M E M O R A N D U M

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Subject: Collection of Connection Fees from Davis-Monthan Air Force Base

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 discusses the options available to the County to end the disagreement.

1. Seek Judicial Relief for Past Fees

DAF has never conceded that the County's connection fees are a fee rather than a tax. However, that argument should, based on the definition of fee in *DeKalb County v. United States*, 108 Fed.Cl. 681, 699 (2013), mitigate in the County's favor.

In *DeKalb*, DeKalb County, Georgia, sued to recover stormwater management fees assessed against eighteen federal facilities. It based its complaint on § 313 (33 U.S.C. § 1323) of the Clean Water Act which requires federal facilities to pay "reasonable service charges" resulting from Clean Water Act compliance. The fees were due pursuant to a DeKalb County stormwater management ordinance, which DeKalb County adopted in 2003 to comply with Clean Water Act

standards. The ordinance required each property owner to pay a stormwater management assessment based on the amount of impervious surface area on the property.

The federal facilities refused to pay the charges, asserting that they were taxes. The Court of Federal Claims rejected the County's argument that the charges were fees rather than taxes. The Court of Claims determined 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. The Court found DeKalb County ordinance to be broadly imposed and to provide no individualized benefit to those paying the charges.

In contrast, the County's connection fees are imposed only on those connecting to the public sewer system and each user directly benefits from the connection.

Further, DAF argues the fees are unreasonable. As discussed above, § 313 of the Clean Water Act requires federal departments, agencies, and instrumentalities to comply with all local requirements "respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges." Id. at (a), emphasis added. DAF argues that the fees then charged were not reasonably related to the cost of providing service. In part, it argues the fees were larger than justified by the cost of capacity. DAF also argues it paid for more capacity than it currently uses.

In 2012, Pima County restructured its connection fee charges and now the fees charged for new connections tie directly to capacity reserved for the base. The connection fees charged prior to restructuring may not meet the reasonableness test required to qualify as a fee but DAF's arguments are not likely to prevail for any fees due post restructuring.

With respect to the "already paid" argument, DAF agreed in 1988 that it would pay for net capacity reservation changes going forward. It did so until 1993 and based on the joint FUE review that occurred in 2009, there is a record of FUEs installed through the date of the review. However, due to DAF's non-cooperation, there is no supportable record of FUEs installed after 2009 although there is a strong belief that new construction at DMAFB has occurred. The joint review data provides sufficient net FUE installation data to support connection fee recovery. Additional data will be required to determine fees due after 2009.

The 2012 change to the County ordinance presents a new wrinkle to the post-2009 fee determination. The County now bases connection fees on a user's potential to discharge based on water meter size rather than by counting FUEs. DMAFB obtains all of its potable water and part of its irrigation water from onsite wells. Historically, the well flow data was used to calculate user fees. The County now bases user fees on actual flow to the sewer.[1] This change creates a disconnect between discharge potential estimation methodologies before and after the 2012 ordinance revision. The net increase in FUEs at the base after 2012 ordinance revision cannot

[1] The County installed, operates, and maintains, all at DAF expense, a sewage flow monitoring system on base property. The flow monitoring system was installed because of inconsistent well flow reporting results and the failure of the method to account for inflow and infiltration of stormwater from DMAFB's onsite sewer system.

provide a basis for determining whether there is an increase in discharge potential. An alternative method is needed for that period. However, the connection fees due for the net FUE increase between the joint FUE review date in 2009 and the 2012 ordinance revision date are potentially recoverable.

To obtain judicial relief from DAF for contractual or quasi-contractual damages, the County must file suit in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. In this matter, the County would allege an action under the Contract Disputes Act (41 U.S.C. §§ 7101-7109) based on DAF's breach of the 1988 contract and DAF's failure to comply with the County connection fee ordinance (a quasi-contractual relationship).

Litigation is unlikely to be successful for any County claim older than six years. There is an absolute six-year statute of limitations for contractual claims against the federal government filed in the Court of Federal Claims. 28 U.S.C. § 2501. Whether the County still has a viable claim depends on the date of accrual.

For federal claim purposes, the date of accrual is "the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." FAR § 33.201. The issue of when the County's claim accrued is factual. Did it accrue in 2005 when RWRD first contacted DAF; when it first became aware in 2009 of the extent of the new construction; or when it invoiced DAF in 2011? DAF will undoubtedly argue for the 2005 or 2009 accrual dates.

In *DeKalb, supra*, the court determined that the date of accrual was the date payment was due under invoices sent by DeKalb County. Because Pima County did not have any way to determine what fees were due until DMAFB agreed to cooperate with an FUE count. The County did not send an invoice until 2011. The July 28, 2011 invoice specified "net 30."

In addition, DAF's reasonableness argument may make collection of any fees due prior to the 2012 ordinance revision difficult to collect. To collect, the County will need to prove that those pre-2012 fees were reasonable although the County might, in the alternative, argue that DAF nevertheless owes "reasonable" connection fees for the 2011 through 2012 period.

Further, for the post-2012 ordinance revision period, the County must show that new construction at DMAFB will result in a higher potential to discharge wastewater to the County system than existed prior to the ordinance revision. As discussed above, the shift from FUE counts to water meter size cuts off the historical use between the parties of FUEs as basis for estimating discharge volume potential. Individual connections (*i.e.*, individual water meters) do not exist on DMAFB so the County's new methodology is not readily useable. Using a County-created alternative methodology as a basis for litigation would likely be aggressively challenged by DAF.

Negotiation of past fees has similar limitations to the litigation option, above. DAF will argue that it is not obligated to pay any fees incurred prior to the accrual date and, for those fees

incurred subsequent to the accrual date, it can pay only those fees that are reasonable. However, there may be more flexibility on DAF's part, particularly on the accrual date issue, if it can settle the matter without litigation.

> Recommendation: Pursue litigation options by filing a claim with DAF followed by a complaint in the Court of Federal Claims. Parallel to this, initiate settlement discussion with DAF.

2. Negotiate a Method of Assessing Future Fees

Going forward, DAF and the County must develop a method of tracking increases in DMAFB's potential to discharge to the County sewer. As discussed above, the County now directly measures wastewater flow from DMAFB. The metering station has been fully operational for slightly more than a year and the County now has data tracking flows over that period. One route toward a new connection fee tracking system is to use that and additional data to establish a flow cap could form the basis for future connection fees. If flows exceed the cap, connection fees would be charged for the excess amount at the then current cost per gallon per day for capacity and the cap would be adjusted upward. Other methods may exist but direct measurement reduces dispute opportunities.

DAF asserts that it has already paid for a substantial amount of capacity and may, based on its own calculations, further assert the payments cover more capacity than it currently uses. It has, on occasion, claimed that the base now has significantly fewer persons living onsite. However, it has not provided the County with data showing how many persons work within the base.

> Recommendation: In conjunction with the past fee settlement discussions, pursue development of a going-forward method of tracking and charging for DMAFB capacity needs.