



Control Number: 43572



Item Number: 32

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014

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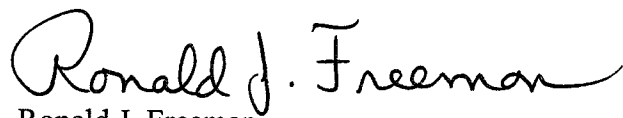
Ms. LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, Mail Code 105
Austin, Texas 78711-3087

RE: Application of Bexar Metropolitan Water District to Amend Water CCN No. 10675 in Bexar County, TCEQ Docket No. 2003-0664-UCR, SOAH Docket No. 582-03-3725

Dear Ms. Castañuela:

Enclosed for filing in the above referenced cause please find the Bitterblue, Inc.'s Response to the Response of Bexar Metropolitan Water District to Bitterblue's Motion For Dismissal by Summary Disposition. Because this motion is being served by fax, the original will be forwarded to you by mail as required by TCEQ's rules.

Very truly yours,


Ronald J. Freeman

RJF/gmm

CC: Gene Powell
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**SOAH DOCKET NO. 582-03-3725
TCEQ DOCKET NO. 2003-0664-UCR**

IN RE: APPLICATION OF BEXAR METROPOLITAN WATER DISTRICT TO AMEND WATER CCN NO 10675 IN BEXAR COUNTY	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**Response to Bexar Metropolitan Water District's Response to Bitterblue's Motion For
Dismissal by Summary Disposition**

Comes now, Bitterblue, Inc. ("Bitterblue") who files this Response to Bexar Metropolitan Water District's Response to Bitterblue's Motion for Dismissal by Summary Disposition in the referenced Docket and would respectfully show as follows:

I.

**Bexar Met's Argument That a Fact Issue Exists as to Whether Bexar Met May Annex
Property by Obtaining a CCN is Incorrect**

While Bexar Met's response to Bitterblue's Motion to Dismiss (the "Motion") does not dispute that Bitterblue's properties are not within BMWD's boundaries, Bexar Met nonetheless argues that it has created a "fact issue concerning its legal ability to expand its boundaries by obtaining the CCN made the basis of this Application."¹ Bexar Met, by using the phrase "BMWD's boundaries" in the quoted language, seems to still be arguing that Bexar Met believes that when it gets a CCN it has *annexed* the property where the CCN is located. This issue has been the subject of controversy for many years. At the present time, the issue is ripe for decision by the courts (Comal County District Court) in pending litigation filed against Bexar Met by GBRA and the City of Bulverde. For a complete history of this long dispute, which is essential for the ALJ's understanding of the current forum in the courts for resolution of this issue, the ALJ is respectfully directed to the Austin Court of Appeals decision denying Bexar Met's attempt to keep the courts

¹ Bexar Met Response at p. 3.

from ruling on this issue of law. A copy of the Austin Court of Appeals decision is attached as **Attachment A**. The factual discussion is at pp.83-85.

Bexar Met's argument that it has now created a "fact issue" concerning its "legal ability" to annex Bitterblue's property is self-contradictory on its face, especially in light of the long history of this disputed issue. Either Bexar Met has the legal ability to annex Bitterblue's property by obtaining a CCN or it does not—there is no "fact issue" concerning Bexar Met's "legal ability" to annex Bitterblue's property, allegedly by simply obtaining a CCN.

Bexar Met must find legal authority to support its theory that it can annex Bitterblue's property (and that of any other landowner) by simply obtaining a CCN. And, that legal authority must be found either in its enabling legislation or in the general law of the State. Bexar Met's enabling legislation does not authorize Bexar Met to annex property. Sections 6 and 6A of Bexar Met's original 1945 enabling legislation² formerly provided procedures by which Bexar Met could annex property. However, those sections of that enabling legislation have now been repealed by the Texas Legislature.³ In order to annex the Bitterblue properties into its boundaries, Bexar Met must now rely on general law contained in Chapter 49, Texas Water Code. Sections 49.301 and 49.302, Texas Water Code, govern those annexation procedures. Neither allows unilateral annexations by a district—whether by acquisition of a CCN or any other type of unilateral annexation. Instead, both mandate that annexations be initiated pursuant to a formal petition filed by all, or a majority in value, of the owners of the properties requesting annexation. Neither Chapter 49 nor Chapter 13, Texas Water Code, anywhere state that inclusion of property in a district's CCN effects an annexation of the property into the district.

² See Exhibit A to Bexar Met's response.

³ See S. B. 1494, 2003 Texas Legislature, 78th Regular Session, copy attached as Exhibit D to Bitterblue's original Motion to Intervene and Motion for Dismissal, at Section 4.

II.

Bexar Met's Argument That It Can Serve Outside Its Boundaries Raises No Fact Issue

After initially claiming that by getting a CCN Bexar Met would effect an annexation of Bitterblue's property, strangely Bexar Met spends the rest of its response arguing that it is authorized to serve *outside* of its boundaries by Chapter 49, Water Code. Bexar Met relies solely on Sec. 49.215, Texas Water Code, for that authority. At p. 4 of its response, Bexar Met states that "Bitterblue erroneously characterizes Bexar Met as a special law district to whom Texas Water Code Sec. 49.215 does not apply." Not only does this statement mis-characterize what Bitterblue said in its Motion, but Bexar Met then goes on and on for several pages in its response talking about the fact that it is, indeed, a special law district.

Bitterblue's argument in its initial Motion (see relevant excerpts attached hereto as **Attachment B**) was not that Chapter 49, Water Code, does not apply to a special law district such as Bexar Met; instead, Bitterblue pointed out in its original Motion that Bexar Met's enabling legislation was in direct conflict with the general law provision in Sec. 49.215, Texas Water Code, regarding out-of-district service, and because of such conflict, the special law would prevail over the general law as mandated by Sec. 49.002, Texas Water Code. In any event, this question is purely a question of law, not fact; and as pointed out earlier and below, that legal issue is being, and should be, decided by the courts, not the TCEQ.

III.

The ALJ Should Defer to the Courts By Abating This Case

Bexar Met also spends a great deal of time arguing that SOAH and/or the TCEQ has previously decided that they have jurisdiction to determine whether, and where, Bexar Met is authorized by law to provide retail water service. The problems with this argument are several. First, ALJ Norman's PFD in the GBRA/Bulverde/SAWS CCN fight so strongly relied on by Bexar Met was changed by the Commission. Second, that PFD and the Commission's changes to it were all adopted prior to the passage of SB 1494 by the 2003 Texas Legislature. See footnote 3 above. Finally, and most significantly, the courts have now decided that the issue of the meaning of SB 1494 is ripe for determination by them.

As the ALJ is aware from earlier pleadings in this Docket, GBRA and the City of Bulverde have filed suit against Bexar Met in Comal County District Court seeking a declaratory judgment as to these very issues by that court. A copy of the GBRA/Bulverde petition is attached as **Attachment C** to this Response. This petition raises the very issue which the parties are struggling with in this case. The problem with Bexar Met now arguing to SOAH and the TCEQ that they have authority to decide this legal issue, is that Bexar Met made the same argument to the Comal County District Court that the TCEQ had primary jurisdiction to decide the issue and Bexar Met's argument was rejected by both that Court and the Austin Court of Appeals.⁴ Bexar Met's attempt to further appeal the decision of the District Court and the Court of Appeals to the Texas Supreme Court⁵ was recently denied. Therefore, there is now nothing to prevent the District Court from ruling on the GBRA/Bulverde petition in Comal County District Court which will resolve this issue.

