Appendix F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, STATE OF MISSOURI Plaintiff-Intervenor, v. BENTON COUNTY SEWER DISTRICT NO. 1 OF BENTON COUNTY, MISSOURI, *et al*., Defendants.	)	Case No. 13-00319-CV-W-BP

ORDER

On July 30, 2014, the Court held a hearing on Plaintiffs' Joint Motion for Approval of the Asset Purchase Agreement ("APA") and for Authorization of its Execution and Performance by the Receiver, (Doc. 59), and the Motion to Intervene or for Participation as Amici Curiae by Interested Parties Robert Geranis, Leroy Harris, Gerald Duvall, and Mike Doak, (Doc. 64).[1]

Plaintiffs request approval of the APA and for authorization for the Court-appointed receiver to execute and perform it. The APA will allow the Benton County Sewer District No. 1 (the "District") to transfer its assets to Missouri American Water Company ("Missouri American"), a private company. Defendants do not oppose the sale of the District's sewer system to Missouri American. (*See* Doc. 85 ("the Board of Trustees of Benton County Sewer District No. 1, Missouri . . . agrees by majority that the assets of Benton County Sewer District No. 1 be sold to Missouri American Water Company.").) However, Interested Parties oppose the

[1]Interested Party George Hall, who is proceeding pro se, has continued to file oppositions to Plaintiffs' Motions. (*See* Docs. 67, 88.) He previously filed Motions to Intervene, (Docs. 23, 41), that were denied, (Docs. 37, 51), and he did not appeal those Orders. Nonetheless, the Court has considered his recent filings in making its ruling.

sale. Having heard and reviewed the evidence before it, the Court makes the following findings of fact and conclusions of law, and hereby **GRANTS** Plaintiffs' Motion and **DENIES** Interested Parties' Motion.

I. Facts

a. Background

In April 1994, the commissioners of Benton County, Missouri filed a Petition for Formation of a Common Sewer District in Benton County Circuit Court. (*See* Doc. 13-2.) On April 20, 1994, the Circuit Court issued an order finding that construction and maintenance of the proposed sewer system was necessary to maintain proper sanitary conditions and preserve public health in Benton County. (Doc. 13-2.) The Circuit Court formally incorporated the District, and further ordered that District voters vote on the creation of the District and the authorization to incur revenue bond debt. (Doc. 13-4.) On November 7, 1995, District voters authorized the District to issue $2,000,000 in revenue bonds. (*See* Doc. 3-2.)

In February 1996, the Missouri Department of Natural Resources ("DNR") issued a letter to the USDA Office of Rural Development, opining that the proposed sewer system was needed. (*See* Doc. 13-2.) In September 1996, the USDA Office of Rural Development issued an Environmental Assessment regarding the District, approving USDA financing of the District's proposed sewer system and finding that, from an environmental standpoint, there was "no viable alternative to construction of a public sewer system." (Doc. 13-2.)

On April 14, 1998, the District's Board of Trustees passed a Bond Resolution authorizing issuance of a $1,529,600 revenue bond. (Doc. 3-2.) The Bond Resolution provides that the District will continuously own and operate the sewer system as a revenue-producing facility, and that the District will collect rates to produce revenues sufficient to cover the bond debt service.

(*Id*.) The Bond Resolution further states that the District will not encumber or dispose of the system. (*Id.*) Additionally, the Bond Resolution provides for acceleration of payment upon default, including by mandamus or other suit to enforce the bond owner's rights to compel the district to perform its obligations, and to enjoin any acts that violate the rights of the bond owner. (*Id.*)

The USDA also made a grant of $913,000 to the District for construction of the sewer system. (Doc. 3-4.) The Grant Agreement, dated April 24, 1998, provides that the District will: (1) operate and maintain the system; (2) adjust service charges as necessary to cover debt service; (3) use the real and personal property acquired for purposes of the grant as long as needed; (4) not encumber or dispose of property wholly or in part with grant funds, absent the USDA's consent; and (5) upon default, at the USDA's option, repay the USDA the grant funds. (*Id.*)

On April 24, 1998, in accordance with USDA requirements, the District's Board of Trustees also passed a Loan Resolution. The Loan Resolution provided that the District would: (1) not transfer or encumber the system without USDA consent; and (2) continually operate and maintain the system and provide for adequate revenues to meet debt service. (Doc. 13-4).

