



Control Number: 49871



Item Number: 24

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DOCKET NO. 49871

PETITION OF THE CITY OF RED OAK §
INDUSTRIAL DEVELOPMENT §
CORPORATION TO AMEND §
ROCKETT SPECIAL UTILITY §
DISTRICT'S WATER CERTIFICATE §
OF CONVENIENCE AND NECESSITY §
IN DALLAS AND ELLIS COUNTIES §
BY EXPEDITED RELEASE §

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BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

**SUPPLEMENT TO PETITIONER'S SECOND MOTION
TO LIFT ABATEMENT AND MOTION TO DISMISS THE PETITION**

The City of Red Oak Industrial Development Corporation (Red Oak) files this Supplement to its Second Motion to Lift Abatement and Motion to Dismiss the Petition (Motion), filed herein on February 4, 2020. Red Oak files this Supplement to notify the Commission of additional statements made by the USDA that Rockett does not have a federal loan note guarantee.

The USDA filed a Brief in the Red Oak Suit unequivocally stating that Rockett does not have a federal guarantee, and adding that "legal consequences do not flow until the loan note guarantee is finally issued."¹ Accordingly, the USDA once again confirmed that Rockett does not have a loan note guarantee and is not entitled to Section 1926(b) protection.

Supporting its Brief, the USDA filed a Declaration by Elizabeth A. Sherrod, Community Programs Specialist at the USDA's Texas State Office of Rural Development, stating, "USDA and RUS cannot issue a Loan Note Guarantee until (1) they receive the required lender's certification and (2) USDA and RUS independently verify that all requirements have been met by the lender. . . .USDA and RUS do not believe that CoBank will imminently issue the required

¹ Red Oak Suit, Defendant United State Department of Agriculture's Brief in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint and Motion to Transfer at 11 (Feb. 14, 2020). A copy is attached as Attachment A for the Commission's convenience. Red Oak requests that the Commission take judicial notice of the fact of the filings cited in this Supplement (along with their contents). See Tex. R. Evid. 201; *Freedom Comms. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012).

Red Oak does not agree with the USDA that final agency action has not yet occurred, but does agree that the USDA is not legally obligated on the guarantee until it is issued. As Red Oak has previously noted, the disagreement as to the existence of final agency action does not matter for the Commission's purposes.

lender's certification."² 7 C.F.R. §§ 1779.63 and 1779.64 explicitly state that the USDA cannot issue the loan note guarantee until it receives the lender's certification referenced by Ms. Sherrod.

Red Oak respectfully requests that the Commission lift the abatement imposed by Order No. 4. Red Oak also respectfully requests that its Petition be granted and Rockett's Motion to Dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020, a true and correct copy of the foregoing document was served on all parties of record in this proceeding in accordance with 16 Tex. Admin Code § 22.74.


To: GEORGIA N. CRUMP

² Red Oak Suit, Declaration of Elizabeth A. Sherrod, Appendix to Support Defendant United States Department of Agriculture's Motion to Dismiss Plaintiffs' First Amended Complaint and Motion to Transfer at 2 (Feb. 14, 2020). A copy is attached as Attachment B for the Commission's convenience.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF RED OAK, TEXAS, and the
RED OAK INDUSTRIAL
DEVELOPMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, acting by and through
George Ervin "Sonny" Perdue, III,
Secretary of Agriculture; RURAL
UTILITIES SERVICE, acting by and
through Edd Hargett, State Director;
ROCKETT SPECIAL UTILITY
DISTRICT; and COBANK, ACB

Defendants.

Civ. No. 3:19-CV-02761-S

**DEFENDANT UNITED STATES DEPARTMENT OF AGRICULTURE'S
BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT AND MOTION TO TRANSFER**

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Defendant United States Department of Agriculture (USDA) files this Brief in Support of its Motion to Dismiss (ECF No. 35) under Federal Rule of Civil Procedure 12(b)(1) and requests that the Court transfer or dismiss all of Plaintiffs City of Red Oak and Red Oak Industrial Development Corporation (together, Red Oak)’s claims against the USDA in the First Amended Complaint (ECF No. 25), as explained below.

I. SUMMARY OF THE ARGUMENT

First, this lawsuit should be transferred¹ or dismissed under the first-to-file rule because the issues in this case substantially overlap with issues already pending before U.S. District Judge Robert L. Pitman in the Western District of Texas in *Rockett Special Utility District v. Botkin*, No. 1:19-CV-1007 (W.D. Tex. Oct. 16, 2019). Second, the case should be dismissed for lack of subject-matter jurisdiction because there has been no final agency action and because the case is unripe, as Red Oak admits in its pleadings in the Western District. App. 064, 066 n.2 (Red Oak represented to Judge Pitman that “[u]ntil” Rockett has a federal loan guarantee—which has not yet occurred—“the case is unripe,” and “the Court lacks subject-matter jurisdiction.”).²

In truth, this case is not the *real* lawsuit. Instead, this case is Red Oak’s procedural gambit to obtain helpful statements from the USDA (and potentially this Court) as levers to defend itself in the real lawsuit first-filed by Rockett Special Utility

¹ Under Fifth Circuit case law, “once [a] district court [finds] that the issues might substantially overlap, the proper course of action [is] for the court to transfer the case” to the first-filed court for *that court* to determine “which case should, in the interests of sound judicial administration and judicial economy, proceed.” *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999).