The ALJ should recognize that the state courts have now held that they have jurisdiction to decide the issue of whether Bexar Met may annex and/or serve territory currently outside its boundaries without formally annexing the property under Sections 49.301 or 49.302, Texas Water

⁴ See the decision of the Austin Court of Appeals attached as **Attachment A** where the Court at pp. 89-90 says:

See pp. 89-90 of the Court of Appeals decision where the Court states as follows:
...[T]he relevant issues in this case involve a determination of what Bexar-Met's boundaries are, whether BexasMet may provide water utility services outside its boundaries, and whether BexarMet may expand its territory through CCNs issued by the Commission now that Senate Bill 1494 has passed. Unlike other cases finding an agency has exclusive jurisdiction, the determination on these issues will depend on the construction of a statute.

....

Courts have the authority to determine what a statute means. ... Statutory construction is a matter of law and for the courts to decide.

...

In this case there is no statute giving the Commission exclusive authority to determine what a water district's enabling statute means.

...

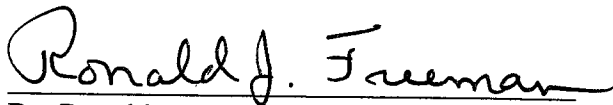
The Commission has neither exclusive jurisdiction nor primary jurisdiction over the issues raised in this case.

⁵ A copy of Bexar Met's Petition for Review to the Texas Supreme Court was attached as Exhibit B to SAWS' Reply to Bexar Met's Response to SAWS Motion to Intervene in this Docket dated August 29, 2005.

Code. Now that Bexar Met has exhausted its attempts to delay and frustrate the District Court from resolving that issue, it seems ripe for determination by the District Court. The courts have patiently waited to resolve this issue despite Bexar Met's many attempts to frustrate their efforts to do so. As requested in Bitterblue's Motion to Dismiss, this Docket should be abated until the District Court has determined this basic jurisdictional issue of whether Bexar Met can serve (and annex) property outside its current boundaries by simply obtaining a CCN from the TCEQ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of October 2005, a true and correct copy of Bitterblue's Response to Bexar Metropolitan Water District's Response to Bitterblue's Motion for Dismissal by Summary Disposition was served on the parties of record by facsimile transmission and First Class Mail.

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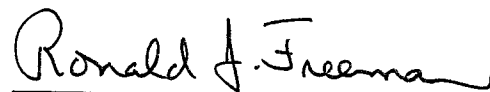
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Ronald J. Freeman

BEXAR METRO: WATER v. CITY OF BULVERDE
 Cite as 156 S.W.3d 79 (Tex.App.—Austin 2004)

Tex. 79

CONCLUSION

In summary, we conclude that the trial court did not err by admitting Eldridge's testimony or by imposing sanctions. Further, we conclude that there is legally and factually sufficient evidence to support the jury findings except for punitive damages. We affirm the judgment of the trial court except that we reform the judgment to provide for punitive damages of \$300,000 against defendant Frank Cass, and \$300,000 against defendants Frank Cass and Michael Cass.



BEXAR METROPOLITAN WATER DISTRICT, Appellant,

v.

CITY OF BULVERDE, Texas; Guadalupe-Blanco River Authority; City of Boerne; and City of Fair Oaks Ranch, Appellees.

No. 03-04-00367-CV.

Court of Appeals of Texas,
Austin.

Nov. 18, 2004.

Rehearing Overruled Jan. 12, 2005.

Background: City and river authority brought declaratory judgment action against water district, seeking a determination as to location of water district's boundaries, its authority to extend those boundaries, and its authority to provide water service beyond those boundaries. The 22nd Judicial District Court, Comal County, Gary L. Steel, J., denied water district's plea to the jurisdiction. Water district appealed.

Holdings: The Court of Appeals, Mack Kidd, J., held that:

- (1) statute giving attorney general exclusive authority to file suit contesting the validity of the creation or boundaries of a water district did not preclude suit;
 - (2) city and river authority had standing;
 - (3) city and river authority could bring action under Uniform Declaratory Judgment Act (UDJA);
 - (4) Commission on Environmental Quality did not have exclusive or primary jurisdiction; and
 - (5) river authority was a "person" entitled to bring a cause of action under UDJA.
- Affirmed.

1. Waters and Water Courses §183.5

Water districts are created by statute and can only exercise powers clearly given to them by the legislature.

2. Waters and Water Courses §183.5

The boundaries of water districts are defined by statute.

3. Pleading §104(1)

A plea to the jurisdiction contests the trial court's authority to adjudicate the subject matter of the cause of action.

4. Appeal and Error §863

In reviewing the grant or denial of a plea to the jurisdiction, Court of Appeals does not review the merits of the case.

5. Appeal and Error §70(3)

Because the statute authorizing interlocutory appeals from the grant or denial of a plea to the jurisdiction brought by a governmental unit is a narrow exception to the general rule that only final judgments and orders are appealable, Court of Appeals must give it a strict construction.

V.T.C.A., Civil Practice & Remedies Code § 51.014(a)(8).

6. Appeal and Error ⇐893(1)

Court of Appeals reviews a district court's ruling on a plea to the jurisdiction de novo.

7. Appeal and Error ⇐863, 916(1)

Court of Appeals' task upon review of a district court's ruling on a plea to the jurisdiction is to take the facts pled in the petitions as true and determine if subject-matter jurisdiction is present.

8. Pleading ⇐111.38

For purposes of a plea to the jurisdiction, unless the face of the petition affirmatively demonstrates a lack of jurisdiction, the allegations in the petition will be liberally construed in favor of jurisdiction.

9. Waters and Water Courses ⇐183.5

Statute giving attorney general exclusive authority to file suit contesting the validity of the creation or boundaries of a water district did not preclude city and river authority from filing suit seeking a declaration as to location of water district's boundaries, its authority to extend those boundaries, and its authority to provide water service beyond those boundaries; suit did not contest validity of water district's statutory boundaries. V.T.C.A., Water Code § 49.066(d, e).

10. Quo Warranto ⇐1

The state may use a quo warranto action to challenge the authority to engage in certain practices specifically enumerated by statute. V.T.C.A., Civil Practice & Remedies Code § 66.001.

11. Waters and Water Courses ⇐183.5

City and river authority had standing to seek declaratory judgment determining water district's boundaries, its authority to extend those boundaries, and its authority to provide water service beyond those

boundaries, despite contention that city and river authority were mere competitors of water district; city and river authority alleged that water district's actions were beyond the scope of its statutory authority, and city and river authority were parties affected by water district's actions in that they sought to provide water service to same area, and river authority could be forced to provide water to water district.

12. Waters and Water Courses ⇐183.5

If a water district acts beyond its statutory powers, its actions are void.

13. Municipal Corporations ⇐104

If a governmental authority's actions are void, as opposed to voidable, the actions can be challenged by affected persons.

14. Declaratory Judgment ⇐209

City and river authority could bring declaratory judgment action under Uniform Declaratory Judgment Act (UDJA) against water district, seeking to determine water district's boundaries, its authority to extend those boundaries, and its authority to provide water service beyond those boundaries, even if city and river authority did not have a cause of action against water district separate and apart from the UDJA; city and river authority sought to have court interpret water district's enabling act, and UDJA could be used for that purpose. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

15. Declaratory Judgment ⇐1

Suits under the Uniform Declaratory Judgment Act (UDJA) are not limited to cases where the parties have a cause of action separate and apart from the UDJA. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

16. Declaratory Judgment ⇨2

Declaratory judgment actions are intended to determine the rights of parties when a controversy has arisen, before any wrong has actually been committed, and are preventative in nature. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

17. Declaratory Judgment ⇨61

A person seeking a declaratory judgment need not have incurred actual injury. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

18. Declaratory Judgment ⇨122.1

The Uniform Declaratory Judgment Act (UDJA) may be used to clarify the meaning of statutes. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

19. Administrative Law and Procedure ⇨228.1

An administrative agency has exclusive jurisdiction when the legislature gives the agency the sole authority to make an initial determination in a dispute.

