



MEMORANDUM

Date: April 12, 2017

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **Davis-Monthan Air Force Base Sewer Connection Fees**

On April 18, 2017 in Executive Session, the Board of Supervisors is scheduled to review various legal options regarding this matter. It is a long-term and complex issue.

Attached is an April 11, 2017 memorandum from the County Attorney that is not Attorney/Client Privileged. This memorandum provides general background and the history of this matter. It would be appropriate to review this information prior to the upcoming Executive Session.

The County Attorney will present to the Board legal options for the Board's consideration in the April 18 Executive Session.

CHH/mjk

Attachment

c: Thomas Weaver, Chief Civil Deputy County Attorney
Charles Wesselhoft, Deputy County Attorney
Carmine DeBonis, Jr., Deputy County Administrator for Public Works
Jackson Jenkins, Director, Regional Wastewater Reclamation



MEMORANDUM

Pima County Attorney's Office

Civil Division

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To: Chuck Huckelberry
Carmine DeBonis
Jackson Jenkins

From: Charles Wesselhoft

Date: April 11, 2017

Subject: Davis-Monthan Air Force Base Connection Fees

Davis-Monthan Air Force Base (DMAFB) is a facility operated by the Department of the Air Force (DAF) on the east side of Tucson. DAF has not paid sewer connection fees to the County since 1993 despite evidence of extensive construction activity at DMAFB. Efforts to resolve the matter have been met with various legal and practical arguments by DAF and are presently at a standstill. This Memorandum reviews the history of connection fee payments by DMAFB and the County's efforts to collect outstanding fees.

The City of Tucson (City) originally owned and operated the airfield now included within DMAFB but transferred it to the Department of the Army (Army) in 1940. The United States and the City contracted in 1941 to construct sewers connecting the airfield to the City's existing sewer system. The City and the United States each designed and constructed runs of connecting sewer with the United States supplying 4,300 feet of 15 inch pipe for the project. The 1941 agreement makes no reference to user or connection fees.

In 1942, the Army began a substantial expansion of the airfield and required sewage treatment services well beyond the City's existing capabilities. The City and United States entered into an agreement (the 1942 Agreement) wherein the United States contributed \$160,000 toward the expansion of the City's Ft. Lowell treatment facility in exchange for the City's agreement to accept and treat wastewater from the airfield (and other Tucson-area military facilities). Pursuant to the 1942 Agreement, the City expanded the treatment facility to handle airfield flows generated by up to 22,600 men. The 1942 Agreement required the City to operate and maintain

the expanded facility and related conveyance system at its “sole cost and expense.”¹ The term of this agreement was fifty years (or until May 26, 1992).

The City and Army (which later became DAF) operated under the 1942 agreement until 1972 when civilian growth near DMAFB overloaded portions of the City’s sewage conveyance system. DAF owned under-utilized sewers in the vicinity. Rather than construct additional public sewers, the City requested use of the DAF-owned sewers. DAF agreed. In exchange, the City agreed to extend the term of the 1942 Agreement an additional twenty years (or until May 26, 2012).

During 1972, the Federal Water Pollution Control Act Amendments (33 U.S.C. §§ 1251 to 1387) became law. This legislation (also known as the Clean Water Act or “CWA”) expanded the federal government’s role in regulating direct and indirect discharges to navigable waters. Included in the CWA are provisions requiring recipients of federal treatment plant construction grants to charge all users a proportionate share of plant operations and maintenance (O&M) costs (33 U.S.C. § 1284(b)(1)(A)), and requiring federal facilities to comply with “all Federal, state, interstate, and local requirements . . . including the payment of reasonable service charges.” 33 U.S.C. § 1323(a).

Following enactment of the CWA, the City developed and instituted a sewer system user fee program. The program, approved by U.S. EPA, required payment of user fees by all users, including DAF. The City interpreted the CWA to supersede the 1942 agreement regarding fees and began, in 1975, invoicing DAF for sewer user fees. DAF refused to pay, arguing that the 1942 Agreement fee arrangement took precedence over any subsequent legislation. Efforts by the City to resolve the matter were unsuccessful.