² “App.” citations refer to the Appendix to Support Defendant United States Department of Agriculture’s Motion to Dismiss Plaintiffs’ First Amended Complaint and Motion to Transfer filed with this Brief. See Local Civ. R. 7-2(e).

District (Rockett) in the Western District. *See, e.g.*, App. 042, 048 (citing an email from counsel for the USDA as proof that Rockett has not yet obtained a loan note guarantee (App. 058, 062)). In the real lawsuit, Rockett sued to enjoin the Public Utility Commission of Texas (PUC) from amending Rockett's water certificate of convenience and necessity under certain provisions of the Texas Water Code. App. 022, 038.

Red Oak's strategy directly implicates the purposes of the first-to-file rule—to avoid involving federal courts in the complexity of parallel lawsuits. This prudential doctrine of comity serves to “maximize judicial economy and minimize embarrassing inconsistencies by [requiring that federal courts refuse] to hear a case raising issues that might substantially duplicate those raised by a case pending in another court.” *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999).

For these reasons and as elaborated below, the Court should dismiss or transfer this case in favor of the first-filed case pending in the Western District or for lack of subject-matter jurisdiction.

II. LEGAL BACKGROUND OF SECTION 1926(B)

The underlying legal battle between Red Oak and Rockett centers on a federal program administered by the USDA's Rural Utilities Service (RUS)³ that provides federal loans to rural water districts like Rockett. *See* 7 U.S.C. § 1926(b).

³ Red Oak has also sued the RUS, which is a component division within USDA and not a separate person or agency. To the extent a response to Red Oak's First Amended Complaint is deemed required, RUS is filing a motion to join the USDA's motion to dismiss and this Brief.

A. Section 1926(b) protects rural water districts' ability to repay.

To protect rural water districts' ability to repay federal loans, section 1926(b) unambiguously prohibits local governments (like Red Oak) from curtailing, encroaching, interfering, or competing within the participating utilities' service areas:

The service provided or made available through any such [rural water district] shall not be curtailed or limited by the inclusion of the area 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 said loan; nor shall the happening of 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.

Accord N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 915 (5th Cir. 1996) (“The service area of a federally indebted water association is sacrosanct.”); *City of Madison v. Bear Creek Water Ass’n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987) (“The statute unambiguously prohibits any curtailment or limitation of an . . . indebted water association’s services . . .”). As the Fifth Circuit explained, “Congress’s purpose” in enacting section 1926 was to encourage “inexpensive water supplies for farmers and other rural residents and [protect] those associations’ ability to repay their [federal] debts.” *Madison*, 816 F.2d at 1060.

B. The requirements for section 1926(b) include (1) making service available, (2) being unable to access credit elsewhere, and (3) servicing a rural area.

To qualify for protection under section 1926(b), the rural utility must establish, among other things, that a local government “has encroached on an area to which the [u]tility ‘made service available.’” *N. Alamo*, 90 F.3d at 915 (emphasis added) (quoting

§ 1926(b)). To qualify for a section 1926(b) loan guarantee, the agency must first “determine that the borrower is unable to obtain the required credit without the loan guarantee from private, commercial, or cooperative sources at reasonable rates and terms for loans for similar purposes and periods of time.” 7 C.F.R. § 1779.20(a). And the facilities “must be located in rural areas,” with certain exceptions. § 1779.20(e).

C. A Texas CCN is legally equivalent to making service available.

The Fifth Circuit has held that a Certificate of Convenience and Necessity (CCN) issued under Texas law by the PUC is the “legal equivalent to,” and establishes, the utility making “‘service available’ under § 1926(b).” *Id.* at 916. Thus, one avenue for a local government like Red Oak to challenge section 1926(b) protection is to petition the PUC to decertify or amend the CCN. *See* Leonard H. Dougal, *State Bar of Texas: Essentials of Water Resources* § 29.9:5, 2018 WL 792871 (2018) (“Any decertification by the PUC based on inadequate service brings into question whether service is being made available in satisfaction of section 1926(b).”).

III. FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. Red Oak petitions the PUC to decertify Rockett’s CCN.

In August 2019, Red Oak petitioned the PUC to decertify areas within Rockett’s CCN.⁴ Red Oak intends to develop property located within Rockett’s CCN “for lucrative industrial development requiring large amounts water,” which Red Oak alleges,

⁴ Tex. Pub. Utils. Comm’n, *Pet. of City of Red Oak Indus. Dev’t*, No. 49871 (docket), available at <https://interchange.puc.texas.gov/Search/Filings?ControlNumber=49871>. This Court may take judicial notice of court and administrative proceedings as “matters of public record.” *In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019); accord Fed. R. Evid. 201(b)(2).

“Rockett does not have the existing infrastructure to provide.” Pls.’ First Am. Compl.

¶¶ 25–26, 29, ECF No. 25.

B. Rockett sues the PUC to enjoin the decertification proceedings.

In October 2019, Rockett sued the PUC Commissioners in their official capacities in the U.S. District Court for the Western District of Texas—the first-filed lawsuit in Judge Pitman’s court referenced above—seeking to enjoin the PUC from decertifying Rockett’s CCN and requesting a declaratory judgment that section 1926(b) preempts conflicting provisions in the Texas Water Code. App. 022, 037–38, ¶¶ 33–37.

