per unit and monthly charge of \$24.00 a month, plus \$4.90 per thousand gallons used). Compare that to what they are paying for in city rate and the land owner is saving a significant amount being served by the City.

The City Mayor and the City's legislative lobbyist came to the Water District's November 15, 2006 Quarterly Board Meeting and said the City does not want to continue to honor the Settlement Agreement confirmed by Court Order in 1997.

The two reasons they expressed for wanting a change:

1. People subject to the fee are not represented on the Water District Board and have complained to the Council that they are not represented; and
2. The fee is causing a lack of development.

The Board asked for written confirmation of any lot owner that had complained to the Council. To date, a year and a half later, "NONE" has been provided. The facts are: these lot owners are paying significantly less than if they were on the Water District system and these lot owners are still within the District's boundaries and are invited to attend the public quarterly Board meetings and one annual meeting and express any concerns they may have. These lot owners are receiving City water from the City system. These lot owners are not concerned about the other services that effect "participating members" as defined by the Kansas Law for fifty years, i.e. water quality, water quantity, water pressure, maintaining water distribution system lines, storage tower, booster pumps, chlorinators, Water Purchase Agreements with Providers, and cost of water. None of these issues effect the person being newly defined by HB 2807: "participating members" as

someone “which is charged a franchise fee for water service which is paid, either directly or indirectly through another water provider, to such district.”

(2) It appears Park City is developing at a very high rate. There does not appear to be any deterrent to Park City’s tremendous growth. The District asked for the name of at least one business that refused to build in Park City solely because there was a fee associated with the Water District. To date, a year and a half later, no businesses have been named.

To date, even though the settlement was reached and started in 1998, the District has not received enough from the water fees to reimburse the expense incurred by the Water District for Engineering and Legal fees required to defend against the City’s lawsuit.

The bottom line: (A) Both the Water District and the City compromised its position to settle three lawsuits by a mutually agreed and Court Ordered Settlement.

(B) This Settlement Agreement does not require the City’s General Fund pay any money to the Water District.

(C) The small amount paid by new water users is significantly less than if they were served by the Water District.

(D) Any of these water users are welcome to attend any and all District meetings.

(E) If there are legitimate issues from the Settlement Agreement the Water District is willing to talk with the City about them.

The only way Rural Water District No. 2, Sedgwick County and hundreds of other Rural Water Districts have to protect their territory from encroachment is 1926b. If the State allows a municipality to pay off the debt and requires the District to take the payment, the entire District and all the participating members are subject to paying more for service with less service area to support the costs of future operation.

When the Water District Board settled the lawsuits and reached and approved an agreement to prevent the need for further lawsuits, the next elected Boards have continued to honor that agreement.

Similarly, when the Rural Water District makes a long term Water Purchase Agreement, it is honored by both the provider, Valley Center, and the Rural Water District Board. The agreements the District has with customers, the District continues to honor from one elected Board to another.

The current Mayor was on the Park City Council when this Settlement Agreement was reached. It was reviewed and approved by the authorized City Council, just as it was approved by the predecessor Water District Board. The District is prepared to honor the terms of the Agreement.

It is the Water District’s expectation, now that you know some of the history, that you as a

State Representative will honor the Agreement reached by the parties and not attempt to change the law to try and allow Park City additional argument to set aside a binding Agreement. Please vote "NO" on HB 2807 proposed changes to the law.

Sincerely,

A handwritten signature in black ink that reads "Ray L. Connell". The signature is written in a cursive style with a large, stylized "R" and "C".