In 1979, The County took over ownership of the City’s wastewater assets and continued the City practice of billing DAF for user fees. DAF made no payments.

The first County attempt to resolve the matter occurred in 1984 and, once again, DAF cited the 1942 Agreement as its basis for non-payment. Discussions between DMAFB personnel and the County continued with no progress until 1985 when DMAFB personnel made a request to “Headquarters” for a decision on DAF responsibility for the outstanding user fees. Headquarters, in 1986, advised that it considered the 1942 Agreement binding.

Following the “Headquarters” decision, the County began preparations to litigate the matter. It also began discussing settlement with DAF personnel at Tyndall AFB. These discussions resulted in the 1988 Settlement Agreement between DAF and the County. In that agreement, DAF agreed to:

- a. Begin paying user fees pursuant to the County ordinance;
- b. Pay connection fees, pursuant to County ordinance, for all constructions projects where ground breaking occurred on or after October 1, 1988;

¹ The 1942 Agreement recitals included an acknowledgment that, as an “implied term” of the 1941 contract, the City agreed to manage the Davis-Monthan Field wastewater without charge.

- c. Pay the County \$1,495,089 for sewer services rendered between 1942 and 1988; and
- d. Unconditionally release County from its obligation under the 1942 Agreement to furnish sewer services to DMAFB at no cost.

From 1988 through 1993, the County received payments from DAF for both user fees and connection fees. The parties discussed a 1989 draft agreement to formalize the process of tracking construction and demolition activities at DMAFB but no final agreement was reached.

The last connection fee payment received from DAF for DMAFB construction occurred in 1993 (DAF continued to pay user fees). Between 1993 and 2009, DAF ceased reporting new construction activity to the County and, as a result, the County had no basis for issuing invoices to DAF for new connections. During this same period, a few contractors paid connection fees for third party-owned facilities constructed within DMAFB.

In 2005, RWRD requested a meeting with DAF personnel to discuss past due connection fees. The request resulted from County personnel observations of construction activity at DMAFB. A meeting occurred in early 2006 wherein DAF advised that it would investigate and respond. No response was ever received.

In 2009, Pima County cited DAF for significant non-compliance related to an exceedance of sewer permit discharge limits. During discussions with DMAFB personnel, the base personnel agreed that substantial, unreported, construction activity had occurred at DMAFB between 1993 and 2009.

The County held several meetings with DMAFB in early 2009 concerning both the non-compliance and connection fee issues. DMAFB personnel initially were very cooperative on the connection fee issue² and agreed to work with the County to create an updated inventory of facilities at DMAFB. DAF and the County assigned personnel to the effort and, as a result of the effort, DAF provided County with data on construction/demolition of residential and commercial facilities at DMAFB. Using that data, it was estimated that DM had constructed a net total of 8,146 fixture unit equivalents (or FUEs) between 1993 and 2009.³

The County met in early 2010 with the expectation that a settlement amount would be resolved based on the FUE study. Instead, DAF attorneys assigned to the Utility Law Field Support Center at Tyndall AFB attended the meeting and, for the first time, argued that the connection fees demanded by the County are a tax rather than a service fee and, by virtue of the federal government's sovereign immunity, it does not have to pay taxes imposed by state or local governments.

Following that meeting, the parties exchanged correspondence focused on the taxation issue. DAF continued to argue that the fee is a tax mainly on the theory that the rate charged by the

² The non-compliance issue was amicably resolved through a Negotiated Settlement Agreement, No. 2009-01.

³ DMAFB constructed 8,663 new FUEs and demolished 517, for a net total of 8,146.

County is unrelated to the cost of providing service.⁴ DAF demanded financial information from the County justifying the connection fee rate.

In response to DAF's request, the County provided financial history information and rate calculations.⁵ This resulted in a request for more information concerning the calculation of connection fees.⁶ To produce the requested connection fee rate calculations, the County contracted with a financial consultant experienced in utility rate setting. This resulted in the Raftelis "Connection Fee Structure Review,"⁷ which was transmitted to DAF on July 27, 2012. Based on the recommendations of the Raftelis study, the County revised its connection fee program (Ord. 2012-045).