20. Administrative Law and Procedure ⇨228.1

An agency has exclusive jurisdiction if there is a pervasive regulatory scheme that indicates the legislature wanted the regulatory process to be the exclusive manner of resolving problems the regulation addresses.

21. Administrative Law and Procedure ⇨228.1

Statutory interpretation is used to determine if an administrative agency has exclusive jurisdiction.

22. Appeal and Error ⇨893(1)

In determining whether an agency has exclusive jurisdiction, an appellate court uses a de novo standard of review.

23. Constitutional Law ⇨72

Commission on Environmental Quality did not have exclusive jurisdiction over issues involving water district's boundaries, its authority to extend those boundaries, and its authority to provide water service beyond those boundaries, and thus trial court had subject matter jurisdiction over declaratory judgment action filed by city and river authority that raised those issues; resolution of issues required interpretation of water district's enabling act, which was an inherently judicial function, and no statute gave Commission exclusive authority to interpret enabling act.

24. Courts ⇨35, 155

Trial courts have general jurisdiction; unless a contrary showing is made, trial courts presumably have subject matter jurisdiction over a dispute.

25. Administrative Law and Procedure ⇨305

Administrative agencies are not presumed to have the authority to resolve a dispute and may only exercise powers that are given to them by statute by express and clear language.

26. Statutes ⇨176

Courts have the authority to determine what a statute means.

27. Statutes ⇨176

Statutory construction is a question of law and for the court to decide.

28. Constitutional Law ⇨67, 72

Construing a statute is an inherently judicial function, and courts are not deprived of their jurisdiction unless a statute explicitly grants an administrative agency exclusive jurisdiction.

29. Waters and Water Courses ⇨183.5

Commission on Environmental Quality did not have primary jurisdiction over declaratory judgment action filed by city and

river authority that sought a determination as to water district's boundaries, its authority to extend those boundaries, and its authority to provide water service beyond those boundaries; action required interpretation of water district's enabling act, and Commission had no special expertise in determining what statute meant.

30. Administrative Law and Procedure ⌘228.1

Primary jurisdiction is a prudential doctrine.

31. Administrative Law and Procedure ⌘228.1

Primary jurisdiction occurs when both the courts and administrative agencies have the authority to make initial determinations in a dispute.

32. Administrative Law and Procedure ⌘228.1

Under doctrine of primary jurisdiction, if a trial court and an administrative agency have the authority to decide an initial issue, trial courts should allow an administrative agency to make the decision when: (1) an agency has experts trained in handling the issue, and (2) great benefit is derived from an agency interpreting its laws, rules, and regulations.

33. Declaratory Judgment ⌘302.1

River authority was a "person" entitled to bring a cause of action under the Uniform Declaratory Judgment Act (UDJA); UDJA defined person to include a "corporation of any character," and river authority's enabling act declared it to be a "governmental agency and body politic and corporate." V.T.C.A., Civil Practice & Remedies Code §§ 37.001, 37.004(a).

Paul M. Terrill, Hazen & Terrill, E. Lee Parsley, E. Lee Parsley, P.C., Austin, for Appellant.

Jonathan H. Hull, Reagan, Burrus, Dirksen, Lamón & Bluntzer, P.C., New Braunfels, for City of Boerne and City of Fair Oaks Ranch.

Molly Cagle, David P. Blanke, Spencer F. Smith, Vinson & Elkins, LLP, Roger P. Nevola, Law Offices of Roger P. Nevola, Austin, for Guadalupe-Blanco River Authority.

C. Robert Heath, Sydney W. Falk Jr., Bruce E. Wasinger, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, LLP, Austin, Frank J. Garza, Davidson & Troilo, P.C., San Antonio, for City of Bulverde, Texas.

Before Justices KIDD, PATTERSON and PURYEAR.

OPINION

MACK KIDD, Justice.

The City of Bulverde ("Bulverde") and the Guadalupe-Blanco River Authority ("GBRA") sought declaratory judgments in the Comal County District Court. They asked the trial court to determine Bexar Metropolitan Water District's ("BexarMet") boundaries, to determine if BexarMet can provide water-utility services outside its boundaries, and to determine whether BexarMet has the authority to expand its territory outside of the boundaries defined in BexarMet's enabling act. In response, BexarMet filed a plea to the jurisdiction arguing that the district court did not have subject-matter jurisdiction over the controversy in question. The district court denied BexarMet's plea to the jurisdiction, and BexarMet appeals that decision. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a) (West Supp.2004-05). On appeal, BexarMet contends that the Texas Water Code prohibits Bulverde and GBRA

from contesting its boundaries, that Bulverde and GBRA do not have standing to file the claims in question, that the Texas Commission on Environmental Quality ("the Commission") has exclusive and primary jurisdiction over the claims in question, and that GBRA cannot bring a cause of action under the Uniform Declaratory Judgment Act ("UDJA") because it does not qualify as a "person" entitled to bring the suit. We will affirm the district court's denial of BexarMet's plea to the jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

[1, 2] Water districts are created by statute and can only exercise powers clearly given to them by the legislature. *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 135 Tex. 280, 142 S.W.2d 945, 948 (1940). The boundaries of water districts are defined by statute. See *Harris County Water Control & Imp. Dist. No. 58 v. City of Houston*, 357 S.W.2d 789, 796 (Tex.Civ.App.-Houston 1962, writ ref'd n.r.e.).

Some water-district enabling acts provide that water districts may sell or distribute water only *within* their boundaries. See, e.g., Act of May 29, 1965, 59th Leg., R.S., ch. 557, § 2(a), 1965 Tex. Gen. Laws 1207, 1208 (amending Act of May 20, 1937, 45th Leg., R.S., ch. 454, § 2(a), 1937 Tex. Gen. Laws 1128, 1128) (District may "sell ... within the boundaries of the District"). Other enabling acts allow a water district to distribute or sell water *within* or *without* the district's boundaries. See, e.g., Act of May 4, 1961, 57th Leg., R.S., ch. 114, § 5(f), 1961 Tex. Gen. Laws 217, 220 (Dis-

trict may "sell ... water within or without the boundaries of the district").

In 1947, the Texas Attorney General released an opinion stating that a specific water district could not sell water outside of its boundaries because its enabling statute limited sale of water to *within* the district. Op. Tex. Att'y Gen. No. V-319 (1947). The attorney general concluded that if a district was not authorized to sell or distribute water outside of its boundaries, the legislature must have intended that the water only be sold or distributed *within* the water district's boundaries. *Id.*

BexarMet was created in 1945 and was given the authority of a "governmental agency, a body politic and corporate, and a municipal corporation." Act of May 9, 1945, 49th Leg., R.S., ch. 306, § 2, 1945 Tex. Gen. Laws 491, 492 ("BexarMet Act"). BexarMet's original enabling act stated that BexarMet's district was within Bexar County, Texas. *Id.* § 5, 1945 Tex. Gen. Laws at 494. The original enabling act allowed BexarMet to annex territory and expand its boundaries. *Id.* § 6, 1945 Tex. Gen. Laws at 496. In addition, BexarMet's boundaries were extended automatically to any territory that was annexed into the City of San Antonio. *Id.* § 6a, 1945 Tex. Gen. Laws at 497.