In November 2019, the PUC stayed the CCN decertification proceedings “due to the pendency of the federal litigation” in the Western District of Texas.⁵

C. Four days later, Red Oak files this lawsuit against the USDA seeking to enjoin the section 1926(b) loan note guarantee.

Four days later, Red Oak sued the USDA and Rockett seeking to enjoin the USDA from issuing a \$1,720,000 loan note guarantee as contrary to USDA regulations and seeking a declaratory judgment regarding the same. Compl. ¶¶ 64, 66–67, ECF No. 1. In its amended complaint, Red Oak contends the loan will finance facilities that serve non-rural areas in violation of 7 C.F.R. §§ 1779.20(d) and 1779.25(d) and Rockett can obtain comparable credit from private or commercial lenders without a federal guarantee, which if true would disqualify Rockett from the program under 7 C.F.R. § 1779.20(a). Pls.’

⁵ Tex. Pub. Utils. Comm’n, *Pet. of City of Red Oak Indus. Dev’t*, No. 49871 (Nov. 15, 2019) (Order No. 4), available at https://interchange.puc.texas.gov/Documents/49871_13_1041342.PDF.

First Am. Compl. ¶¶ 51–63. As noted above, Red Oak is separately challenging the “making service available” factor through the now-stayed PUC proceedings.⁶

D. USDA has not yet issued a loan note guarantee.

Rockett has applied for a \$1,720,000 loan note guarantee, and USDA (through its component RUS) issued a Conditional Commitment for Guarantee on Form RD 449-14 on July 23, 2019. App. 005–13. Under the terms of the Conditional Commitment, the final Loan Note Guarantee “will not be issued until the Lender certifies that there has been no adverse change in the borrower’s financial condition, nor any other adverse change in the borrower’s condition during the period of time from issuance of the Conditional Commitment for Guarantee to the date of Lender’s certification.” App. 005.

The lender must also provide, among other things:

- “evidence that the borrower has adequate insurance and fidelity bond coverage” and
- the borrower’s agreement “not to incur future indebtedness that would affect the security [offered] without the Lender’s and the USDA Rural Development’s consent.” App. 008.

The lender must also certify:

- “The borrower has marketable title to the collateral,”
- “There has been no substantive adverse change in the borrower’s financial condition or any other adverse change in the borrower,” and
- “[T]he borrower has obtained”:

⁶ See *supra* Part III.B.

- “A legal opinion relative to the title to rights-of-way and easements” and
- “A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any.”

App. 012–13.

Under 7 C.F.R. § 1779.64, the USDA cannot issue the Loan Note Guarantee until (1) the lender provides the required certifications and then (2) the USDA reviews the lender’s certification and independently determines that “all requirements have been met.” The lender has not yet provided the required certification, and the USDA does not believe the lender’s certification is imminent. App. 001, 002, ¶¶ 7–8.

IV. LEGAL STANDARD

The USDA moves to dismiss under Federal Rule of Civil Procedure 12(b)(1), invoking the first-to-file rule⁷ and because the Court lacks subject-matter jurisdiction (for lack of final agency action and ripeness). The Court should dismiss under Rule 12(b)(1) if “the court lacks the statutory or constitutional power to adjudicate the case.” *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 311–12 (5th Cir. 2015). The plaintiff, “as the part[y] asserting federal subject-matter jurisdiction, [must] bear the burden of proving that its requirements are met.” *Willoughby v. United States ex rel. U.S. Dep’t of the Army*, 730 F.3d 476, 479 (5th Cir. 2013). The Court may dismiss claims under Rule 12(b)(1) based on “(1) the complaint alone; (2) the complaint supplemented by

⁷ See 5B Arthur R. Miller et al., *Federal Practice and Procedure* § 1350 (3d ed. 2019) (identifying Rule 12(b)(1) as the proper “procedural vehicle for raising various residual defenses,” including the first-to-file rule). USDA also moves to transfer under 28 U.S.C. § 1404 or dismiss under Rule 12(b)(3) and (6) if the Court deems any of these provisions the more appropriate procedural vehicle to invoke the first-to-file rule.

undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.*

Although subject-matter jurisdiction should usually be resolved first, *id.*, the Fifth Circuit instructs that a federal district court should start with the first-to-file rule—and limit “its inquiry to the potential overlap between the two cases” before “entertaining . . . jurisdiction or . . . standing arguments,” *Cadle*, 174 F.3d at 606.

V. ARGUMENT & AUTHORITIES

All of Red Oak's claims against the USDA should be dismissed or transferred (A) under the first-to-file rule and (B) because the Court lacks subject-matter jurisdiction, as Red Oak itself admits in pending proceedings in the Western District.

A. The Court should transfer or dismiss this case under the first-to-file rule.

“Under the first-to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap.” *Cadle*, 174 F.3d at 603. “Courts use this rule to maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might substantially duplicate those raised by a case pending in another court.” *Id.* at 604.

