

No. 2024-2293

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

On Appeal from the United States Court of Federal Claims in case no. 18-1586C,
Judge Philip S. Hadji.

DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The question in the appeal is whether the Armed Forces Retirement Home (Home) is exempt from paying sewer charges under the exception clause in the 1954 Act's water provision. The trial court correctly held that the water provision's exception applies equally to the sewer provision. But the court erred when it held that the exception does not apply to the Home.

The trial court's interpretation of the Act is unreasonable because it ignores the plain meaning of the operative words "extension" and "predicated on the value of." In addition, the reading would place DC Water and the District of Columbia (DC) into serious financial jeopardy, which contravenes the very purpose of the Act, to strengthen the city's water and sewer infrastructure through more robust fee-based funding.

Even if the trial court were correct, appellee has waived any rights under the Act, or should at the very least be estopped from relying on it when, for more than 50 years, it acknowledged that the Home owed no charges. For the reasons below, the judgment below should be reversed.

ARGUMENT

I. The Text, Context, and Purpose of the 1954 Act Confirm that The Act's Exception Applies to the Home

In 1954, Congress began requiring the Federal Government to pay for water and sewer services, but stated clearly that the requirement did not extend to "water

and water services furnished to the United States for the maintenance, operation, and extension of the water system[.]” AppellantBr6-8 (ECF 18). As we demonstrated in our opening brief, the Home was provided water and water services in exchange for the easement it gave DC to build and maintain the reservoir. And because construction of a reservoir is an extension of the water system, the Home’s water and water services fall squarely within the exception. Then, because of the parallel provision for sewer services that refers back to the water provision, the Home is *also* exempt from the requirement to pay sewer services. The trial court correctly agreed that the exception contained in the water provision applies equally to the sewer provision, but it erred when it held the exception does not cover the Home.¹

DC Water asserts two main points in opposition. First, it challenges the trial court’s decision that the exception applies equally to the water and sewer provisions, despite Congress’s explicit direction that sewer payments shall be “predicated on the value of water and water service.” AppelleeBr2-22 (ECF 31). Second, even if the exception does apply to both, DC Water argues the Court should ignore dictionary definitions in favor of the alleged “special meaning” of extension in the utility law context. *Id.* In DC Water’s view, an extension of a water system can never mean the

¹ We note that DC Water has only sought to recover sewer charges in this case. Appx2-3, Appx40. No claim for water charges against the Home has been expressly brought in this case or the related case.

construction of a reservoir because a reservoir merely strengthens the existing system but does not extend it. DC Water is wrong on both counts.

A. The Exception Applies to Sewer Services

DC Water incorrectly contends that the sewer provision stands alone, without reference to the water provision. AppelleeBr17-22. As a threshold point, DC Water did not file a cross appeal to challenge this part of the trial court’s decision.

Regardless, DC Water fails to read the statute as a whole, ignoring that the Court is “not guided by a single sentence or member of a sentence, [rather it] look[s] to the provisions of the whole law, and to its object and policy.” *Itserve Alliance, Inc. v. United States*, 122 F.4th 1364, 1369 (Fed. Cir. 2024). DC Water reads the sewer provision in isolation and misses the provision’s explicit cross-references to the water provision.

The water and sewer provisions in the Act work together to grant DC Water authority to charge the Federal government and to explain how those charges will be assessed. Title I authorizes DC Water to charge the Federal government for water services. Specifically, section 106 of the 1954 Act requires the Federal government to pay for water and water services at the same rates charged to the other DC residents. Pub. L. No. 83-364 § 106, 68 Stat. 102 (Add43); D.C. Code § 34-2401.25(a) (Add80). It is section 106 that contains the exception at issue in this appeal. The section also explains how services should be charged and, importantly, sets up a forward-looking estimate system to assess the value of water used by the Federal government. AppellantBr6-8. Every year, DC Water must assess the “value” of water services used

by the Federal government. As originally enacted, there was to be an amount appropriated to a fund in “a sum corresponding to the value of the water services furnished to the United States.” Add43. While that specific language was changed by amendment, that change did not alter the fundamental point that “value” is the operative concept. Pub. L. 101-168 § 133, 103 Stat. 1280.