On several occasions, BexarMet has expanded its territory to areas outside the territory defined in its original enabling act. However, rather than annexing territory as provided for in the original enabling act, BexarMet has, over the years, enlarged its territory by obtaining certificates of convenience and necessity ("CCNs") from the Commission¹ in order to serve the water needs of cities and rural areas throughout the state.²

1. For convenience, we will refer to both the Commission and its predecessor, the Texas Natural Resource Conservation Commission, as the Commission.

2. BexarMet, through the CCN process, has expanded its service to areas in Atascosa, Comal, and Medina counties.

The controversy in question began in 2000 when BexarMet and Bulverde both filed applications with the Commission asking for a CCN to provide water service to part of southwestern Comal County. In its application, Bulverde informed the Commission that in order to fulfill its water service requirements under the CCN, it would be relying on an agreement with GBRA to provide Bulverde with water.

The competing applications of BexarMet and Bulverde were referred to the State Office of Administrative Hearings. The administrative law judge recommended that BexarMet's CCN application be granted and Bulverde's be denied. Bulverde and GBRA objected to the proposal for decision, and the Commissioners reversed the decision of the administrative law judge and awarded CCN No. 12864 to Bulverde. BexarMet appealed the decision of the Commissioners to the Travis County District Court.

In 2003, after the Commissioners awarded the CCN to Bulverde, the legislature passed Senate Bill 1494, which amended BexarMet's enabling act. Act of May 28, 2003, 78th Leg., R.S., ch. 375, 2003 Tex. Gen. Laws 1593 ("BexarMet Amendment") (amending BexarMet Act, 1945 Tex. Gen. Laws 491). The amendment added the words "within the District" to statutory language describing BexarMet's ability to develop, transport, deliver, distribute, store, and treat water. BexarMet Amendment, § 2, 2003 Tex. Gen. Laws at 1593 (amending BexarMet Act § 3(a), 1945 Tex. Gen. Laws at 492). The amendment also added two new provisions that granted BexarMet new powers, but the language limited the authority to act to "within" BexarMet's district. BexarMet Amendment, § 2, 2003 Tex. Gen. Laws at 1595. In addition, the amendment defined BexarMet's boundaries. The boundaries included not only Bexar County but also the

territory that had been certificated to BexarMet in prior CCNs issued by the Commission and described in CCN Nos. 10675, 12759, and 12760. BexarMet Amendment, § 3, 2003 Tex. Gen. Laws at 1596. When Senate Bill 1494 passed, CCN Nos. 10675, 12759, and 12760 identified areas in Bexar, Comal, Medina, and Atascosa counties as part of BexarMet's territory.

Bulverde and GBRA assert that the addition of "within" to the enabling act provisions evidences an intention by the legislature to limit the activities of BexarMet to within its own territory. Bulverde and GBRA also insist that, after the amendment inserted *within* into BexarMet's enabling act, BexarMet does not have the authority to provide water service to areas outside of its boundaries including the areas in Comal County that were certificated to Bulverde by CCN No. 12864. Finally, Bulverde and GBRA contend that the amendment limits BexarMet's boundaries to those areas described in the amended enabling act and prevents BexarMet from expanding its boundaries.

In response, BexarMet asserts that the amendment to its enabling act does not prevent it from expanding its service areas or its boundaries through CCNs granted by the Commission. BexarMet concedes that the amendment repealed sections 6 and 6a of the original enabling act, which had given BexarMet the power to annex territory and had automatically extended BexarMet's boundaries when San Antonio's city limits were extended, but contends that the amendment does not prevent BexarMet from annexing territory through CCNs issued by the Commission. See BexarMet Amendment, § 5(b), 2003 Tex. Gen. Laws at 1596 (amending BexarMet Act, §§ 6, 6a, 1945 Tex. Gen. Laws at 496). As proof of this assertion, BexarMet points to a letter written by the sponsor of Senate Bill 1494 to the Commission's exec-

utive director stating that Senate Bill 1494 repealed portions of BexarMet's enabling act that were inconsistent with a federal court decision regarding voting rights in BexarMet elections, but it states that Senate Bill 1494 did not restrict BexarMet's ability to expand its boundaries or obtain CCNs.

After the legislation was enacted, Bulverde and GBRA filed suit in Comal County District Court in order to prevent BexarMet from expanding into Comal County. In their suit, Bulverde and GBRA asked for declaratory judgments regarding BexarMet's statutory boundaries, BexarMet's authority to annex territory outside its statutory boundaries, and BexarMet's authority to provide water-utility services outside of its statutory boundaries. Specifically Bulverde and GBRA wanted the court to declare the following: (1) BexarMet's boundaries include only the territory listed in its current enabling statute, (2) BexarMet does not have the authority to annex territory outside of its boundaries, (3) BexarMet cannot provide water-utility services to areas outside its boundaries including areas in Comal County not already awarded to BexarMet, and (4) Bulverde, not BexarMet, has the exclusive right to provide water-utility service to the areas in Comal County listed in CCN No. 12864.

In response, BexarMet filed a motion to transfer venue to Travis County, a plea to the jurisdiction, and a plea in abatement. The district court denied all of BexarMet's requests. BexarMet files this interlocutory appeal from the denial of its plea to the jurisdiction.

STANDARD OF REVIEW

[3, 4] A person may file an interlocutory appeal from either the granting or the

3. Section 100.001 of the Texas Civil Practice and Remedies Code includes agencies and water districts as part of the definition of

denial of a plea to the jurisdiction brought by a governmental unit.³ Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(8). A plea to the jurisdiction contests the trial court's authority to adjudicate the subject matter of the cause of action. *Texas Dep't. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). In reviewing the grant or denial of a plea to the jurisdiction, we do not review the merits of the case. *Chocolate Bayou Water Co. and Sand Supply v. Texas Natural Res. Conservation Com'n*, 124 S.W.3d 844, 849 (Tex.App.-Austin 2003, pet. denied) (citing *Rylander v. Caldwell*, 23 S.W.3d 132, 135 (Tex.App.-Austin 2000, no pet.)).

[5] Because the statute authorizing interlocutory appeals is a narrow exception to the general rule that only final judgments and orders are appealable, we must give it a strict construction. See *City of Austin v. L.S. Ranch, Ltd.*, 970 S.W.2d 750, 753 (Tex.App.-Austin 1998, no pet.); *America Online, Inc. v. Williams*, 958 S.W.2d 268, 271 (Tex.App.-Houston [14th Dist.] 1997, no pet.); *Tober v. Turner of Tex., Inc.*, 668 S.W.2d 831, 835 (Tex.App.-Austin 1984, no writ). Thus, we will limit our discussion to the narrow issue that is before us, the question of whether the trial court erred in denying BexarMet's plea to the jurisdiction.

[6–8] We review a district court's ruling on a plea to the jurisdiction de novo. *State ex rel. Dep't. of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex.2002). Our task is to take the facts pled in the petitions as true and determine if subject-matter jurisdiction is present. *City of Mission v. Cantu*, 89 S.W.3d 795, 800 (Tex.App.-Corpus Christi 2002, no

governmental unit. Tex. Civ. Prac. & Rem. Code Ann. § 100.001 (West Supp.2004–05).

pét.). Unless the face of the petition affirmatively demonstrates a lack of jurisdiction, the allegations in the petition will be liberally construed in favor of jurisdiction. *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 266 (Tex.App.-Austin 2002, no pet.).