Cases substantially overlap if:

- “the core issue” is “the same,” *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 730 (5th Cir. 1985);
- the relief requested is the same, *see In re Amerijet Int'l, Inc.*, 785 F.3d 967, 976 (5th Cir. 2015); and

- there exists a “substantial risk” of conflicting rulings and “piecemeal resolution of issues that call for a uniform result,” *id.* (quoting *Cadle*, 174 F.3d at 603).

“The rule does not, however, require that cases be identical. The crucial inquiry is one of ‘substantial overlap.’” *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). Cases may substantially overlap even if there is a “lack of identical parties.” *Cadle*, 174 F.3d at 603.

Once a party demonstrates “the likelihood of a substantial overlap,” then it is “no longer up to the second filed court to resolve the question of whether both should be allowed to proceed”; the second-filed court should transfer the case to the first-filed court. *Cadle*, 174 F.3d at 605–06 (cleaned up). Otherwise, the second-filed court would be acting “as a ‘super appellate court’” and would impinge “on the authority of its sister court, one of ‘the very abuses the first-to-file rule is designed to prevent.’” *Id.* at 606.

Here, the core issue in the Western District is the same as the core issue in this case—whether Rockett is entitled to section 1926(b) protection from Red Oak. The true parties in interest—Rockett and Red Oak—are the same.⁸ The relief requested is the same. The plaintiffs in both cases seek mirror-image declaratory judgments: in the Western District, Rockett seeks a declaration that it is entitled to section 1926(b) protection; here, Red Oak seeks a declaration that Rockett is not entitled to section 1926(b) protection. In both cases, the parties dispute whether a federal lawsuit is ripe

⁸ See, e.g., *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015) (identifying “similarity of the parties” as an important factor and noting “the first-to-file rule does not require exact identity of the parties. Rather, the first-to-file rule requires only substantial similarity of parties.” (citations omitted)).

before the USDA has finally approved the loan note guarantee. And if the PUC grants Red Oak's petition to amend Rockett's CCN, then Rockett may no longer have protection under section 1926(b) for the disputed area. After all, Rockett would no longer be making service available in those areas under Fifth Circuit case law—potentially obviating Red Oak's Administrative Procedure Act (APA) challenges to the USDA's determinations whether Rockett services rural areas or cannot access credit elsewhere. Thus, there is a substantial risk of conflicting rulings and “piecemeal resolution of issues that call for a uniform result,” *see In re Amerijet*, 785 F.3d at 976 (quoting *Cadle*, 174 F.3d at 603).

Because the issues in this case substantially overlap with those in the first-filed case, this Court should refuse to hear this later filed case and transfer this case to the Western District of Texas. *See Cadle*, 174 F.3d at 606 (“[O]nce the district court found that the issues might substantially overlap, the proper course of action was for the court to transfer the case to the [first-filed] court to determine which case should, in the interests of sound judicial administration and judicial economy, proceed.”).

B. The Court should dismiss this case for lack of subject-matter jurisdiction because a conditional commitment is not “final agency action” and Red Oak admits this case is not ripe.

The USDA moves to dismiss Red Oak's allegations against it under Rule 12(b)(1) because the federal government has waived sovereign immunity under the APA only for “final agency action,” 5 U.S.C. § 704, and the Conditional Commitment for Guarantee is not final action. Moreover, as Red Oak itself acknowledges in parallel proceedings before the Western District, this case is unripe. *See John Doe, Inc. v. Drug Enf't Admin.*,

484 F.3d 561, 567 (D.C. Cir. 2007) (“[Although] ripeness . . . and finality may be difficult to distinguish in some contexts, they must be carefully delineated.”).

1. A conditional commitment for guarantee is not a final agency action.

“[T]wo conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). “And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.*

Here, the Conditional Commitment meets neither *Bennett* prong. On its face, the Conditional Commitment is precisely that—conditional. Under 7 C.F.R. § 1779.64, the USDA cannot finally approve the loan note guarantee until it receives the required certification from the lender, and then the USDA must independently determine that “all requirements have been met.” The challenged Conditional Commitment decision is therefore interlocutory in nature, in that it expressly “anticipates the necessity of further agency action before” the loan note guarantee is finally approved. *La. State v. U.S. Army Corps of Eng’rs*, 834 F.3d 574, 582 (5th Cir. 2016). As noted above, the loan note guarantee remains subject to numerous conditions precedent that must be satisfied by the lender and borrower before the final loan note guarantee may be issued.⁹ And legal consequences do not flow until the loan note guarantee is finally issued. *Cf. La. State*, 834 F.3d at 583 (“[T]he legal consequences that typify final agency action reviewable

⁹ See *infra* Part III.D.

under the APA . . . normally affect a regulated party's possible legal liability; these consequences tend to expose parties to civil or criminal liability for non-compliance with the agency's view of the law or offer a shelter from liability if the regulated party complies."'). Red Oak has not identified potential civil or criminal liability that flows from a conditional commitment for guarantee (or shelter from liability), nor could it. Therefore, the Conditional Commitment is not final agency action.

2. *Red Oak admits this case is not ripe.*

To establish that an APA claim is "ripe," the Fifth Circuit requires "the party bringing the challenge" to establish all of the following four factors:

1. "the issues are purely legal,"
2. "the issues are based on a final agency action,"
3. "the controversy has a direct and immediate impact on the plaintiff," and
4. "the litigation will expedite, rather than delay or impede, effective enforcement by the agency."