In November 1998, the District issued a revenue bond to the USDA (the "Bond") in the amount of $1,529,600, amortized at $89,864 per year from 2001 through 2033. (Doc. 3-3.) The Bond terms incorporate the Bond Resolution terms, and provide that the District will keep the covenants of the Bond Resolution, and will collect rates sufficient to cover Bond payments. (*Id*.) As of March 27, 2013, $1,169,313 remained outstanding on the Bond. As of March 21, 2014, the outstanding balance on the Bond was $1,164,199.39, with a daily accrual of interest of

$141.47. As of July 30, 2014, the outstanding balance on the bond was approximately $1.2 million.

On November 19, 012, a petition signed by at least eight percent of voters in the District was presented to the Benton County Clerk, seeking inclusion of the ballot question: "Shall the Benton County Sewer District #1 of Benton County, Missouri be dissolved?" in the April 2013 election. (Doc. 13-1.) The petition stated that it was submitted pursuant to Mo. Rev. Stat. §§ 67.950 and 67.955. (*Id*.) A majority of the voters of the District voted "yes" on the question in the April 2, 2013 general municipal election. (Doc. 13-1.) A majority of the voters of the District also voted "no" on a ballot measure that would levy taxes on property within the District to help finance the District's operations.

b. District Court Proceedings

On April 1, 2013, the United States initiated this action, and filed a Motion for Temporary Restraining Order. (*See* Docs. 1, 2.) On the same day, this Court entered a temporary restraining order enjoining the District from commencing dissolution, and requiring it to continue operations of the sewer system pending further order of the Court to the contrary. (Doc. 5.)

On May 1, 2013, this Court entered a preliminary injunction enjoining the dissolution of the District. (Doc. 18.) In issuing the preliminary injunction, the Court stated that its primary concerns were: (1) that dissolution of the District may leave residents of Benton County without an adequate means of disposing of their sewage; (2) that residents of surrounding counties may be harmed by the dissolution of the District, yet their interests are not being represented; (3) that dissolution of the District may cause homes and businesses in surrounding counties to flood with

raw or partially treated sewage; and (4) that dissolution of the District would lead to sewage overflow that may pollute the Lake of the Ozarks.[2] (*Id.*)

On June 14, 2013, the Court granted the State's motion to intervene as a plaintiff. (Doc. 33.) On July 2, 2013, the Court appointed Scott Totten, a DNR employee, as Receiver for the District. (Doc. 39.) The receivership order provided that the Receiver is to have exclusive possession and control over all assets and operations of the District, and authorized the Receiver to provide information about the sewer system to any potential purchaser, with terms of any proposed sale to be presented to the Court for approval. (*Id.*) On October 10, 2013, the Court denied Interested Parties' Motion to Intervene. (*See* Doc. 53.) Interested Parties appealed that Order, which is currently pending before the Eighth Circuit and is set for oral arguments on September 11, 2014. *See United States v. Robert Geranis, et al.*, No. 13-3394 (8th Cir. 2013); (*see also* Docs. 54-56.)

On July 30, 2014, the Court held a hearing and heard oral arguments regarding issues in this case. During that hearing, the Court heard testimony from Tracy Rank, an environmental public health specialist from the Benton County Health Department. Ms. Rank served as an environmental public health specialist for 15 years. Her duties included inspections of on-site sewer systems and issuing permits to construct on-site sewer systems. In performing these duties, Ms. Rank was required to determine whether on-site sewer systems in Benton County were operated in accordance with to state law and local ordinances, and to assess whether certain properties would be suitable for on-site sewer systems. During her time as an environmental public health specialist, Ms. Rank trained as an apprentice for four years, attended several conferences directly related to on-site sewer systems, and spoke at conferences about on-site