Ray L. Connell
General Counsel

Rural Water District No. 2, Sedgwick County
(Also Legal Representative to 12 additional
Rural Water Districts opposed to changes
proposed in HB 2807)

P.O. Box 6

El Dorado, Kansas 67042

(316) 321-4300

Mark H. Neis
12775 County Line Road; Eudora, Ks 66025
Mobile # 785-423-1902; Home # 785-542-2084

Testimony in Support of HB2808

Good morning Chairman and members of the Committee. My name is Mark Harold Neis and I reside in Eudora, Kansas on a family farm. I am before you today to express my support for House Bill 2808. I took over the family farming operation after my father Harold Neis passed away in April of 1998. Farming is all that I and my family has known for generations. I farm to provide for my family of a wife, Dana and 2 boys Trevor Mark Neis 9 and Carter Matthew Neis 7, which hopefully someday the farm will be passed on to.

My farming operation includes the production of Wheat, Corn and Soybeans as well as a Cow Calf operation. I farm land primarily in the Douglas county area and surrounding counties. I currently farm land owned by Thomas Miesse in Douglas County where one of the proposed wells is to be placed by the Public Wholesale Water Supply District #25. I farm other land for other land owners as well as my family owns property that is within the 2 mile buffer zone of the proposed well. It is my understanding that no new wells will be allowed within this 2 mile buffer zone if the proposal is allowed. The soil composition in the area of the proposed well is a sandy loamy soil that although can be highly productive needs more water than other types of soil during the hot summer months. By the placement of this well, the water table in the area will potentially be lowered, therefore causing my crops that are planted in the area to not have a sufficient water source to make it through the hot dry months when rain can be scarce, which in turn affects the yields of the crops and my livelihood.

I have been troubled by the fact that this proposal was made only to the landowners where wells would be placed. There has been no communication made to adjacent landowners or the farmers that farm in the area that would be directly affected by this proposal.

I would like to comment on some wells in the area that my family has allowed the City of Eudora to place on family owned land several years ago. My family discussed this at length when the City of Eudora came to us asking for help do to their need for more water. My family settled in Eudora back when the pioneers came from Germany, therefore we allowed these wells to be placed knowing that it could affect the water table in the area, but felt that it was for our local community that our family has been a part of for so long.

I urge you today to support House Bill 2808 and not let this proposal that is just bad public policy to be allowed. I'm not here to block development or growth, but to protect what I view not only my future, but the future of family farming, which is shrinking everyday. The farming industry is facing so many obstacles today that I feel this is one that we do not need to face, and it is your job to protect us as our representatives in the state.

In conclusion I'm requesting the committee pass House Bill 2808 and to do what is right to protect us farmers.

Sincerely,

Mark Neis

HOUSE ENERGY AND UTILITIES
DATE: 2/21/2008
ATTACHMENT 10

Testimony in Support of HB2808

Good morning Chairman and members of the Committee. My name is Gregory Shipe. I own Davenport Orchards, Vineyards and Winery located in Eudora, Kansas. I am here today to testify in support of HB2808.

I farm in the Kaw Valley just west of Eudora in some of the best soil that we have in the United States if not the World. There is a finite number of acres of this soil left. I grow specialty crops which are different from the normal crops grown in Kansas lately. We grow mostly grapes but also have apples, peaches and a truck farm farmed by John Brett. farms.

We are asking for passage of HB2808 because:

1. We need the water for future growth.
2. Water is already available for PWS 25 from Clinton Lake.
3. This will help all growers in Kansas.
4. This makes good public policy.

Specialty crops are high input crops like grapevines. The cost to plant an acre of grapes based on a 40 acre field is \$8000 per acre. The information can be found in a publication from the University of Arkansas. It is very difficult to grow grapes without water and impossible to grow melons of commercial quality without water.

Kansas Department of Commerce has been a great help in keeping us going and also helping new growers get established. They manage grants for upgrade in equipment, marketing needs and many other items. They are renovating a building at the Kansas State Fair spending about \$100,000 over a few years just for a Kansas Farm Winery wine tasting area. They offer no interest loans on buildings. In the past they spent \$10,000 on brochures for the Farm Wineries. They have been very great asset for us.