Title II covers sewer services, but in some shorthand. It authorizes DC Water to collect charges for sewer services from the general public “in the same manner and at the same time as water charges are collected.” AppellantBr8-9. Section 207 then lays out the manner in which sanitary sewer charges are to be assessed for all DC residents. *Id.* Finally, section 212 explains that Federal entities would now be charged for sewer services which are to be “predicated on the value” of water and water services received by the government. Pub. L. No. 83-364 § 212, 68 Stat. 108 (Add49); D.C. Code § 34-2112 (Add86). Originally, this meant that sewer charges would be a percentage of the value of water services received by the government. The “value” of water and water services was derived, as section 207 explained, from the “charges” and “rates” assessed for water charges. And from section 106, we know that the “value” of water services is derived to arrive at the appropriation.

DC Water responds that sewer billing is entirely separate from water billing in the 1954 Act and “the [w]ater [m]andate has no relevance to this determination because its scope is limited to charges for water and water services, not sewer service charges.” AppelleeBr17-18. And, in DC Water’s view, to the extent that the two

provisions speak to each other, it is to base sewer charges on water *volume*, not water value. *Id.* at 21-22. But DC Water ignores that the plain meaning of value connotes cost, while volume clearly does not. Value is defined as “the monetary worth of something.” *Value*, Webster’s New int’l Dictionary at 2814 (def. 2) (2d ed 1943). Volume is defined as the amount of “space occupied, as measured by cubic units[.]” *Id.* at 2857. As just demonstrated, until recently the Act required DC Water to assess the monetary value of water used by Federal entities and then apply a percentage to derive sewer charges. If sewer charges were “predicated on the value” of water services (which we know were based on charges and rates), and if an entity has paid no water charges and has no water rate, then that entity’s water services have zero value, and a percentage of zero is zero.

By the same logic, when the commissioners compile their annual estimates of water services provided under section 106, they assess the *value* of those services, which becomes the *amount* appropriated to an account at the United States Treasury under the current procedures. Add81, Add86-87. Even Amicus, the District of Columbia Department of Energy and Environment, agrees that “value” in the sewer provision means “monetary worth” and the “monetary worth of sewer services [the Home] consumes is keyed to the *value* of water and water services provided.” AmicusBr10-11 (emphasis in original).

DC Water then recounts the history of the provisions but the history only confirms that “predicated on the value” has remained in the statute throughout—and

this is critical. Specifically, DC water discusses the evolution of sections 207 and 212. Section 207, as originally enacted by Congress, was entitled “Basis for Charges.” It explained how charges for DC consumers should be calculated. AppelleeBr18-21. As the trial court correctly noted, section 207 is a general provision that does not apply to the Federal government except as specifically provided in section 212. Appx65 (“Section 207 cannot supersede the specific mandate in Section 212 to predicate sewer charges to the Government on the value of water and water services received, which, as discussed above, is governed by the Water Mandate and its exception.”).

Section 212 then explicitly authorized DC Water to charge the Federal government for sewer charges, and it directs to section 207 for exactly how to calculate those charges. As originally enacted, Section 207 stated that the “sanitary sewer charges established under the authority of this title shall be based on the water consumption of, and water service to, the properties served, and be determined by one of the following methods: (a) . . . as a percentage of the water charge applicable[.]” Add47.

In 2009, Section 207 was changed in the DC Code to state that charges are “based on . . . [a] billing methodology that takes into account both the water consumption of, and water service to, a property[.]” See Add91-95. Because that methodology now multiplies a consumer’s water consumption, effectively a volume as measured by a water meter, by a predetermined rate set by DC Water per unit of

water consumption, DC Water contends that sewer charges are no longer actually “predicted upon the value of water and water services received” by the Home.

But DC Water concedes that Congress has not removed the “predicated on the value of water and water services provided” language in section 212, and it concedes that Congress also removed the reference to 207 in section 212. AppelleeBr20. In other words, the District’s version of the statutes contains the cross-reference but the enacted version does not. So, to the extent that the method for calculating “value” has changed to include amount used (or volume), Congress did not intend that change to apply to the Federal government.

And even if Congress had not been so clear, DC Water does not reconcile section 212’s insistence that sewer charges be predicated on the value of water, with the amended methods explained in section 207, or explain how “value” can now mean “volume.” It cannot be that section 207, which gives no specific direction about calculating Federal sewer charges because it is the general provision applicable to all DC residents, can trump section 212, which still requires Federal sewer charges to be based on the value of Federal water charges. *See Morales v. TransWorld Airlines, Inc.* 504 U.S. 374, 384 (1992) (“it is a commonplace of statutory construction that the specific governs the general.”).