DISCUSSION

BexarMet contends that the Comal County court does not have jurisdiction to hear Bulverde's and GBRA's claims. On appeal, BexarMet raises the following claims: (1) only the attorney general, not Bulverde or GBRA, may file a suit contesting a water district's boundaries; (2) Bulverde and GBRA lack standing to file this lawsuit; (3) the Commission has primary or exclusive jurisdiction over the subject matter of this lawsuit; and (4) GBRA does not qualify as a person entitled to bring this suit under the UDJA. We will address BexarMet's claims in order.

Only the Attorney General may File Suit

[9] In its first issue on appeal, BexarMet contends that section 49.066 of the Texas Water Code prohibits Bulverde's and GBRA's suit because the provision prohibits third-party challenges to a water district's boundaries. See Tex. Water Code Ann. § 49.066 (West 2000). BexarMet asserts that challenges to a water district's boundaries can only be brought by the attorney general in a quo warranto proceeding.

[10] A writ of quo warranto is an ancient common-law writ that gave the king an action against a person who claimed or usurped any office, franchise, or liberty, to inquire by what authority that person supported the claim to hold office. *State ex rel. City of Colleyville v. City of Hurst*, 519 S.W.2d 698, 700 (Tex.Civ.App.-Fort Worth 1975, writ ref'd n.r.e.). In the modern context, the state may use a quo warranto

action to challenge the authority to engage in certain practices specifically enumerated by statute. See Tex. Civ. Prac. & Rem. Code Ann. § 66.001 (West 1997). A quo warranto proceeding may be instituted by the attorney general or by a district or county attorney. See Tex. Const. art. IV, § 22; Tex. Civ. Prac. & Rem. Code Ann. § 66.002 (West 1997).

Section 49.066 states "no suit may be instituted in any court of this state contesting: (1) the validity of the creation and boundaries of a district created under this code." Tex. Water Code Ann. § 49.066(d). However, the water code does allow the attorney general to file a suit contesting either the validity of the creation of a water district or the validity of the boundaries of a water district enacted by the legislature. BexarMet claims that the suit filed by Bulverde and GBRA impermissibly contests BexarMet's boundaries. To support this assertion, BexarMet points to language in the trial court pleadings in which Bulverde and GBRA describe their suit as one involving a dispute over BexarMet's boundaries. BexarMet also points to language in Bulverde's and GBRA's amended pleadings and motions that repeatedly refer to BexarMet's boundaries.

However, we do not interpret section 49.066 to prohibit all third-party suits involving a water district's boundaries. The third-party prohibition only applies to claims attacking the *validity* of a legislative act creating a water district's boundaries. *Id.*; see *Walling v. North Cent. Tex. Mun. Water Auth.*, 162 Tex. 527, 348 S.W.2d 532 (Tex.1961) (writ of quo warranto appropriate remedy when alleging statute not followed when establishing territory limits); *La Salle County Water Improvement Dist. No. 1 v. Guinn*, 40 S.W.2d 892 (Tex.Civ.App.-San Antonio 1931, writ ref'd) (writ of quo warranto

required to contest legality of 85,000 acre water district reduced from 200,000 acres).

The third-party prohibition does not apply in this case because Bulverde and GBRA are not attacking the *validity* of BexarMet's boundaries as defined by the legislature. Here, Bulverde and GBRA are asking the district court to determine what BexarMet's boundaries are after Senate Bill 1494 amended BexarMet's enabling statute. In addition, Bulverde and GBRA are seeking a court declaration determining whether BexarMet has the power to both expand its boundaries through a CCN and provide water-utility services outside its boundaries under BexarMet's amended enabling act. Requesting a declaration regarding the location of a district's boundaries and the district's authority to provide service and expand its boundaries is not the same as challenging the validity of those boundaries. Such determinations are not prohibited by section 49.066.

Because section 49.066 of the Texas Water Code does not prohibit Bulverde and GBRA from filing their claims before the Comal County District Court, we overrule BexarMet's first issue.

Standing

In its second issue on appeal, BexarMet urges that Bulverde and GBRA lack standing to file the suit in question for the following three reasons: (1) only the attorney general can file boundary contests; (2) competitors of BexarMet cannot file suit to limit BexarMet's ability to act; and (3) Bulverde and GBRA do not have an underlying cause of action necessary to confer standing for a UDJA claim.

As for point number one, we have already explained that a quo warranto proceeding is not necessary to pursue Bulverde's and GBRA's claims and that it is not necessary for the attorney general to file these claims because Bulverde and

GBRA are not attacking the validity of the creation of BexarMet's boundaries.

[11] As for BexarMet's second point, although there are cases suggesting that a competitor, without more, lacks standing to challenge the actions of its competitor, this prohibition does not apply here. See, e.g., *English v. Landa Motor Lines*, 166 S.W.2d 721, 723 (Tex.Civ.App.—Austin 1942, writ ref'd w.o.m.). BexarMet contends that, as competitors, Bulverde and GBRA may not challenge BexarMet's actions because only parties interested in a corporation or the state may challenge a corporation's actions. See *Southwestern Pub. Serv. Co. v. Public Util. Comm'n*, 578 S.W.2d 507, 513 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.) (Southwestern, as a competitor, lacked justiciable interest to challenge competitors actions; "whether a corporation has acted in excess of its lawful powers can be raised only by a party interested in the corporation or in a direct proceeding brought by the state."); *Mulcahy v. Houston Steel Drum Co.*, 402 S.W.2d 817, 819-20 (Tex.Civ.App.—Austin 1966, no writ) (attorney general can file quo warranto action to prevent corporation from engaging in behavior prohibited by law).

However, in this case, GBRA is not merely a competitor of BexarMet. BexarMet has filed with the Commission a petition to compel raw water commitment from GBRA. The petition would require GBRA to provide BexarMet with 3,000 acre-feet of water per year. GBRA, therefore, has a larger stake in the outcome of this case than as a mere competitor.

In addition, Bulverde and GBRA are claiming that BexarMet is acting beyond the authority granted to it by statute. Bulverde and GBRA insist that after Senate Bill 1494 amended BexarMet's enabling act, BexarMet lacks the authority to

annex territory outside its boundaries and does not have the authority to provide or seek to provide retail water-utility service to areas outside its boundaries including the areas certificated to Bulverde.

[12, 13] If a water district acts beyond its statutory powers, its actions are void. *Tri-City*, 142 S.W.2d at 947; see also *Mobil Oil Corp. v. Matagorda County Drainage Dist. No. 3*, 597 S.W.2d 910, 913 (Tex. 1980) (holding that drainage district's attempt to annex lands was beyond its statutory power and therefore null). If a governmental authority's actions are void, as opposed to voidable, the actions can be challenged by affected persons. See *City of Irving v. Callaway*, 363 S.W.2d 832, 834 (Tex.Civ.App.-Dallas 1962, writ ref'd n.r.e.) (quo warranto proceeding necessary where actions are voidable, but quo warranto proceeding not necessary and claim may be brought by private citizens affected by action when annexation ordinance attacked on grounds alleging action void).

Bulverde and GBRA seek declarations that actions undertaken by BexarMet are beyond the scope of its statutory authority and, therefore, void. In addition, both Bulverde and GBRA are parties affected by the actions of BexarMet. Bulverde and BexarMet are seeking to provide water-utility services in the same area, while GBRA could be forced to provide water to BexarMet. Because Bulverde and GBRA are alleging that BexarMet's actions are beyond the scope of its statutory authority and because both are parties affected by the actions of BexarMet, Bulverde and GBRA have standing to seek a declaratory judgment.