Kansas Department of Agriculture has also stepped up to aid us in our growing problems. Secretary Polanski has brought back the Grape and Wine Advisory Council and we meet four times a year with the Secretary. KDA has added us to their web page with a picture of a vineyard and a sensitive crop registration section. They printed about 40,000 brochures called Project Good Neighbor which helps educate people on the proper use of potential harmful herbicides to grapes and other sensitive crops. Farm Bureau added the brochure to one of their news letter last year.

Kansas State University has also helped us. They are in the second year of a study called Kansas River Valley Project which is investigating what can be done to bring back the specialty crops to the valley as once existed in the past. This information is on the KSU web page.

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 11-1

Kaw Valley Farm Tour is going on to its fourth year this fall. The public is invited to visit several farms of every kind in this area. Bison ranches, Christmas tree farms, goat cheese farms, nurseries, farm wineries and others. This is a successful project and I think this will be here for a long time.

It is my understanding that water is available for RWD 5 and they are in the process of putting the final touches on the new contract with the city of Lawrence. We found out that there is 106,000 acre feet of water that can be used but is just going down the river. Clinton Lake is only 6% silted in and will provide water for a long time. Now that it looks like a deal is made there is no need to take the water from us.

PWS 25 application as I now understand will take all the remaining water that can be appropriated over a 12 square mile area of which 4000 acres are in the valley. At first I thought they only needed the water under our property. We were offered \$16,000 each to allow them to take water not knowing that we would be selling out our neighbors. I also understand that if PWS 25 were to get their application, there would be a two mile radius in which no other well could be drilled.

Passage of HB2808 will help all farmers in Kansas, especially those working the Kansas Kaw Valley currently. It seems that we are stuck in the middle of a water issue between the cities and rural water district and they are using us to settle the issue.

Farmers are small in numbers so we need your help to protect us and protect some of the best soils in the world. Thank you for your time and consideration in this matter. I ask you that support and pass HB2808.

Thank You
Gregory Shipe

John Pendleton Farmer/Land Owner

1446 E. 1850 Rd. Lawrence, KS 66046 785-843-1409

Testimony in Support of HB2808

Good morning Chairman and members of the committee. My name is John Pendleton and I am here today in support HB2808.

I live and farm in the Kaw River Valley between Lawrence and Eudora. Our farm produces a wide variety of horticultural crops. We grow 20 acres of asparagus and commercially grow spinach, eggplant, peppers, tomatoes, other vegetables and field grown cut flowers. We produce in our greenhouses, bedding plants and hydroponic tomatoes. The history of our farm includes traditional corn, wheat, and soybean production. We have acreage in Leavenworth County, just north of Eudora, that is now farmed by a neighbor. We presently have an irrigation well used for flood irrigation.

The demand is high for locally grown produce and flowers. People are more and more aware of where their food comes from, and they want to buy locally. We can easily sell all that we produce. The biggest challenge our farm faces is the weather. We have experienced:

1992³ - too much summer rain

4/18/2003 - severe hail with 60 mph winds

3/12/2006 - microburst

3/6,7,8/2007 - record breaking freeze.

The reason California is the largest horticultural producing region in the US is because they have a mild desert climate with moderate temperatures and winds. They lack rain in their growing season so they irrigate to the plant's needs, and get maximum production. Again, our weather in Kansas can be difficult. Being able to irrigate and have some control is a must for growing fruits, vegetables, and commercial flowers. Water is a basic tool for all of agriculture, and especially for horticultural crops.

A few weeks ago, our tenant and I looked into upgrading to a pivot system. We needed more water rights for this improvement to be feasible. When applying for additional water rights, we were told it was within the two mile radius of Public Wholesale Water District #25's application, and thus those water rights are not available to us. I believe water rights should be available to the people who live in the location the water is generated and need to be available for future agricultural needs.

Thank you for your time and consideration on HB2808. I think it is an important public policy not to allow outside entities to use eminent domain to take away potential water rights from future agricultural uses.