B. The Exception Applies to the Home

Alternatively, DC Water contends that the exception does not apply to the Home because the reservoir construction was not an “extension” of the water system.

AppelleeBr4-17. Again, DC Water ignores the plain meaning of the words in the Act. The plain meaning of “extension,” as found in the contemporaneous dictionary definition, would have been understood to refer to any “[a]ct of extending” the water system or any “enlargement in dimension, area, . . . or scope” of that system. *Id.* at 24. Certainly, the easement granted to DC in 1938 allowed it to enlarge the dimension, area, or scope of the water system.

DC Water advises the Court to ignore the dictionary definition of “extension” in favor of a specialized utility law meaning. AppelleeBr4-10. However, the cases DC Water cites do not establish this alleged specialized meaning. Indeed, *Dep’t of Land Conserv. and Devel. v. Lincoln Cty.*, 925 P.2d 135, 138-139 (Or. App. 1996), *Matzke v. City of Seward*, 226 N.W. 2d 340, 345 (Neb. 1975), and *Garden Develop. Co. v. City of Hastings*, 436 N.W. 2d 832, 833 (Neb. 1989) (relying on *Matzke*) all held that the meaning of “extension” as used in Oregon and Nebraska statutes was determined by its plain meaning, and those courts relied on dictionary definitions of “extension” to discern the word’s meaning. Far from establishing that “extension” has a special meaning in the utility context, those cases hold that the word’s ordinary meaning controls.

Similarly, *Radford v. City of Cross Plains*, 86 S.W. 2d 204, 205-06 (Tex. 1935) fails to establish the alleged special meaning of “extension.” In *Radford*, the Commission of Appeals of the Texas Supreme Court, in the context of revenue bonds to help finance a reservoir, considered the meaning of “extend” and “extensions” as used in Articles 1111 and 1112 of the Texas Revised Statutes. That court concluded that

because Article 1111 used both “improve” and “extend” the only proper reading was the one that did not render the two terms coterminous. Again, far from establishing that “extend” has a special, immutable meaning when used in the utility law context (and in fact finding it unnecessary “to define just what the Legislature meant by ‘extensions’”), the case establishes only that statutory text must be interpreted in context. Here, the context exempts payments when water services are provided for the maintenance, operation, or extension of the system. The easement was provided for, at the very least, extension of the system. No other context limits the plain meaning. If anything (as discussed below), the easement could have been provided for the operation of the system, which leaves the Home in the same exempt status.

Further, *City of Hamlin, Tex. v. Brown-Crummer Inv. Co.*, 93 F.2d 680, 683-84 (5th Cir. 1937) and *City of Corpus Christi v. Hayward*, 111 F.2d 637, 639 (5th Cir. 1940) simply rely on *Radford* to resolve similar questions regarding Articles 1111 and 1112 of the Texas Revised Statutes. Because there is no special meaning that must be applied to “extension,” DC Water’s declaration is of no value because it assumes a special definition when we know special definitions exist only in their very specific contexts.

DC Water also makes the uncontroversial point that “there is nothing in the Water Mandate providing that the applicability of the exception clause depends in any way on the specific source from which the water or water services are applied to the U.S.” AppelleeBr11. A service can be provided for the extension of the system and not come *from* the extension of the system. Similarly, a service can be provided for

the maintenance of the system and not come from the maintenance of the system. We have never said otherwise.

Similarly, Amicus is incorrect that the water provision distinguishes between two types of water—that furnished “for direct use” and that furnished “for the maintenance, operation, and extension of the water system.” AmicusBr12-15. The water provision states:

All water and water services furnished from the District water supply system through any connection thereto *for direct use* by the Government of the United States or any department, independent establishment, or agency thereof, situated in the District, except water and water services furnished to the United States *for the maintenance, operation, and extension of the water system*, shall be paid for at the rates for the furnishing and readiness to furnish water applicable to other water consumers in the District. [].

Pub. L. No. 83-364 § 106, 68 Stat. 102 (Add43); D.C. Code § 34-2401.25(a) (Add80) (emphasis added).