[14] In its third standing point, BexarMet contends that Bulverde and GBRA lack standing to bring suit against BexarMet because they do not have an underlying common-law, statutory, or constitutional cause of action. BexarMet asserts that

the UDJA does not enlarge a court's jurisdiction and that a claimant pursuing a declaratory judgment must have an underlying cause of action.

[15] However, suits under the UDJA are not limited to cases where the parties have a cause of action separate and apart from the UDJA. *City of Waco v. Texas Natural Res. Conservation Comm'n*, 83 S.W.3d 169, 177 (Tex.App.-Austin 2002, pet. denied). The UDJA provides a basis for a claimant to obtain a declaration of rights, status, or other legal relations under a writing or statute. See Tex. Civ. Prac. & Rem.Code Ann. § 37.004 (West 1997); *City of Waco*, 83 S.W.3d at 177. The legislature intended the UDJA to be remedial, to settle and afford relief from uncertainty and insecurity with respect to rights, and to be liberally construed. Tex. Civ. Prac. & Rem.Code Ann. § 37.002 (West 1997); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex.1995); *City of Waco*, 83 S.W.3d at 177.

[16-18] Declaratory-judgment actions are intended to determine the rights of parties when a controversy has arisen, before any wrong has actually been committed, and are preventative in nature. *Montemayor v. City of San Antonio Fire Dept.*, 985 S.W.2d 549, 551 (Tex.App.-San Antonio 1998, pet. denied). Historically, challengers to improper governmental action have sought declaratory relief. *Frasier v. Yanes*, 9 S.W.3d 422, 427 (Tex.App.-Austin 1999, no pet.); see *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex.1996). A person seeking a declaratory judgment need not have incurred actual injury. *City of Waco*, 83 S.W.3d at 175; *Texas Dept. of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex.App.-Austin 2000, pet. denied). The UDJA may be used to clarify the meaning of statutes. *Frasier*, 9 S.W.3d at 427. Courts have also issued

declaratory judgments construing a statute before the statute is violated. See *The Pea Picker, Inc. v. Reagan*, 632 S.W.2d 674, 677 (Tex.App.—Tyler 1982, writ ref'd n.r.e.) (trial court had power to construe Open Meetings Act and determine whether notice must be given and when meeting is required to be open).

Bulverde and GBRA have standing under the UDJA and have the right to have the courts interpret BexarMet's amended enabling act to determine what BexarMet's boundaries are, whether BexarMet can expand its territory through CCNs, and whether BexarMet has the authority to provide water-utility service outside its boundaries. See *Frasier*, 9 S.W.3d at 427; *Pea Picker*, 632 S.W.2d at 677. The allegations of Bulverde and GBRA are sufficient to confer jurisdiction on the district court.

BexarMet also insists that boundary disputes cannot be litigated under the UDJA. See *Martin v. Amerman*, 133 S.W.3d 262, 267–68 (Tex.2004). However, as previously discussed, Bulverde and GBRA are not disputing the validity of BexarMet's boundaries, and therefore, this prohibition does not deny Bulverde and GBRA standing. Because we have concluded that Bulverde and GBRA have standing to file their claims, we overrule BexarMet's second issue.

Whether the Commission has Exclusive or Primary Jurisdiction

[19–22] In its next issue on appeal, BexarMet contends that the Commission has exclusive jurisdiction or primary jurisdiction over the issues raised in this appeal. An administrative agency has exclusive jurisdiction when the legislature gives the agency the sole authority to make an initial determination in a dispute. *Subaru of Am., Inc. v. David McDavid Nissan,*

Inc., 84 S.W.3d 212, 221 (Tex.2002) (citing *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex.2000)). An agency has exclusive jurisdiction if there is a pervasive regulatory scheme that indicates the legislature wanted the regulatory process to be the exclusive manner of resolving problems the regulation addresses. *Id.* Statutory interpretation is used to determine if an administrative agency has exclusive jurisdiction. *Id.* In determining whether an agency has exclusive jurisdiction, an appellate court uses a de novo standard. *Id.* at 222.

[23] BexarMet insists that the legislature created a pervasive regulatory scheme for managing surface water in Texas and gave the Commission exclusive jurisdiction to decide the issues raised in this case and that Bulverde and GBRA must exhaust all administrative remedies available to them before seeking judicial review. See *id.* at 221. BexarMet contends that because Bulverde and GBRA have not exhausted all administrative remedies available, the trial court does not have subject-matter jurisdiction to hear this case. See *id.* (“Typically, if an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review of the agency’s action,” citing *Cash Am.*, 35 S.W.3d at 15).

However, the relevant issues in this case involve a determination of what BexarMet’s boundaries are, whether BexarMet may provide water-utility service outside its boundaries, and whether BexarMet may expand its territory through CCNs issued by the Commission now that Senate Bill 1494 has passed. Unlike other cases finding an agency has exclusive jurisdiction,⁴ the determination of these issues will depend on the construction of a statute.

4. See *Howell v. Texas Workers’ Comp. Comm’n*, 143 S.W.3d 416, 435 (Tex.App.—Aus-

tin 2004, no pet.) (finding Workers’ Compensation Commission had “sole authority to

[24, 25] Trial courts have general jurisdiction. *Id.* at 220. Unless a contrary showing is made, trial courts presumably have subject matter jurisdiction over a dispute. *Id.* Administrative agencies, by contrast, are not presumed to have the authority to resolve a dispute and may only exercise powers that are given to them by statute by express and clear language. *Id.*

[26-28] Courts have the authority to determine what a statute means. *Amarillo Indep. Sch. Dist. v. Meno*, 854 S.W.2d 950, 955 (Tex.App.-Austin 1993, writ denied). Statutory construction is a question of law and for the court to decide. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex.1989). Construing a statute is an inherently judicial function, and courts are not deprived of their jurisdiction unless a statute explicitly grants an administrative agency exclusive jurisdiction. *Public Utils. Bd. of City of Brownsville v. Central Power & Light Co.*, 587 S.W.2d 782, 788 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd n.r.e.).⁵

In this case, there is no statute giving the Commission the exclusive authority to determine what a water district's enabling statute means.⁶ The Comal County District Court is not deprived of jurisdiction to determine what BexarMet's boundaries are under its amended enabling act, whether BexarMet may expand its territo-

ry by obtaining CCNs, and whether BexarMet may provide water services outside the boundaries established by its enabling statute.

[29-32] BexarMet also asserts that the Commission has primary jurisdiction over the claims in question. Primary jurisdiction is a prudential doctrine. *Subaru*, 84 S.W.3d at 220. Primary jurisdiction occurs when both the courts and administrative agencies have the authority to make initial determinations in a dispute. *Id.* at 221. If a trial court and an administrative agency have the authority to decide an initial issue, trial courts should allow an administrative agency to make the decision when: (1) an agency has experts trained in handling the issue; and (2) great benefit is derived from an agency interpreting its laws, rules, and regulations. *Id.*

Statutory interpretation or construction is not something that needs to be left to the Commission to decide. The Commission has no expertise that is greater than the courts in determining what a statute means. The Commission has neither exclusive jurisdiction nor primary jurisdiction over the issues raised in this case. We overrule BexarMet's third issue on appeal.