[2] The Court subsequently modified the preliminary injunction to account for the Receivership, discussed below. (Doc. 46.) These portions of the Order were incorporated into the modified Order on the preliminary injunction.

sewer system inspections and permit issuance. Ms. Rank testified that, given her familiarity with the industry standards, housing conditions, and geology, she believed a very low number of properties in Benton County would be able to support an on-site sewer system that complied with state law and local ordinances because the lots are too small. She further testified that she was not aware of any additional restrictions that would be imposed as a result of the sale of the District's sewer system to Missouri American. If the sewer system was operated by Missouri American, she stated, hook up to the sewer system would no longer be mandatory. Thus, after the sale, residents of the District would be permitted to set up on-site sewer systems if they qualified under state law and local ordinance.

The Court also heard testimony from Scott Totten, the Court-appointed Receiver and DNR employee. At the DNR, Mr. Totten spent 30 years in the water pollution program, and twice served as the deputy division director for that program. He has also served as the chief ombudsman for the DNR. In both positions, Mr. Totten's duties included overseeing compliance with or the compliance of public water and wastewater systems, as well as budgeting.

Mr. Totten testified that the District currently faces several problems and requires significant repairs and upgrades to efficiently and effectively operate its sewer system. First, the wastewater treatment system for the District has a tank that is currently nonoperational and cannot be operated due to lack of funds. Second, the District's wastewater treatment system is in need of plumbing changes to meet the industry standards. Third, the grinder pumps for District's sewer system need to be repaired or replaced to properly and efficiently dispose of sewage. Mr. Totten opined that addressing these infrastructural problems would cost in excess of $1 million. However, Mr. Totten testified that the District cannot address any of these problems due to financial difficulties, which partially arise from the fact that many of the District's customers

owe overdue debts to the District. Even with the USDA's current suspension of the District's monthly payment on the Bond, which has helped recoup some of the District's losses, the District is still struggling and would continue to struggle, financially and operationally, if it continued operations as is. Mr. Totten further testified that he had reviewed the APA and recommended that the sale of the District's assets to Missouri American go forward.

c. The APA

Section 2.1 of the APA provides that at the its closing, the District will transfer the "Acquired Assets," as defined by Exhibit 1 to the APA, to Missouri American. (*See* Doc. 59-1.) These assets include the District's wastewater treatment facility, defined as the "System" in APA under Paragraph U in the Recitals. (*Id.*) The Acquired Assets also includes the District's real property used and required in the operation of the System, the District's personal property, as well as its easements, rights of way, and its books, records, and files. (*Id.*) Section 2.1 further provides that Excluded Assets, as defined by Exhibit 1 to the APA, are not part of the sale. Excluded Assets include the District's cash, short-term investments, bank accounts, proceeds of accounts receivable arising before closing, and causes of action, judgments, and claims. (*Id.*)

Section 2.2 incorporates Paragraph X of the Recitals. (*Id.*) These two sections provide that the consideration for the Acquired Assets will be a payment to the USDA of $750,000 in exchange for an executed release by the USDA of any claim under the Bond, the Bond Resolution, the Loan Resolution, and the USDA Grant Agreement that the District, as described in Paragraph X of the Recitals. (*Id.*) Thus, the District's obligation to repay the outstanding balance on the Bond, which is approximately $1.2 million, and the $913,000 grant would be extinguished upon closing of the APA transaction and the payment of $750,000 to the USDA.

II. Discussion

a. Motion to Intervene, (Doc. 64)

Interested Parties have opposed approval and execution of the APA based on issues related to the wind-down process and dissolution of the District, the terms of the proposed sale, and the role of the Court and court-appointed Receiver in the sale, wind-down process, and dissolution of the District. Thus, before approving the APA, the Court must first decide whether Interested Parties are permitted to intervene.