Even assuming that “for direct use” means consumed by the Home, the provision can only be read to mean that all water “furnished” to the Home is “consumed” by the Home because this phrase is in the independent clause. The exception clause is a dependent clause and can only be read to qualify the dependent clause. Therefore, “for the maintenance, operation, and extension” can only be read as qualifying when the water furnished to the Home, all of which constitutes “consumption” under the “for direct use” clause, is exempted.

Finally, DC Water makes two inferences about neighboring language, both of which are unpersuasive. First, it contends that the other two exceptions to payment (for operation or maintenance) are limited concepts, therefore “extension” must also be interpreted narrowly. But the examples DC Water gives of operation or maintenance are just that—examples. There is nothing to say that a larger project could not also be for operation or maintenance. And they certainly do not mention that, in the very correspondence that led to the 1938 Agreement, it was DC *itself* that pitched the reservoir as necessary “to properly operate and safeguard the supply and distribution of water in the District of Columbia.” Appx126. If the easement was not given for an extension of the water system, then it most certainly was given for the operation of the water system, by DC’s own admission.

And second, DC Water contends that the Act’s express exception for churches and other institutions suggests Congress knew how to exclude entities and simply chose not to exclude the Home. AppelleeBr14. Of course, the exception for churches was created anew and therefore was, unsurprisingly, spelled out in more detail.

C. The Act’s Purpose Confirms The Meaning of Extension

Amicus helpfully provides the reasons underlying the 1954 Act. Users in DC did not pay sewer fees and the “sewer infrastructure was in a ‘disturbing’ condition.” AmicusBr5. To address the crisis, Congress assessed a sewer service charge to customers, including the Federal government, because it was “the only way to

sustainably fund the District’s infrastructure.” AmicusBr6. The Act “contemplated full payment by the United States Government with an emphasis on mandating that the United States pay the full value of services it received from the District.” *Id* (cleaned up). “In short, this user-based funding model would allow the District’s sewer infrastructure to be financially self-supporting.” *Id.* at 8. We do not dispute the history and purpose of the Act. Ours is the only interpretation that comports with that purpose.

If the Court does not agree with our interpretation of the exception, then the 1954 Act forced DC and now DC Water to repudiate the 1938 Agreement. The United States would then be entitled to restitution. When the United States enters into contracts, its rights and duties are governed by the law applicable to contracts between private individuals. *See United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996). “[W]hen one party to a contract repudiates that contract, the other party ‘is entitled to restitution for any benefit that he has conferred on’ the repudiating party ‘by way of part performance or reliance.’” *Mobile Oil Exploration & Producing SE, Inc. v. United States*, 530 U.S. 604, 607-08 (2000) (quoting the Restatement (Second) of Contracts § 373 (1979)). This would mean that DC Water would owe the Home the fair market value of the land, which is a 3-acre tract of land in the middle of a major United States city. *See* 24 U.S.C. § 411(i)(2)(D) (any lease of the Home’s real property shall be for “consideration in an amount that is not less than the fair market value of the lease interest, as determined by the Chief Operating Officer[.]”). It is fair to say that the

fair market value of the land would likely exceed decades of sewer payments. Using the amount sought by DC Water from the Home for sewer services in fiscal year 2021 as a proxy, the value of services that the Home has received since 1955 would be, as a maximum estimate, approximately \$42.5 million. Appx1082, Appx1106-1107. The fair market value of a land parcel in DC about the size of a full city block would far exceed that amount. This could be an unprecedented cash outlay that would take funds away from the sewer system—a result that is wholly incompatible with the Act’s purpose.

Even if the trial court were correct that the Act nullified the 1938 Agreement (dictum that is contrary to the precedent above), the result would be even more damaging to DC Water. If the contract were nullified, the easement would no longer exist and the Home would be free to maximize the land’s potential for the benefit of its community. Similarly, there can be no partial nullification where DC Water maintains the easement and the Home pays for sewer services. AppelleeBr16.

It strains credulity for DC Water to simultaneously argue that the 1938 Agreement’s exchange is not preserved by the water provision’s exception clause because the text does not “mention or at least allude to the agreement” yet also contend that it “remains a valid agreement” concerning the easement despite the alleged nullification of the express consideration. *Id.* at 13, 16. If Congress has not mentioned or alluded to the agreement, there is certainly no basis to infer that Congress removed DC Water’s obligation to pay but granted it the ability to retain the

valuable easement the Home provided for the reservoir on terms different from those to which the parties had previously agreed.