Person under the UDJA

[33] In its final claim of error, BexarMet contends that GBRA cannot bring a

make an initial determination of a medical fee or a medical necessity dispute"); *Burgess v. Gallery Model Homes, Inc.*, 101 S.W.3d 550, 558 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (holding that provisions of the tax code provide "the exclusive means of obtaining a refund on an improperly collected sales tax").

5. See *In re Entergy Corp.*, 142 S.W.3d 316, 322-23 (Tex.2004) (court found Public Utility Commission was given exclusive jurisdiction because Public Utility Regulatory Act stated its purpose was to "establish a comprehensive and adequate regulatory system" and stated "the Commission has exclusive original juris-

diction over the rates, operations, and services of an electric utility," citing Tex. Util. Code Ann. §§ 31.001(a), 32.001(a) (West 1998)).

6. See *Williams v. Houston Firemen's Relief and Ret. Fund*, 121 S.W.3d 415, 427 (Tex. App.-Houston [1st Dist.] 2003, no pet.) (statute gave agency power to interpret its organic statute, which gave agency exclusive jurisdiction); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 223 (Tex.2002) (vehicle board has exclusive jurisdiction when statute said board had exclusive jurisdiction).

cause of action under the UDJA because it does not qualify as a person entitled to bring a UDJA claim. The UDJA creates a remedy for “persons . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise.” Tex. Civ. Prac. & Rem.Code Ann. § 37.004(a) (West 1997).

BexarMet asserts that if the UDJA had not defined a “person” in its statute, the Code Construction Act’s definition of a “person” would apply. Because the Code Construction Act’s definition of a person includes governmental entities and political subdivisions of the state, BexarMet argues GBRA would be a “person” under the Code Construction Act. Tex. Gov’t Code Ann. § 311.005(2) (West 1998); *see also City of LaPorte v. Barfield*, 898 S.W.2d 288, 294 (Tex.1995) (under Code Construction Act, person includes governmental entities). However, BexarMet insists that the definition of a “person” under the UDJA is narrower than the definition given under the Code Construction Act and does not include upper level government entities like GBRA.

The definition of a person under the UDJA includes a “corporation of any character.” Tex. Civ. Prac. & Rem.Code Ann. § 37.001 (West 1997). GBRA’s enabling act declares that GBRA is “a governmental agency and body politic and corporate.” Act of Oct. 12, 1933, 43d Leg., 1st C.S., ch. 75, § 1, 1933 Tex. Gen. Laws 198, 198. Because GBRA is a corporation, it qualifies as a person under the UDJA. Therefore, GBRA has a cause of action under the UDJA, and we overrule BexarMet’s final issue on appeal.

CONCLUSION

Because we overrule all of BexarMet’s issues on appeal, we affirm the district

court’s denial of BexarMet’s plea to the jurisdiction.



BUDDY GREGG MOTOR HOMES, INC.//Cross-Appellant, Marathon Coach, Inc., d/b/a Marathon Coach of Texas, Appellant,

v.

MOTOR VEHICLE BOARD OF The TEXAS DEPARTMENT OF TRANSPORTATION and Marathon Coach, Inc., d/b/a Marathon Coach of Texas//Cross-Appellees, Motor Vehicle Board of the Texas Department of Transportation and Buddy Gregg Motor Homes, Inc., Appellees.

No. 03-03-00543-CV.

Court of Appeals of Texas,
Austin.

Dec. 16, 2004.

Background: Competitor challenged issuance of franchised dealer’s license and converter’s license to licensee who transformed hollow bus shells into luxury motor coaches, alleging licensee was actually a manufacturer and therefore was precluded under Texas motor vehicle regulatory laws from holding both manufacturer’s license and franchised dealer’s license. The Motor Vehicle Board of Texas Department of Transportation determined that licensee was a motor home manufacturer, but gave licensee 12 months to restructure its licenses, and declined competitor’s request for cease and desist order. Licensee and competitor sought judicial review. The 345th Judicial District Court, Travis County, Lora J. Livingston, J., consolidated the

Attachment B
Excerpt from Bitterblue's Original Motion to Dismiss

Bitterblue's original Motion, in relevant part, stated as follows:

"The Properties proposed to be included within BMWD's CCN and served by BMWD pursuant to the pending Application are not, and can never be, within BMWD's boundaries and, therefore, cannot legally be served by BMWD. The legislative enactment creating and governing BMWD and granting it the power to provide retail water service simply does not authorize BMWD to provide retail water service to the Properties. See Sec. 3 and 5A, as amended, of BMWD's statutory enabling legislation attached as Exhibit D. These Sections specifically provide that BMWD may distribute water "within the District" (Sec. 3 (a)) and that BMWD's boundaries are limited to its CCN area in effect at the time of enactment of the 2003 amendment (Sec. 5A (a) and (b)).

BMWD may argue that it has authority to provide retail water service to areas outside its boundaries pursuant to Sec. 49.215, Texas Water Code. Such an argument is without merit. Chapter 49, Texas Water Code, is a general law applying to all water districts, except as otherwise provided therein. The problem with BMWD's argument that Sec. 49.215 authorizes it to provide retail water service outside of its boundaries is that Sec. 49.002 states:

(a) ...[T]his chapter applies to all general and special law districts to the extent that the provisions of this chapter do not directly conflict with a provision in any chapter of this Code or any Act creating or affecting a special law district. In the event of such a conflict, the specific provisions in such other chapter or Act shall control.

...

BMWD is a special law district. And, Sec. 3 (a) and 5A, as amended, of BMWD's enabling legislation (see Exhibit D attached—SB 1494, Texas Legislature, 2003, effective June 18, 2003) specifically provides that BMWD's retail water service area is limited to BMWD's CCN service area in 2003 when that legislation was passed, and BMWD's service area did not include the Properties at that time. Further, Sec.5 (b) and (c) of SB 1494 (the 2003 amendment to BMWD's enabling legislation attached as Exhibit D) is of no help to BMWD. That Section provides that the 2003 amendment does not apply to a pending CCN application of BMWD at the TCEQ "that has been referred to [SOAH] before the effective date of this Act" However, again, no application for a CCN was filed by BMWD and pending at SOAH as of the effective of the 2003 amendment involving the Properties. The current Application was not referred to SOAH until June 20, 2003, two days after that deadline. Accordingly, BMWD's own enabling legislation makes it clear that BMWD's retail water service area does not include the Properties and cannot include the Properties unless they are annexed into BMWD's boundaries. That will not happen."

Exhibit C

NO. _____

**CITY OF BULVERDE, TEXAS, and
GUADALUPE-BLANCO RIVER
AUTHORITY,**

Plaintiffs,

v.

**BEXAR METROPOLITAN WATER
DISTRICT,**

Defendant.

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IN THE DISTRICT COURT OF

COMAL COUNTY, TEXAS

_____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

Plaintiffs City of Bulverde, Texas ("Bulverde" or the "City") and Guadalupe-Blanco River Authority ("GBRA") file this plaintiffs' original petition and respectfully show the court as follows:

I.

NATURE OF THE SUIT

1. This is a suit brought under the Texas Declaratory Judgment Act ("Act"), Chapter 37 of the Texas Civil Practice and Remedies Code, seeking declaratory relief against Defendant Bexar Metropolitan Water District (the "District" or, as it refers to itself, "BexarMet"). Plaintiffs seek declarations that certain past and threatened actions of BexarMet exceed its statutory authority.

II.

JURISDICTION AND VENUE

2. BexarMet is a governmental agency, a body politic and corporate created by act of the Texas Legislature under the authority of article 16, section 59 of the Texas Constitution.