John Pendleton
Farmer / Land Owner

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 12

STEVENS & BRAND^{LLP}

ATTORNEYS AT LAW
US BANK TOWER
900 MASSACHUSETTS, SUITE 500
POST OFFICE BOX 189
LAWRENCE, KANSAS 66044-0189
TELEPHONE: (785) 843-0811
FAX: (785) 843-0341
WWW.STEVENSBRAND.COM

WEBSTER L. GOLDEN
PETER K. CURRAN
WINTON A. WINTER, JR.
EVAN H. ICE
SHERRI E. LOVELAND
MOLLY M. WOOD
CHRISTOPHER F. BURGER*
BRADLEY R. FINKELDEI
MATTHEW H. HOY*
LESLIE M. MILLER
SHANNON C. OURY†
EMILY A. DONALDSON
REBECCA J. WEMPE
BURKE W. GRIGGS

RICHARD B. STEVENS
1899-1991

JOHN W. BRAND
1907-1971

JOHN W. BRAND, JR.
RETIRED

February 21, 2008

*ADMITTED IN KANSAS AND MISSOURI
†ADMITTED IN KANSAS AND COLORADO

**THIS ENCLOSURE IS SENT TO YOU WITHOUT A PERSONAL LETTER
SO THAT IT MAY REACH YOU AS QUICKLY AS POSSIBLE.**

TO: Kevin Barone
Kbarone01@yahoo.com

RE: Testimony for Kevin Barone/Shipe

Please find attached the testimony prepared by Burke. If there are any problems, please let us know. Thanks again.

Very Truly Yours,
STEVENS & BRAND, L.L.P.

Deb Shaw
Legal Assistant to Burke W. Griggs
dshaw@stevensbrand.com

Enclosures

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 13-1

Good morning, Chairman Holmes and members of the House Energy and Utilities Committee. My name is Burke Griggs. I am a water lawyer with Stevens & Brand, LLP, of Lawrence, Kansas, and I represent Mr. Gregory Shipe of the Kansas River Valley Growers. On their behalf, I am here to testify in support of House Bill 2808, in particular to support an important aspect of this bill, which clarifies and corrects the meaning and intention of the original statute, K.S.A. 19-3522. As currently established, this statute allows the abuse of eminent domain power, at the expense of private property rights.

First, some background. My client, Mr. Shipe, called me shortly after receiving a notice from Public Wholesale Water Supply District #25 (PWWS#25), which is composed of Rural Water Districts #2 and #5 from Douglas County, and Osage County RWD #2. In that notice, PWWS#25 notified Mr. Shipe that it was planning to bring an eminent domain action against him, to condemn and to obtain permanent access to his land for the purpose of obtaining water rights. Rural water districts and PWWS's have clear power of eminent domain, which can be needed to obtain easements for the transportation and distribution of water through pipelines. In this case, however, PWWS#25 is not seeking such an easement, and it is not seeking anything in terms of distribution. Rather, it seeks to drill a well upon Mr. Shipe's property for the purpose of obtaining a water right. That is odd: of all the other PWWS's in Kansas—25 or 26 at last count—PWWS#25 is only the second to seek groundwater rights. Odder still is the fact that Mr. Shipe's property stands clearly outside the boundaries of PWWS#25. This wholesale district is, to repeat, composed of three rural water districts; and Mr. Shipe's land has never been within any of these districts. We plan to contest this eminent domain action, and we plan to contest the water right it seeks as well. We have clear legal authority to do both.

Mr. Shipe's situation reveals two unintended but significant flaws in the current statutory section which governs his situation, namely, K.S.A. 19-3552(5). That section grants PWWS's the power to "acquire land and interests in land . . . by eminent domain to be exercised within or without the boundaries of the district." The first flaw concerns the PWWS's power to acquire land and interests in land by eminent domain. This statutory language unintentionally overstates the proper eminent domain powers of a PWWS. The second flaw concerns the PWWS's power to obtain by eminent domain water rights outside of its boundaries. This statutory language unintentionally and improperly sanctions extraterritorial acquisitions of property, and is tantamount to allowing Douglas County to condemn land in Johnson County. I address each of these flaws in turn.