Tex. Office of Pub. Util. Counsel v. F.C.C., 183 F.3d 393, 411 n.11 (5th Cir. 1999). If an application "may or may not be granted," the dispute is "'abstract and hypothetical' and thus unripe for judicial review." *Monk v. Huston*, 340 F.3d 279, 283 (5th Cir. 2003).

Because Red Oak admits in its pleadings before the Western District of Texas that "the case is unripe" since "Rockett has no federal loan guarantee," App. 064, 066 n.2, Red Oak cannot possibly carry its burden to establish that this controversy has a direct and immediate impact on Red Oak. Moreover, the loan guarantee may be denied if the lender and borrower do not meet the requirements of the regulations and the terms of the

Conditional Commitment. *See, e.g., Suburban Trails, Inc. v. N.J. Transit Corp.*, 800 F.2d 361, 367–68 (3rd Cir. 1986) (holding case unripe because the federal agency was waiting on a third party before finally approving a federal grant and “would still be free to withhold funding,” reasoning “[a]gency action may be found not ripe because the need will not arise until some action is taken by third parties”). And as noted above, a conditional commitment for guarantee does not constitute final agency action. Lastly, the issues are not purely legal. Whether Rockett can obtain credit elsewhere and is servicing rural areas are fact-bound questions. Therefore, this case is not ripe—as Red Oak is attempting to persuade Judge Pitman in Austin.

3. *Melissa and Schertz are distinguishable.*

The government notes that federal district courts in the Eastern and Western Districts of Texas in different circumstances have concluded that USDA approval of a direct rural loan application constitutes ripe, final agency action. *City of Schertz v. U.S. Dep’t of Agric. ex rel. Perdue*, No. 18-CV-1112, 2019 WL 5579541, at *3 (W.D. Tex. Oct. 29, 2019); *Melissa Indus. Dev. Corp. v. N. Collin Water Supply Corp.*, 256 F. Supp. 2d 557, 562 (E.D. Tex. 2003).

Schertz and *Melissa* are distinguishable. First, this case involves a contemplated USDA guaranteed loan being made by Defendant CoBank, ACB—not a direct loan from the USDA—whereas, *Melissa* and *Schertz* both involved direct loans. This distinction matters because in this case—unlike *Schertz* and *Melissa*—the USDA cannot legally act on the Conditional Commitment under the applicable regulations until it receives various commitments from the lender and the borrower detailed above. *See* 7 C.F.R. §§ 1779.2,

1779.64. Second, the plaintiff in this case (Red Oak) admitted in parallel proceedings that the case is not yet ripe until the USDA has issued a final loan note guarantee (App. 064, 066 n.2)—an admission not present in either *Melissa* or *Schertz*.

VI. CONCLUSION

The issues in this case substantially overlap with those already pending in the Western District. The Conditional Commitment does not constitute final agency action. And Red Oak admits the case is not ripe, depriving the Court of subject-matter jurisdiction. Therefore, the Court should refuse to hear this case, and either transfer to the Western District or dismiss the claims against the USDA for lack of subject-matter jurisdiction.

Dated: February 14, 2020

Respectfully Submitted,

ERIN NEALY COX
UNITED STATES ATTORNEY

/s/ George M. Padis
George M. Padis
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*Attorneys for Defendant United States
Department of Agriculture*

CERTIFICATE OF SERVICE

I certify that on February 14, 2020, a copy of the above was electronically filed with the Court's CM/ECF system and served on Plaintiffs and Defendant Rockett Special Utility District by email in accordance with the agreement among USDA, Plaintiffs, and Defendant Rockett Special Utility District.

/s/ George M. Padis
George M. Padis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF RED OAK, TEXAS, and the
RED OAK INDUSTRIAL
DEVELOPMENT CORPORATION,

Plaintiffs,

Civ. No. 3:19-CV-02761-S

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, acting by and through
George Ervin "Sonny" Perdue, III,
Secretary of Agriculture; RURAL
UTILITIES SERVICE, acting by and
through Edd Hargett, State Director;
ROCKETT SPECIAL UTILITY
DISTRICT; and COBANK, ACB

Defendants.

**DECLARATION OF ELIZABETH A. SHERROD
UNDER PENALTY OF PERJURY**

Under 28 U.S.C. § 1746, I, Elizabeth A. Sherrod, make the following declaration under penalty of perjury.

1. My name is Elizabeth A. Sherrod. I am competent to make this declaration. The facts in this declaration are within my personal knowledge.

2. I am employed by the United States Department of Agriculture (USDA). I am the Community Programs Specialist at the USDA's Texas State Office of Rural Development.

3. As the Community Programs Specialist, I have access to and am familiar with the USDA, Rural Utilities Service (RUS)'s official records related to the contemplated

Loan Note Guarantee that may be issued in connection with CoBank, ACB (CoBank)'s loan to Rockett Special Utility District (Rockett).