Congress is not presumed to create a property right by silence. *United States v. Union Pac. R. Co.*, 353 U.S. 112, 116 (1957) (explaining that land grants are construed favorably for the United States, nothing passes absent clear language conveying the grant, and any doubts are resolved in favor of the United States). And when Congress has created easements through legislation, it does so with specificity. *See* An Act to Authorize the Secretary of the Navy to Convey to the City of Los Angeles, California, an Easement for Construction and Operation of a Storm Drain in and Under Certain Government-owned Lands Situated in that City, Pub. L. No. 80-11, 61 Stat. 9 (March 7, 1947).

Finally, any interpretation of the sewer provision should be consistent with the Home's existing obligations to its constituents, embodied in other Federal statutes. Allowing DC Water to maintain the easement with no consideration would violate 24 U.S.C. § 411(i), which ensures that the Home receives fair market value for leased property, and violates 40 U.S.C. § 8124, in which Congress gave the Home the ability to transfer jurisdiction of its land on agreed-upon terms subject to approval by the

National Capital Planning Commission², which incidentally is the entity that approved the 1938 Agreement in the first place.

II. Alternatively, DC Water Waived its Right to Seek Sewer Charges From the Home Or Should Be Equitably Estopped From Doing So Now

Despite agreeing for over 50 years that it would continue to recognize the bargained-for exchange, an implicit acknowledgment that the 1954 Act exempted the Home by not charging the Home for any water or sewer services, DC Water claims that neither waiver nor estoppel can be applied against it for three reasons. First, DC Water claims that these defenses are foreclosed because it is a government actor, and applying these defenses creates a separation of powers problem. AppelleeBr23-25. Second, DC Water argues these defenses effectively amount to the United States seeking an unconstitutional *de facto* repeal of the sewer provision. AppelleeBr26-28. Finally, DC Water argues that even if the Court entertains these defenses, the United States cannot prove that waiver or estoppel is appropriate. AppelleeBr28-44. DC Water is incorrect on all grounds.

Amicus adds to these arguments by asserting that the power to impose sewer and water charges on the Home, and on the United States generally, constitutes an enforcement duty, akin to police power, that cannot be waived. AmicusBr19-24. Further, Amicus asserts that even if DC Water is determined to have previously

² The legislative history of the 1954 Act affirms that it was intended to institute a funding mechanism for DC and also noted that all individual projects would be reviewed and approved by the National Capital Planning Commission. Add77.

waived its ability to impose these fees, as a sovereign actor, it can correct these enforcement lapses and collect this revenue from the Home going forward. *Id.* at 23.

A. DC Water Is Not a Government Entity

DC Water contends that waiver and estoppel do not apply to it because it is a “governmental entity” possessing a “mandate” from Congress to “enforce” the 1954 Act. AppelleeBr23–28. This is incorrect. DC Water is a commercial entity, distinct from DC, that performs proprietary functions to which sovereign immunity does not apply.³ Throughout the various iterations of local government in DC, the operation of its water and sewer system has been recognized as a proprietary or nongovernmental function. *See Scull v. District of Columbia*, 250 F.2d 767, 768 (D.C. Cir. 1957) (holding that because the operation of a water and sewer system is proprietary, DC was amenable to suits in negligence).

DC Water “demonstrably is not the same entity as the District of Columbia, and a suit against [it] is not the same thing as a suit against the District.” *Dingwall v. D.C. Water & Sewer Auth.*, 766 A.2d 974, 978 (D.C. 2001) *op. adopted and aff’d en banc*, 800 A.2d 686 (D.C. 2002). DC Water and DC have separate legal personalities, and courts have consistently denied it the benefit of governmental privileges afforded to DC. *See id.* (requirement of pre-filing notice).

³ DC Water asserts that it “relies primarily on relaxed standing principles to litigate structural federalism claims which implicate the separation of powers,” AppelleeBr.25, n.6, apparently acknowledging that it is not a government actor and does not enjoy the benefits of immunity.