First, K.S.A. 19-3552(5) allows a PWWS "to acquire land and interests in land by . . . eminent domain. . . ." A straightforward reading of this language provides one clear interpretation: that the phrase "land and interests in land" denotes fee title to land, or a lesser interest in land, such as a leasehold, an easement, a restrictive covenant, or some other, lesser, interest in land. Here, PWWS#25 is seeking an easement which, if intended for a pipeline, or some other transportation or distribution use, would be a proper application of this statutory power. However, what PWWS#25 is really seeking is not land but water: a very large water right, over 3,000 acre-feet in volume, which it hopes to draw

from beneath Mr. Shipe's fragile farmland. PWWSD#25 is using its powers of eminent domain to obtain a different property interest—a water right—which is neither land nor an interest in land.

Please allow me to distinguish between these two property rights. As stated above, K.S.A. 19-3552(5) describes "land or interest in land." The statute uses "land." It does not use "real estate" or "real property." By contrast, the Kansas Water Appropriation Act, K.S.A. 82a-701 et seq., defines a water right as a "real property right, appurtenant to and severable from the land." Water rights, then, are real property distinct from land. Although they are appurtenant to and severable from the land, the KWAA makes a clear distinction between them. "Real estate" or "real property" comprises land and what lies beneath it and above it: mineral rights, water rights, and air rights, which together form the "whole bundle" of real estate. "Land" is the surface component, a subset of real property. Water rights are another subset of real property. They are distinct property interests within the whole "real estate."

This is an important distinction, because it reveals the impropriety of PWWSD's using this statute to obtain water rights. A common use of the eminent domain power is to obtain easements that enable water lines. This is utterly acceptable and a necessary application of that power, similar to easements obtained for electrical transmission lines. What is not acceptable—and, in my opinion, unjustified even under the current law—is the abuse of this power to extend to obtaining water rights, which, as stated above, are real property rights, but distinct from land and interests in land. Indeed, PWWSD#25's use of this power is so unusual that it may be unprecedented.

The second flaw in K.S.A. 19-3552(5) concerns the PWWSD's power to obtain by eminent domain land or interests in land outside of its boundaries. Again, I would argue that the original intent of this legislation was to enable a PWWSD to obtain access and easement rights for the infrastructural requirements of a water district—siting and running water lines, meters, treatment plants, and so forth. A PWWSD may have a legitimate need to run a water line from one part of its district to another, and across land that is outside the district. Yet with Mr. Shipe, and much of the Kansas River Valley, that is not the case. PWWSD#25 is seeking to condemn land **outside** of its jurisdiction, to obtain water that is **beyond** its boundaries, which are the boundaries of its constituent parts. This is a clear abuse of the statutory power of eminent domain. PWWSD#25, as a quasi-municipal corporation, can condemn land outside of its boundaries at present, but I would stress that this power was intended for the transportation and distribution of water. Such a condemnation **does not** injure the value of the land. The statute was **not** intended to allow extraterritorial condemnations of water rights themselves. Such a condemnation **does** injure the value of the land. PWWSD's cannot condemn outside their boundaries for the purpose of obtaining water rights any more than Douglas County could condemn property in Johnson County for water, or any more than Kansas itself could condemn parts of Nebraska to obtain the rights Kansas deserves under the Republican River Compact. Eminent domain for easements and water distribution is a power that derives legitimately from a municipality's police power; but where the power of eminent domain exceeds the boundaries of a municipality's police power, it exceeds the police power itself, and becomes illegitimate and legally indefensible.