It should be noted that Interested Parties filed a motion to intervene earlier in this lawsuit, (*see* Doc. 52), which was denied. (Doc. 53.) Interested Parties then filed a notice of appeal with the Eighth Circuit. (Docs. 54-56); *see also United States v. Robert Geranis, et al.*, No. 13-3394 (8th Cir. 2013). Generally, "[a] notice of appeal divests the district court of jurisdiction of those aspects of the case involved in the appeal." *Harmon v. U.S. Through Farmers Home Admin.*, 101 F.3d 574, 587 (8th Cir. 1996) (internal marks and quotation omitted). As such, this Court would usually not have jurisdiction to rule on the renewed Motion to Intervene, (Doc. 64). However, Interested Parties argue that because their position has changed now that there is a proposed sale, they should be given an opportunity to intervene at this stage. Having considered the evidence and arguments, the Court concludes that Interested Parties cannot intervene for the reasons stated in its previous Order, (Doc. 53), and because Interested Parties do not have Article III standing.

A party seeking to intervene must also show it meets the requirements of Fed. R. Civ. P. 24 and has Article III standing. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 832 (8th Cir. 2009). Constitutional standing requires: (1) an injury-in-fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not

conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of that is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the Court; and (3) a likelihood that the injury will be redressed by a favorable decision. *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 791-92 (8th Cir. 2004). To establish standing, "a plaintiff must clearly allege facts showing an injury in fact, which is an injury to a legally protected interest that is concrete, particularized, and either actual or imminent." *Metro. St. Louis Sewer Dist.*, 569 F.3d at 833-34 (internal quotations and marks omitted). As such, the injury cannot be "conjectural or hypothetical." *Nolles v. State Comm. for Reorg. of Sch. Dists.*, 524 F.3d 892, 898 (8th Cir. 2008) (quotation omitted).

The circumstances here are similar to those in *Metro. St. Louis Sewer Dist.*, 569 F.3d 829. In that case, the United States and State of Missouri brought an action for injunctive relief and civil penalties under the Clean Water Act against a sewer district, alleging that it had discharged sewage into local waterways. *Id.* at 832. An association of businesses within the district sought to intervene, stating it had an interest in ensuring a reliable and viable sewer system, as well as an interest in ensuring ratepayers were not unreasonably burdened. *Id.* at 833-34. The Eighth Circuit held that the association could not show an injury-in-fact because these interests were not particularized or non-conjectural. *Id.* at 835-36. Specifically, the court held that the interest in viability of the sewer system was not concrete or particularized, and thus did not establish standing. *Id.* at 835 ("[the association] shares its interest in the reliability of the system with all of the 1.4 million users, so it is not the kind of concrete, particularized interest that establishes standing.") (citation omitted). Additionally, the court held that the association's argument that

its members would suffer economic harm was too speculative to confer standing, as it hinged on the outcome of a state administrative process. *Id.* at 835-36.

Here, Interested Parties object to approval of the APA, contending a common sewer system is not needed because they can construct and operate on-site sewer systems that conform with Missouri law. They also contend that the operation of the sewer will affect their rights to use on-site sewer systems. However, like the intervenors in *Metro. St. Louis Sewer Dist*., these interests are ones that Interested Parties share with all residents of the District. Moreover, whether Interested Parties, or any resident of the District, can construct and operate on-site sewer systems is dependent on whether state laws and regulations would permit those individual properties to do so. Additionally, the proposed sale will not impact the rights of Interested Parties or any District residents from constructing, operating, or otherwise relying on an on-site sewer system. Interested Parties have presented no evidence to the contrary, even when given the opportunity to do so. Rather, Interested Parties' alleged injury is based on speculation and hypothetical scenarios as to what may occur after a sale of the District's sewer system to Missouri American. As such, Interested Parties have not shown their interest is concrete or particularized, or is not merely hypothetical or conjectural. *Id.* at 835-36; *see also Nolles*, 524 F.3d at 900 (generalized grievance shared in common by all voters is not a personalized injury); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury must be actual and imminent, not conjectural or hypothetical). Thus, because Interested Parties have not shown an injury-in-fact, they do not have standing to intervene.

b. Motion for Approval of the APA, (Doc. 59)

Despite ruling that Interested Parties cannot intervene, the Court has considered their arguments and finds that approval of the APA is appropriate.