DC Water’s functions have been consistently held to be non-governmental. *D.C. Water & Sewer Auth. v. Delon Hampton & Assocs.*, 851 A.2d 410, 415–16 (D.C. 2004) (“it is apparent that functions and activities of [DC Water], a separate corporate body distinct from the District [] are proprietary in nature[.]” It is routinely held that the “operation of the sewer systems [is] a proprietary not governmental functions” and thus DC Water does not enjoy the protections that a sovereign would receive. *See B. Frank Joy, LLC, v. D.C. Water & Sewer Auth.*, 213 A.3d 90, 97 (D.C. 2019) (exemption from the statute of repose); *see also New 3145 Deanville, L.L.C. v. First American Title Ins. Co.*, 881 A.2d 624, 629 (D.C. 2005) (holding DC Water was not performing sovereign function in collecting unpaid water bills); *Moore v. D.C. Water & Sewer Auth.*, 2018 WL 5983387 at *3 (D.D.C. 2018) (holding “DC Water is not a state actor” and does not enjoy immunity from suits under 42 U.S.C. § 1981).

Even if DC Water’s sewer and water functions were determined to be governmental, waiver and estoppel could still be applied in this case. DC, as a municipal corporation, does possess a limited municipal immunity when it performs a sovereign function. Any immunity DC might possess is derived from the sovereign immunity possessed by Congress, the ultimate authority in DC. *See District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d 394, 403–05 (D.C. 1989). But DC’s municipal immunity is not the same as sovereign immunity. “The inherent limitation of this doctrine, of course, is that the rights protected must be of a public nature, and not merely the private or proprietary interests of particular institutions.” *Id.* at 401.

And in any event, DC itself has been held to be subject to estoppel claims even when it acts in a manner regarding a public or governmental right that “promote[s] a wrong” on “a party acting in good faith under affirmative acts of a municipal corporation.” *District of Columbia v. Cabill*, 54 F.2d 453, 454-55 (D.C. 1931). Indeed, in that case, “justice and right” required that DC be estopped from revoking a certificate of occupancy issued to a property owner, even though DC issued that certificate on a mistake of fact. Because the recipient of the certificate had relied upon its issuing in good faith, and made significant investments to the property, the court held that “to assert a supposed public right would be to encourage and promote a wrong[.]” *Id.* DC Water’s reliance on *Chris Berg, Inc. v. United States*, 426 F.2d 314 (Ct. Cl. 1970) does nothing to undermine the *Cabill* analysis. Any purported mistake by DC Water, or DC, regarding the continued viability of the 1938 Agreement, as expressed in the 1990 letter, justifies applying waiver or estoppel to stop the “promotion of a wrong” by DC Water. *See AppelleeBr35-37.*

Allowing DC Water to assert that it is vindicating a public right of DC’s by collecting sewer charges from the Home would promote a wrong in this case by depriving the Home of the consideration exchanged for the easement. The Home acted in good faith on DC’s longstanding affirmative representation, expressed in the 1990 letter, Appx288, that the 1938 Agreement’s exchange remained in effect even after enactment of the 1954 Act. To allow DC Water to repudiate this representation, which implicitly concedes the statutory text accounts for the agreement, without

consequence, would be unjust because it would deprive the Home of the value it receives for the easement, which it obtained in conformance with its obligation to manage the Home's property for the benefit of the veterans living there.

DC Water does acknowledge that “[t]o the extent there exists even a generalized principal that all statutory rights are waivable under appropriate circumstances, such rule is riddled with exceptions.” AppelleeBr32. Despite implicitly acknowledging *Cahill*, DC Water seeks to distance itself from this precedent by reference to more general considerations.

DC Water's reliance on cases stating that equitable defenses do not apply against the government are unavailing because it is far from an “incontestable fact” that DC Water is a governmental entity. *See* AppelleeBr29-31 (citing *Wilber Nat'l Bank of Oneonta, NY v. United States*, 294 U.S. 120 (1934); *Utah Power & Light Co. v. United States*, 243 U.S. 359 (1917); *Manor Care v. United States*, 630 F.3d 1377 (Fed. Cir. 2011)); *see also* AppelleeBr40-41. And that Congress did not specifically provide for waiver and estoppel in other statutes says nothing about whether equitable defenses case be applied here. *See id.*⁴ None of these cases address the 1954 Act, let alone satisfies the