HB 2808 amends a major deficiency of KSA 19-3552(5), by prohibiting the extraterritorial condemnation of land and interests in land. I fully support this change on behalf of my client, but I also

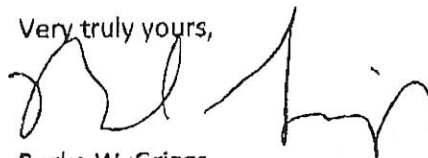
recognize the valid concern that such a change would undercut a water district's ability to run water lines. Because KSA 19-3552(5) was intended for such a purpose—and not, as argued above, to condemn land to obtain water rights—I would suggest the following amendment to this bill: in place of the current language of 19-3552(5), I would describe the eminent domain power of a PWWSD as follows:

“to acquire, solely for the purposes of the distribution and treatment of water, and not for the purpose of obtaining water rights, land and interests in land, but not water rights as set forth in K.S.A. 82a-701 et seq., . . .such power of eminent domain to be exercised within or without the boundaries of the district. . . .

This amendment improves the current statute to protect farmers such as Mr. Shipe and the other Kansas River Valley Growers from the extraterritorial water-grab that PWWSD#25 is attempting, a water grab that KSA 19-3552(5) neither intended nor sanctions. Furthermore, such an amendment retains the protection of allowing a PWWSD to obtain easements and other interests in land as necessary, but not to obtain water.

Thank you for accepting this testimony. I regret that I cannot give it in person, but I am in San Diego at the American Bar Association's annual Water Law meeting. Please do not hesitate to contact me if you have any further questions concerning this bill and my testimony.

Very truly yours,



Burke W. Griggs

Stevens & Brand, LLP



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P.O. Box 226 • Seneca, KS 66538 • 785/336-3760
FAX 785/336-2751 • <http://www.krwa.net>

**Comments on HB 2808
Before the House Utility and Energy Committee
February 21, 2008**

Mr. Chairman and Members of the Committee:

The Kansas Rural Water Association appreciates the opportunity to comment in opposition to HB 2808. The Association has two concerns about the bill. The first regards the meaning of the proposed amendment to K.S.A. 19-3552, given the nature of public wholesale water supply districts (PWWSD's). Unlike virtually every other municipality or political subdivision, PWWSD's have no established boundaries. As a result, it is unclear where the power of eminent domain could be exercised if it is limited to that "within the boundaries of the district".

This is illustrated by PWWSD No. 24, commonly called the Elk River PWWSD. A map of the area is attached. The Elk River PWWSD members consist of the cities of Elk City, Howard, Longton, Moline and Severy, located in Elk, Montgomery and Greenwood counties. The question is, where are the boundaries of the district?

Perhaps more importantly would be the limitation placed on such a district in acquiring interests in land through eminent domain. The members of PWWSD No. 24 all have aged, non-compliant public water supplies serving their citizens. An engineering feasibility study concluded that, as in many places in rural Kansas, the best solution is a regional water supply system that would be connected to the cities via pipelines. As is evident from the attached map these members are widely separated. Lenders will require that these pipelines will generally be located in private easements. While 90 to 95% of easements are generally provided voluntarily and without compensation, but the use of eminent domain may be necessary.

Our review of public wholesale districts is that all eight active districts have had to utilize eminent domain in order to construct the projects. In one case presently on file, Public Wholesale District 12 (which serves users in Anderson, Coffey and Osage counties) has been requested to relocate pipeline due to a KDOT road project. One landowner refuses to provide new easement to the public wholesale district, or to the other utilities including another rural water district, an electric utility and to KDOT itself. Without the authority of eminent domain, the PWWSD 12 may not be able to relocate pipeline to accommodate that new highway project.

An inability to use eminent domain, when necessary in the public interest, will terminate future construction of public wholesale water supply systems.

Respectfully,

Elmer Ronnebaum
General Manager

HOUSE ENERGY AND UTILITIES

DATE: 2/21/2008

ATTACHMENT 14-1