First, the sale of the District's sewer system to Missouri American serves the best interests of the public. Without the continuation of a common sewer system, many residents will not be able to dispose of sewage in conformity with Missouri law. The operation of the sewer system thus provides a lawful means of sewage disposal for many residents of the District. Further, the continuation of a common sewer system will maintain a sanitary method of sewage disposal for residents that prevents pollution and preserves public health. Preserving public health is what led to the creation of the District's sewer system in the first place, and it remains in the best interest of the public to maintain such sanitary means of sewage disposal. (*See* Doc. 13-2 (USDA Environmental Assessment discussing sewage disposal problems and determining that there was "no viable alternative to construction of a public sewer system" in the District, and Benton County Circuit Court judgment holding that the construction and maintenance of a common sewer system was necessary "to secure proper sanitary conditions for the preservation of public health[.]").)

Second, the sale of the District's sewer system to Missouri American will likely benefit the sewer system itself. For some time, the cost to run and operate the sewer system imposed high rates on District customers. These high rates, in part, led to the vote in April 2013, where District voters passed a resolution to dissolve the District. While the issue of high rates is currently being addressed by the Receiver in this case, many District customers owe significant arrearages to the District and, as a result, the District is unable to sustain itself financially. Moreover, the District owes significant bond payments to the USDA, though those payments were recently suspended in light of the financial difficulties that have befallen the District. These financial hardships further impact the operation of the sewer system, which is in need of substantial and costly updates and repairs. Missouri American will be able to make those

upgrades, and given their experience with owning and operating sewer systems, will likely provide efficient sewer services to residents at lower rates. In sum, Missouri American will be able to stabilize the sewer system, both financially and operationally.

Third, the sale of the District's sewer system complies with Missouri law and will eliminate the potential financial liability of the District and its customers. Contrary to Interested Parties' contentions, the sale meets the requirements for wind down of the District under Missouri law. Mo. Rev. Stat. § 67.950 provides that if a majority of voters vote to dissolve a district, it "shall be dissolved for all purposes except the payment of outstanding bond indebtedness, if any." Moreover, Mo. Rev. Stat. § 67.955 states that the district's "governing body, upon passage of a proposition to dissolve, shall dispose of all assets of the district and apply all proceeds to the payment of all indebtedness of the district." Only after liquidation, payments, and refunds are completed does the district cease to exist, "except that if general obligation bonded indebtedness exists the district shall continue to exist solely for the purpose of levying and collecting taxes to pay such indebtedness." Mo. Rev. Stat. § 67.955.

Interested Parties argue that Mo. Rev. Stat. § 204.390[3] conflicts with the provisions of the terms of the APA because the USDA revenue bond will be paid from proceeds of the sale of the sewer system, not from revenues derived from operation of the sewer system. However, the APA provides that the payment of $750,000 to the USDA releases all claims the USDA has

[3] Mo. Rev. Stat. § 204.390 provides:

> Revenue bonds issued under authority of sections 204.250 to 204.470 shall be payable solely from the revenues derived and to be derived from the operation of the sewerage system acquired, constructed, improved or extended in whole or in part from the proceeds of the bonds. No revenue bonds issued pursuant to sections 204.250 to 204.470 shall constitute an indebtedness of the common sewer district within the meaning of any constitutional or statutory restriction, limitation or provision. The face of each bond shall state in substance that the bond has been issued under the provisions of sections 204.250 to 204.470, that the taxing power of the common sewer district issuing the bond is not pledged to the payment thereof either as to principal or interest and that the bond and the interest thereon are payable solely from the revenues of the sewerage system for the benefit of which the bond was issued.

under the Bond, the Bond Resolution, the Loan Resolution, and the USDA Grant Agreement.[4] As such, the payment to the USDA need not be considered a payment on the Bond, but rather, a payment of the District's debt of $913,000 under the Grant Agreement.[5] Therefore, Mo. Rev. Stat. § 204.390 is not implicated and any obligation of the District or its residents on the Bond are wholly eliminated without any payment.