⁴ DC Water cites: *Perma Life Mufflers Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968) (antitrust act and *in pari delicto* defense); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) (illegal contract promises cannot be made enforceable via estoppel claim); *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (amendments to Federal Water Pollution Control Act addressed and displaced issues previously governed by Federal common law); *DiVall Insured Income Fund Ltd. P'ship v. Boatmen's First Nat'l Bank*, 69 F.3d 1398 (8th Cir. 1995) (FIRREA expressly identified claims and defenses for FDIC as receiver, which

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Cabill analysis. Only our interpretation would prevent the “promotion of a wrong” that would result if DC Water and DC are not estopped from repudiating the affirmative representation to “honor the 1938 Agreement . . . [and] will continue to render water and sewer charges to the Home without charge.” Appx288.

DC Water is also incorrect that the legislative policy behind the sewer provision militates against finding waiver or estoppel. AppelleeBr32-35. Even assuming that “Congress clearly intended to alleviate the undue financial burden on the District residents whose tax dollars, prior to said enactment, had to financially support the operation of the District public sanitary sewer system, without adequate contribution from the U.S.,” it does not follow that “waivability would completely undermine this legislative policy by nullifying the intended Congressional mandate of alleviating the burden on the District and its citizens.” AppelleeBr34-35.

As we have demonstrated, if DC or DC Water were forced to repudiate the agreement, the United States would be owed restitution. And if the trial court were correct that the 1938 Agreement was nullified, then the Home would be free to develop the land according to its statutory obligations. Either way, DC or DC Water would owe a very large sum of money to the Home. Waiving sewer charges on the

excluded Federal common law defenses not mentioned); *Burris v. Wilkie*, 888 F.3d 1352 (Fed. Cir. 2018) (Veteran’s Court’s ability to grant monetary relief is limited and excludes the equitable ability to provide other relief).

Home would therefore not undermine the purpose of the 1954 Act, but would rather advance those purposes as it alleviates an additional financial burden.

B. Applying Waiver or Estoppel Against DC Water Would Not Constitute a *De Facto* Repeal of the Sewer Provision

DC Water and Amicus are incorrect that our defenses are a “masquerade” and that we really seek a repeal of the sewer mandate. AppelleeBr23–28; AmicusBr19–20. We endorse no such thing. The Federal Government is obligated to pay water and sewer charges pursuant to the 1954 Act. If the Court disagrees that the Home falls under the Act’s exception, we contend only that DC Water should not be permitted to “promote a wrong” on “a party acting in good faith under affirmative acts of a municipal corporation.” *Cabill*, 54 F.2d at 454. And if there was any doubt that allowing DC Water to collect sewer charges would promote a wrong, DC Water and Amicus have made clear the wrong they seek is to maintain the easement for free. *See* AppelleeBr16; AmicusBr18.

The United States does not argue that DC Water has abandoned its right to collect sewer and water charges under the 1954 Act by failing to enforce it for more than 50 years. AppelleeBr.23. Rather, we maintain that DC Water or DC should be barred from repudiating its affirmative representations that the 1938 Agreement was accounted for and survived passage of the 1954 Act. Applying waiver and estoppel to those actions does not implicate any separation of powers concerns.

District of Columbia v. John R. Thompson, 346 U.S. 100, 113-14 (1953), stands only for the proposition that “the failure of the executive branch to enforce a [criminal] law does not result in its modification or repeal,” but that concept has no relevance in this case. That case concerned a “criminal proceeding prosecuted” for the refusal of a restaurant to serve patrons of a certain race. *Id.* at 102; *see also* David K. Thompson, *Equitable Estoppel of The Government*, 79 COLUM. L. REV. 551, 565–67 (1979); *United States v. Medico Industries, Inc.*, 784 F.2d 840, 845 (7th Cir. 1986) (“Criminal statutes . . . do not depend for their effectiveness on the words and acts of employees of the government. They operate by force of Congress’ decision.”). But the statute at issue in this case is not a criminal one, thus this separation of powers concerns is not implicated.