4. Attached to this declaration (Exhibit 1) is the Conditional Commitment for Guarantee on Form RD 449-14 and Attachment A to the same for the contemplated loan from CoBank (the lender) to Rockett (the borrower) (collectively, the Conditional Commitment). These records are kept by the USDA and RUS in the course of their regularly conducted activities and were made as part of a regular practice of those activities. These records were made by, or from information transmitted by, someone with knowledge of the matters recorded, and were made at or near the time of the matters set forth therein.

5. The record attached to this declaration is a true and correct copy of the Conditional Commitment.

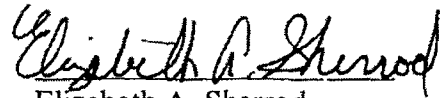
6. My job duties include reviewing and processing loan note guarantees as part of the USDA loan program codified at 7 U.S.C. § 1926. In that capacity, I have personal knowledge of and am familiar with the USDA and RUS's processing of loan note guarantees, including the contemplated rural utilities guaranteed loan between CoBank and Rockett (Case No. 49-070-752305375).

7. CoBank has not yet issued the required lender's certification. USDA and RUS cannot issue a Loan Note Guarantee until (1) they receive the required lender's certification and (2) USDA and RUS independently verify that all requirements have been met by the lender and the borrower.

8. USDA and RUS do not believe that CoBank will imminently issue the required lender's certification.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of February, 2020.

A handwritten signature in black ink, appearing to read "Elizabeth A. Sherrod".

Elizabeth A. Sherrod
Community Programs Specialist
Texas State Office
Rural Development
United States Department of Agriculture
Temple, Texas

Exhibit 1

USDA-RD
Form RD 449-14
(Rev. 8-99)

FORM APPROVED
OMB NO 0573-0137

CONDITIONAL COMMITMENT FOR GUARANTEE

TO: Lender	Case No.
CoBank, ACB	49-070-752305375
Lender's Address	State
6340 S Fid Gr Cr Greenwood Vlg CO 80111	Texas
Borrower	County
Rockett Special Utility District	Ellis
Type of Loan	Principal Amount of Loan
Rural Utilities Guaranteed Loan	\$1,720,000.00

From an examination of information supplied by the Lender on the above proposed loan, and other relevant information deemed necessary, it appears that the transaction can be properly completed

Rural Utilities Service

Therefore, the United States of America acting through _____ 1 or any successor agency, the United States Department of Agriculture (USDA) (herein referred to as "Government") hereby agrees that, in accordance with applicable provisions of Government regulations published in the Federal Register and related forms, it will execute the "Loan Note Guarantee," subject to the conditions and requirements specified in said regulations and below.

The fee payable by the Lender to the Government will be the amount as specified in the regulations on the date of this Conditional Commitment for Guarantee. The interest rate for the loan is 5.2500 % Fixed 2. If the rate is variable, it must be indexed with a rate which cannot change more often than annually 3 and published in a financial publications specifically agreed to between the Lender and its borrower.

A Loan Note Guarantee will not be issued until the Lender certifies that there has been no adverse change in the borrower's financial condition, nor any other adverse change in the borrower's condition during the period of time from issuance of the Conditional Commitment for Guarantee to the date of Lender's certification. The Lender's certification must address all adverse changes and be supported by financial statements of the borrower and its guarantors not more than 60 days old at the time of certification. As used in this paragraph only, the term "borrower" includes any parent, affiliate, or subsidiary of the borrower.

This Conditional commitment for Guarantee is null and void unless the conditions are accepted by the Lender and borrower within 60 days from the date of issuance by the Government. Any negotiations for revisions of these conditions must be completed by that time.

Except as set out below, the purposes for which the loan funds will be used are set out on the Application for Loan and Loan Note Guarantee. Upon acceptance by Lender and Lender's borrower and return to the Government, no major changes of the conditions or approved loan purposes as listed on the forms will be considered. Additional conditions and requirements including the source and use of funds include See Attachment A 4

This Conditional Commitment will expire on 12-31-2020 2 unless the time is extended in writing by the Government. The Lender for Guarantee may terminate this Conditional Commitment for Guarantee at any time by written notification to the Government at the address shown below.

Date: JUL 25 2019

By: Eed Hargrett UNITED STATES OF AMERICA

State Director: mac

(Title)

on behalf of Rural Utilities Service

(USDA Agency)

In accordance with the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0573-0137. The time required to complete this information collection is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

ACCEPTANCE OF
CONDITIONS

To: USDA Rural Development

(Insert name of USDA Agency from which a guarantee is requested).

101 South Main Suite 102
Temple, Texas 76501

The conditions of this Conditional Commitment for Guarantee including attachments are acceptable and the undersigned intends to proceed with the loan transaction and request issuance of a Loan Note Guarantee within 521 days.

CoBank ACB

By:

[Signature]

(Name of Lender)

8/19/19

(Signature for Lender)

Don Werner

(Signature for Borrower)

- 1/ Insert name of agency executing Conditional Commitment for Guarantee.
- 2/ Insert fixed interest rate or, if authorized by regulations, variable interest rate followed by a "V" and the appropriate loan rate.
- 3/ Insert the period prescribed in the applicable RD regulation. For CP loans "annually" will be inserted in this space.
- 4/ Insert any additional conditions or requirements in this space or on an attachment referred to in this space; otherwise insert "NONE".
- 5/ The Government will determine the expiration date of this contract. Consideration will be given to the date indicated by the lender in the acceptance of conditions. If construction is involved the expiration date will correspond with the projected completion of the project.