Concurrent with the County's negotiation with DAF, a similar battle was being fought nationally regarding federal liability for stormwater management fees. U.S. EPA promulgated rules establishing local responsibility for the management and treatment of stormwater. To pay for stormwater management costs, local governments created programs that set fees using a variety of methods, including total property acreage, length of frontage on roadways, and amount of paved area. Many federal facilities impacted by these fees initially paid them but stopped when several governmental agencies argued the stormwater fees are taxes. DAF jumped on that bandwagon with respect to DMAFB's connection fees although the two types of fees were calculated and used differently.

The local governments seeking stormwater fees went to Congress and were successful in amending CWA § 313 to include a provision clarifying the intent of the federal facilities requirements. The Cardin Bill appended subsection (c) to § 313:

c) Reasonable service charges

(1) In general

For the purposes of this chapter, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is—

(A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

⁴ There are several factors considered by the courts when determining whether a charge is a fee or a tax. To be a fee, there must be proportionality between the charge and the service; the collected money has to be used to cover the cost of the service; and the charge has to be nondiscriminatory. Massachusetts v. United States, 435 U.S. 444 (1978). Another fee indicator is the voluntary status of the relationship: an involuntarily imposed charge is often a tax. City of Cincinnati v. United States, 153 F.3d 1375 (Fed. Cir. 1998). In contrast, the Federal Court of Claims believes the Massachusetts test merely determines whether the fee or tax is reasonable. It, instead, held that a fee must be: (1) imposed by an agency upon those subject to its regulation; (2) imposed on a narrow group; and (3) limit use of revenues to the benefit of the narrow group. DeKalb County v. United States, 108 Fed.Cl. 681, 699 (2013).

⁵ June 21, 2010 letter from C.H. Huckelberry to Gen. Paul Thompson.

⁶ July 26, 2010 e-mail from Karen White to Charles Wesselhoft.

⁷ The report concluded that a capacity charge of \$16.02 gal of water usage/day was justified.

(B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

(2) Limitation on accounts

(A) Limitation

The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury.

(B) Reimbursement or payment obligation of Federal Government

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in subsection (a), shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.

Pub. L. 111-378, § 1; 124 Stat. 4128 (2011).

While the bill was pending in Congress, the County, with the aid of the National Association of Clean Water Agencies (NACWA), attempted modifying the language to include a reference to connection fees. However, the bill had progressed too far through the process to amend.

Since the effective date of the amendment, federal agencies have generally paid post-enactment stormwater charges. Attempts by the local governments to recoup fees due prior to the effective date have met with varying results in the courts.⁸

Despite the legislative clarification of Congress' intent that stormwater fees based on treatment capacity requirements are not taxes, DAF's attorneys continued to assert the tax defense as well as the argument that the fees are not reasonably related to the cost of providing infrastructure for conveyance and treatment services. They also assert that the connection fees paid prior to the 1993 cessation more than compensates the County for the infrastructure costs. They argue the Air Force has substantially reduced the number of personnel employed and housed on base thereby reducing the actual usage of County infrastructure.

Given the impasse with DAF's attorneys, the County submitted an invoice to DAF in July 2011 for connection fees due based on the 2009 joint investigation. DAF's response advised that

⁸ The federal agencies argue that the Cardin bill did not specifically identify the stormwater charges as fees. They argue the Cardin bill merely waives sovereign immunity for the stormwater tax. In DeKalb County, Georgia v United States, 108 Fed.Cl. 681 (2013), the Court of Federal claims agreed with the federal position. However, after DeKalb County filed for appeal, the U.S. Department of Justice reached settlement with DeKalb County. It is rumored that DOJ settled because it did not believe it could win on appeal.

DAF's attorney were examining the invoice and would respond "in the near future." No formal response was received. The County issued a subsequent demand for payment, including accrued interest, in November 2011. No response was received.

As of the date of this memorandum, the County has received only a one-page letter, dated March 16, 2017, from the Base Civil Engineer, Michael Toriello, that continues to argue against any DAF responsibility for further connection fee payments. He bases this on measured wastewater flow data being less than estimated. He does, however, leave the door open for further discussion.