Presumably recognizing that waiver and estoppel can apply in this case under the *Cabill* decision, DC Water asserts that “this is no ordinary contract dispute between private parties” and to allow waiver or estoppel “would effectively be encroaching on a function of the legislative branch.” AppelleeBr24. But this is not true. We have established that the rights DC Water seeks to vindicate are proprietary instead of being public or governmental. This is important as it vitiates the separation of powers concern because proprietary rights are not on par with criminal statutes, nor has DC Water established that this Court should hold that they are the same. By applying waiver or estoppel here, the Court would not be encroaching on any legislative prerogative of Congress expressed in the 1954 Act. Quite the opposite, by

applying waiver or estoppel, this Court would be furthering the Act's purported purpose of lessening the financial burden by ensuring that DC Water does not incur undue costs to maintain the easement it received in the 1938 Agreement.

Further, as we demonstrated above, even if the right to collect sewer charges were deemed a governmental function, albeit still not a criminal matter, DC Water should be estopped from abandoning its affirmative representations about the exchange of water and sewer services for the easement because allowing it to do so would "promote a wrong."

In any event, even assuming the affirmative representation does not establish waiver or estoppel and DC Water were able to impose sewer fees in the future, this ability still would not mean that it or DC could maintain the easement for free. As we explained earlier, if the 1954 Act had forced DC to repudiate the 1938 Agreement, then the United States would be entitled to restitution. *See Winstar*, 518 U.S. at 895. And even if the trial court were correct that the Agreement was actually nullified, then the United States still would have to comply with a bevy of other statutory requirements to ensure that DC or DC Water make the Home whole. The Home is an "independent establishment in the executive branch" "under the control and administration of the Secretary of Defense." 24 U.S.C. § 411(a) and (d)(3). The Home's ability to lease its property is "subject to the approval of the Secretary of Defense" and is limited to circumstances that "will promote the purpose and financial stability of the Retirement Home or be in the public interest[.]" *Id.* at

§ 411(i)(1). As we showed, any lease executed by the Home “shall provide for the payment (in cash or in kind) by the lessee of consideration in an amount that is not less than the fair market value of the lease interest, as determined by the Chief Operating Officer.” *Id.* at § 411(i)(2)(D).

C. Waiver Or Estoppel Is Appropriate In This Case

DC Water incorrectly argues that we cannot assert an estoppel defense because we did not assert this specific legal theory below. AppelleeBr37, n.10. It is true that we only explicitly raise waiver in our filings below. Regardless, the Court “may apply the correct law even if the parties did not argue it below . . . but only if an issue is properly before the court.” *Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir. 2002). Whether equitable defense apply against DC Water is properly before this Court, and the Court can apply the correct law, *i.e.* estoppel, if waiver is an incorrect theory.

We demonstrated that waiver applies because DC and DC Water abandoned its ability to impose sewer, or water, charges from 1954 through 1990 by its express conduct. AppellantBr28-29. Similarly, estoppel applies because DC, and DC Water, misled the Home by asserting in its 1990 letter that it would continue to honor the bargained-for exchange of the 1938 Agreement, which prevented the Home from adjusting the fees it charges residents or seeking to obtain current market value for the easement.

In opposition, DC Water again argues that waiver is inapplicable because it is the government, and also contends that we failed to establish that DC’s signatory to

the 1990 letter had authority to waive the right to collect fees. AppelleeBr38-40. DC Water is not the government, as we have explained above. Concerning authority, the 1938 Agreement itself states that DC was authorized to enter into the exchange under 40 U.S.C. § 8124 (formerly 40 U.S.C. § 122). And the 1990 letter was sent by the Director of Public Works, alerting the Home that, pursuant to DC Corporation Counsel’s legal opinion, DC believed it should continue to honor the 1938 Agreement, notwithstanding the 1954 Act. The absence of the actual Corporation Counsel’s opinion is irrelevant. It is the Director of Public Works’s decision that is the operative document. The Department of Public Works is established in D.C. Code § 1-1506.04. The Director has “full authority” over the Department, which oversees planning, provision, and oversight of DC’s physical infrastructure, including finances. It is hard to conjure a person with more authority over this issue than the Director of Public Works.

Regarding estoppel, DC Water cannot show that the 1990 letter does not evidence “affirmative misconduct” or that the Home did not reasonably rely on DC’s representations to its detriment. AppelleeBr40-44. As we explained above, the Home has never adjusted its prices or sought to collect fair market value for the easement because it understood that DC Water would honor the 1938 Agreement.

CONCLUSION

For these reasons, the judgment of the Court of Federal Claims should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,893 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

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