**AMENDED
ATTACHMENT A TO FORM RD 449-14,
“CONDITIONAL COMMITMENT FOR GUARANTEE”**

Loan Conditions

Rockett Special Utility District
126 Alton Adams Dr
Waxahachie, TX 75165

\$1,720,000 Loan
90% Guarantee

Loan Conditions may not be amended or waived without prior approval of the Lender and Rural Utilities Service. With prior approval, certain conditions may be amended as needed and circumstances justify. Regulations contained in RUS Instruction 1779, and Form RD 449-35, “Lender’s Agreement,” will apply.

Conditions in the Lender’s “Loan Agreement” will apply when not in conflict with conditions listed below, RUS Instruction 1779, and the “Lender’s Agreement.”

1. APPROVED USE OF GUARANTEED LOAN FUNDS

The \$1,720,000 guaranteed loan will be used for the construction of two high service pumps and installation of two new turbine pumps which will provide better water quality. In addition, construction will also include the renovation and rehabilitation of a pump station, construction of a new pump house located in Red Oak, and the installation of new sensors, remote terminal unit and monitoring software for SCADA control.

2. RATES AND TERMS OF THE LOAN

Annual payments will be amortized over a period of 30 years with a 5.2500% fixed annual interest rate.

Any changes in the interest rate between the date of issuance of the Conditional Commitment for Guarantee and before the issuance of the Loan Note Guarantee must be approved by USDA Rural Development.

3. SCHEDULING OF PAYMENTS

Annual principal payments and semi-annual interest payment will be due in 60 consecutive installments. The amount of each installment shall be the same principal amount that would be required to be repaid if the loan(s) were scheduled to be repaid in level payments of principal and interest and such schedule was calculated utilizing the rate in effect on the Term Termination Date. If any installment due date is not a business day then such installment shall be due and payable on the next business day.

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Late payment charges will not be covered by the Loan Note Guarantee and may not be added to the principal and interest due under the guaranteed note.

There will be no prepayment penalty assessed.

4. NUMBER OF CUSTOMERS

The borrower will provide service to 12,317 customers within the Certificate of Convenience and Necessity (CCN) area.

5. SECURITY AND LIEN PRIORITY

Security will be a Revenue Bond.

All collateral must secure the entire loan. The Lender will not take separate security to secure only the unguaranteed portion of the loan. The Lender will not require compensation balances or certificates of deposit as a means of eliminating the Lender's exposure for the non-guaranteed portion of the loan.

6. INSURANCE AND BONDING

The Lender must provide evidence that the borrower has adequate insurance and fidelity bond coverage by loan closing or start of construction, whichever occurs first. Adequate coverage must be maintained for the life of the loan and is subject to USDA Rural Development review and approval.

7. FINANCIAL REPORTING

The Lender must obtain the financial statements required by the Loan Agreement. The Lender must submit the borrower's annual financial statements to USDA Rural Development within 180 days of the end of the borrower's fiscal year. The Lender must analyze the financial statements and provide the Agency with a written summary of the Lender's analysis and conclusions, including trends, strengths, weaknesses, extraordinary transactions, other indications of the financial condition of the borrower. Additionally, when applicable, the Lender will require an audit in accordance with the Office of Management and Budget circulars.

The Lender will report semiannually on the status of the account by submitting the Guaranteed Loan Status Report (this report will be mailed to the Lender when due).

The Lender must notify USDA Rural Development if the borrower becomes 30 days past due on a payment, has not met its responsibilities of providing the required financial statements, or is otherwise in default.

8. EQUAL OPPORTUNITY, NONDISCRIMINATION AND AMERICANS WITH DISABILITIES ACT

If applicable, the Lender and Borrower are responsible for ensuring that the contractor complies with the following:

- a) For all construction contract in excess of \$10,000, the contractor must comply with the Executive Order 11246 (30 FR 12319, 3 CFR, 1964-1965 Cop., p. 339) entitled "Equal Employment Opportunity" as amended and as supplemented by applicable Department of Labor regulations (41 CFR part 60-1).
- b) Water and Waste Disposal loans which involve the construction of, or addition to, facilities that accommodate the public and commercial facilities as defined by the Americans with Disabilities Act (42 U.S.C. 1281-et seq.) must comply with that Act.

Age Discrimination Act of 1975 – This Act (42 U.S.C. 6101 et seq.) provides that no person in the United States shall on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

9. MITIGATION MEASURES FOR ENVIRONMENTAL ISSUES

The following is a summary of required mitigation for the project:

If cultural materials are encountered during construction, work will cease in the immediate area. Notification will be made to the State Historical Preservation Officer (512) 463-5867, the Secretary of Interior (202) 343-4104 and the Rural Development State Environmental Coordinator (254) 742-9789. Work in the area of findings will not continue until authorized by the required agencies. Construction will continue in the project where cultural materials are not present.

10. ARTICLES OF INCORPORATION AND BYLAW CHANGES

In accordance with the Bylaws, the Board of Directors has the power to apply for funding, to enter into financial obligations, and to pledge collateral. The USDA Rural Development must consent if any changes to the organizational documents are made.