Additionally, even if the payment of $750,000 were considered a payment on the bond, it would not conflict with § 204.390. Section 204.390 states that revenue bonds are payable from both revenues derived from the operation of the sewer system, and from revenues to be derived from its operation. The plain language of the statute suggests that revenue bond payments can be based on anticipated future revenue generated by the sewer system. *See Soto v. State*, 226 S.W.3d 164, 166 (Mo. 2007) ("The general rule of statutory construction requires a court to determine the intent of the legislature based on the plain language used and to give effect to this intent whenever possible. To ascertain legislative intent, the courts should examine the words used in the statute, the context in which the words are used, and the problem the legislature sought to remedy by the statute's enactment."). Thus, assuming the payment Missouri American will make to the USDA is based on Missouri American's calculation that revenue from the operation of the sewer system will eventually fund the District's payments to the USDA for the Bond, the payment is based on revenue to be derived from the operation of the sewer system and comports with § 204.390.

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[4]Interested Parties argue Recitals Paragraph X of the APA states that payment of $750,000 to the USDA only releases claims under the Bond. However, they only rely on the portion of Paragraph X that supports their arguments. The full text of Paragraph X states that the payment of $750,000 to the USDA releases claims the USDA has under the Bond, as well as under the Bond Resolution, the Loan Resolution, and the USDA Grant Agreement. (*See* Doc. 59-1.)

[5]The District must necessarily violate several provisions of the Grant Agreement in order to dissolve. Such provisions include the duty to operate the sewer system continuously, the duty to make charges that pay debt services, the duty to use the system as long as it is needed, and the duty to not transfer or dispose of property acquired in any part with the grant money without the USDA's consent. When those provisions are breached, the District becomes liable for the $913,000 debt to the USDA.

Moreover, the proceeds from the sale of the District's sewer system can be considered "revenues to be derived" from the operation of the sewer system. The $750,000 is connected to the sale of the sewer system to Missouri American, and thus can considered revenue derived from the operation of the sewer system by the District. *See* Mo. Const. Art. VI, § 27(b) (defining proceeds for disposal of a facility as "revenue"); *See also Kuyper v. Stone Cnty. Comm'n*, 838 S.W.2d 436, 438 (Mo. 1992) (discussing Missouri tax statutes and defining revenue as "the annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state or municipality collects and receives into the treasury for public use.") (internal quotation omitted).

Further, the sale of the District's sewer system fulfills the legislative intent of § 204.390. The intent of this statute is not to absolve a dissolved sewer district of all liability on revenue bonds, as Interested Parties argue. Rather, the intent is to ensure compliance with provisions in the Missouri Constitution that prohibit political subdivisions of the State to incur debts beyond the constitutional limit. *See* Mo. Const. Art. VI, §§ 26(a)-(g), 27(a)-(c). This concern is not implicated in this case. To hold that § 204.390 relieves the District of any liability on the Bond when it is dissolved not only conflicts with the legislative intent of the statute, but is also illogical.

Therefore, having considered the evidence and arguments presented here, the Court finds that approval of the APA and authorization for its execution by the court-appointed Receiver is proper because sale of the District's sewer system pursuant to the APA is in the best interest of the public and District residents, and complies with Missouri law.

III. Conclusion

Accordingly, Interested Parties' Motion to Intervene or Participate Amici Curiae, (Doc. 64), is **DENIED**. Plaintiffs' Motion for Approval of the APA, (Doc. 59), is **GRANTED**. The court-appointed Receiver, Scott Totten, has the authority to take any actions necessary to effect execution and performance of the APA. Interested Parties' various motions for extensions of time and leave to file documents, (Docs. 66, 73, 74, 76), are **GRANTED**. Plaintiffs' Joint Motion for Arguments, (Doc. 75), is **DENIED as moot**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, JUDGE
UNITED STATES DISTRICT COURT

DATE: August 25, 2014