11. FUTURE INDEBTEDNESS/LINE OF CREDIT

An agreement will be obtained from the borrower not to incur future indebtedness that would affect the security officered without the Lender's and USDA Rural Development's consent in accordance with the Loan Agreement.

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12. ACCESS TO LENDER'S RECORDS

Upon request by USDA Rural Development, the Lender will permit representatives of USDA Rural Development (or other authorized agencies of the U.S. Departments of Agriculture) to inspect and make copies of any of the records of the Lender pertaining to the guaranteed loan.

13. CONDITIONAL COMMITMENT EXTENSION

Any request for extension of the expiration date of the Conditional Commitment must be in writing and received by USDA Rural Development State Director at least 15 days before the expiration date. A current financial statement of the applicant must accompany this request and give a full explanation as to why the extension is needed.

14. ISSUANCE OF LOAN NOTE GUARANTEE

The Loan Note Guarantee will be issued after the Lender certifies that the conditions in the Conditional Commitment and the "Lender's Certification and Documentation" from RUS Instruction 1779, §1779.64 have been complied with, to USDA Rural Development.

Lender will deliver the executed "Lender's Certification and Documentation" with appropriate attachments, execute the Lender's Agreement," and submit the Guaranteed Loan Closing Report along with the Guarantee Fee (1%~~x90%~~the amount of the loan.)

15. ASSURANCE REGARDING FELONY CONVICTION OR TAX DELIQUENT STATUS FOR CORPORATE APPLICANTS

This award is subject to the provisions contained in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, P.L. No. 112-55, Division A, Sections 738 and 739, regarding corporate felony convictions and corporate federal tax delinquencies. Attached is a statement must execute prior to receiving this award.

16. SECTION 746 OF TITLE VII OF THE CONSOLIDATED APPROPRIATIONS ACT OF 2017 (Division A - Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2017) applies a new American Iron and Steel requirement:

(1) No Federal funds made available for this fiscal year for the rural water, waste water, waste disposal, and solid waste management programs authorized by the Consolidated Farm and Rural Development Act (7 U.S.C. 1-26 et seq.) shall be used for a project for the construction, alteration, maintenance, or repair of a public water or wastewater system unless all of the iron and steel products used in the project are produced in the United States.

(2) The term "iron and steel products" means the following products made primarily of iron or steel: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials.

(3) The requirement shall not apply in any case or category of cases in which the Secretary of Agriculture (in this section referred to as the "Secretary") or the designee of the Secretary finds that—

a applying the requirement would be inconsistent with the public interest;

b iron and steel products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or

c inclusion of iron and steel products produced in the United States will increase the cost of the overall project by more than 25 percent.

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LENDER'S CERTIFICATION AND DOCUMENTATION

1. No major changes have been made in the Lender's loan conditions and requirements since the issuance of the Conditional Commitment for Guarantee, except those approved in the interim by USDA Rural Development in writing.
2. All planned property acquisition has been completed and all development has been substantially completed in accordance with plans, specifications, and applicable building codes. No costs have exceeded the amounts approved by the Lender and USDA Rural Development.
3. Required insurance is in effect.
4. The borrower's consulting engineer has provided all supporting documentation as set out in RUS Bulletin 1780-35 for American Iron and Steel (AIS) Requirements to document AIS compliance.
5. The loan has been properly closed, and the required security instruments have been obtained, or will be obtained on any after acquired property that cannot be covered initially under state statutory provisions.
6. The borrower has marketable title to the collateral, subject to the instruments securing the loan to be guaranteed and subject to any other exceptions approved, in writing by USDA Rural Development.
7. When required, the entire amount of the loan for working capital has been disbursed except in cases where USDA Rural Development has approved disbursement over an extended time.
8. All other requirements of the Conditional Commitment for Guarantee have been met.
9. Lien priorities are consistent with requirements of the Conditional Commitment for Guarantee.
10. The loan proceeds have been disbursed for purposes and in amounts consistent with the Conditional Commitment for Guarantee and as specified on the application for the guaranteed loan. A copy of a detailed statement detailing the use of loan funds is attached.
11. There has been no substantive adverse change in the borrower's financial condition or any other adverse change in the borrower during the period of time from USDA Rural Development's issuance of the Conditional Commitment for Guarantee to issuance of the Loan Note Guarantee. Financial statements of the borrower support adverse changes not more than 60 days old at the time of certification.

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12. All Federal, State and local design and construction requirements have been met and construction has been completed.
13. Appraisal has been obtained for completed facility.
14. The Lender understands and will meet the requirements of the Debt Collection Act (Chapter 37 of Title 31 of the United States Code).
15. The Lender would not make this loan without an Agency guarantee.
16. The Lender has executed and delivered the Lender's Agreement and closing report along with the appropriate fee.
17. The Lender certifies that the borrower has obtained:
 - a. A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrower have obtained valid, continuous, and adequate right-of-ways and easements needed for the construction, operation, and maintenance of a facility.
 - b. A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any. It is the responsibility of the Lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation, and maintenance of the facility and to provide the required security. For example, when a site is for major structures and the Lender and borrower are able to obtain a right-of-way or easement on such a site rather than a fee simple title, such title opinion must be requested.

CoBank, ACB

By: _____