BexarMet is thus a "person" within the meaning of the Texas Declaratory Judgment Act, and so is amenable to suit under that Act. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004. Plaintiffs are each "persons" under the Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.001, and so may maintain this action, which seeks declarations regarding legal rights and powers of BexarMet, the exercise of which by BexarMet directly affect Plaintiffs and Plaintiffs' legal rights. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a). This court has jurisdiction to hear these complaints. TEX. CIV. PRAC. & REM. CODE ANN. § 37.003.

3. Venue is proper in this court in that all or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred, and will continue to occur, in Comal County. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1).

III.

PARTIES

4. Defendant BexarMet is a conservation district created in 1945 by act of the Texas Legislature under the authority of article 16, section 59 of the Texas Constitution. It operates and derives its authority to act from its organic statute, which will be discussed in greater detail below. BexarMet may be served by service on its General Manager – Chief Executive Officer, Thomas C. Moreno, at the BexarMet offices at 2047 West Malone, San Antonio, Texas, 78225.

5. Plaintiff Bulverde is a Texas general law city, with city offices located at 30070 U.S. Highway 281 North, Suite 236, Bulverde, Texas 78163.

6. Plaintiff GBRA is a conservation and reclamation district created by act of the Texas Legislature under the authority of article 16, section 59 of the Texas Constitution. GBRA's administrative offices are located at 933 East Court Street, Seguin, Texas 78155.

IV.

BACKGROUND

BexarMet's Enabling Act and Territory

7. The 1945 act creating BexarMet (Act of May 1, 1945, 49th Leg., Reg. Sess., ch. 306, 1945 Gen. Laws 456) was amended three times prior to 2003: in 1953 (Act of April 21, 1953, 53rd Leg., Reg. Sess., ch. 66, 1953 Gen. Laws 100); in 1957 (Act of April 3, 1957, 55th Leg., Reg. Sess., ch. 40, 1957 Gen. Laws 86); and in 1997 (Act of May 15, 1997, 75th Leg., Reg. Sess., ch. 91, 1997 Gen. Laws 178). The 1945 Act, as amended prior to 2003, shall be referred to hereafter as the "Pre-2003 Enabling Act."

8. A further amendment was enacted in 2003 (Act of June 18, 2003, 78th Leg., Reg. Sess., ch. 375, 2003 Gen. Laws 1593 ("SB 1494")). BexarMet's organic statute following this most recent amendment shall hereafter be referred to as "BexarMet's Current Enabling Act."

9. BexarMet today provides retail water service to customers within four (4) Texas Counties: Bexar County, Comal County, Medina County and Atascosa County.

10. In its Pre-2003 Enabling Act, the territory of BexarMet is defined geographically by a metes and bounds description to encompass an area within Bexar County. *See* Pre-2003 Enabling Act § 5. This area is believed to be the territory of the City of San Antonio at the time BexarMet was created in 1945. The Pre-2003 Enabling Act also vested the District with the power to expand through annexation.

Under the Pre-2003 Enabling Act, BexarMet's Service Was Confined to Territory of the District

11. The Pre-2003 Enabling Act gave BexarMet authority over water and water quality only inside the District's boundaries. Pre-2003 Enabling Act § 3.

12. The Pre-2003 Enabling Act gave authority to BexarMet to provide retail water utility service only within District territory. Authority was given to “conserve and distribute waters essential for domestic and other *uses by the inhabitants of the District*, including necessary water supply for cities and towns situated *within the District*.” Pre-2003 Enabling Act § 3(c) (emphasis added).

1996 Federal Voting Rights Act Lawsuit

13. In 1996, BexarMet was sued by Rolando Rios under the federal Voting Rights Act of 1965, in federal court in the Western District of Texas, San Antonio Division, in *Rolando Rios v. Bexar Metropolitan Water District*, No. SA-96-CA-335 (W.D. Tex. 1996) (court has retained continuing jurisdiction). At that time, all BexarMet directors were elected “at large;” there were no single-member election districts.

14. BexarMet and Rios presented a jointly-sponsored consent order to the court to resolve the voting rights claims. One element of the agreed consent order called for the boundaries of the District to be reformed so as to encompass all the areas – and only the areas – in which BexarMet provided retail water utility service at that time, and to permit BexarMet customers in these areas to vote in director elections. That is, as modified by the consent order, the District’s territory included all customers in all then-existing service areas – including customers formerly residing outside the formal boundaries of the District – but no longer including persons within the City of San Antonio who were not BexarMet customers.

15. The federal court approved the consent decree, with limitations, and the action by the federal court, among other things, (i) reformed the District’s territorial boundaries to include all areas in which customers of the District were being served and exclude those areas of the City of San Antonio where the District did not serve and (ii) created the District’s present seven

(7) single-member district director plan. Order of April 22, 1996, *Rios v. Bexar Metropolitan Water District*, No. AS-96-CA-0335 (W.D. Tex. 1996) (Hon. Orlando L. Garcia, District Judge).

Service Outside BexarMet's Territorial Boundaries Since 1996

16. Since the consent order was entered in April 1996, the District has attempted to provide retail treated water service to various areas outside its reformed territorial boundaries. It has acquired certificates of convenience and necessity ("CCNs") covering four (4) areas in Comal County. A CCN is a permit issued by the Texas Commission on Environmental Quality ("TCEQ") which authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area. See 30 TAC § 291.3(10). These four areas are all located in Comal County and they all are included, together with other service areas, in TCEQ CCN No. 10675.

17. BexarMet maintains that its boundaries automatically and immediately expanded to absorb these new CCN areas, all of which have been located in Comal County, without BexarMet having complied with mandatory statutory prerequisites for annexation of territory.

18. The Pre-2003 Enabling Act provided a mechanism for BexarMet formally to expand its territorial boundaries. That mechanism required, among other steps, that an election be held regarding assumption of existing debt by the taxpayers of any new area:

provided, that the annexation of any such territory shall not become final until the pro rata part of the indebtedness owed, contracted or authorized by the District shall have been assumed by a majority vote at an election called and held for the purpose of submitting to the qualified property taxpaying voters residing in the territory annexed the proposition of the assumption of the indebtedness owing at that time and the authorization of the levy of the tax or taxes in payment thereof and at the same election there may be submitted the proposition of voting a maintenance tax.

Pre-2003 Enabling Act § 6(4). BexarMet apparently has never complied with this requirement.

Pending Matters Regarding Efforts by BexarMet to Provide Service to Areas Outside Its Boundaries

19. BexarMet's efforts to expand retail water service to areas outside of the District's territory are continuing.

20. In a consolidated proceeding recently concluded at the TCEQ, BexarMet sought a CCN for still more territory in Comal County. BexarMet applied to amend its existing TCEQ CCN No. 10675 to add much of the same area being requested by Plaintiff Bulverde in its own CCN application. After a full contested administrative proceeding involving Bulverde and BexarMet, the Commission awarded the CCN to Bulverde (TCEQ CCN No. 12864). State Office of Administrative hearings ("SOAH") Dockets No. 582-01-3633 & 582-02-0432; TCEQ Dockets No. 2001-0697-UCR & 2001-0951-UCR. BexarMet has appealed the TCEQ's order in Dockets No. 2001-0697-UCR & 2001-0951-UCR to the 250th District Court of Travis County, Cause No. GV3-02775.

21. Recently, on November 7, 2003, BexarMet also filed with the TCEQ a petition "to compel raw water commitment" from GBRA. In its petition, BexarMet asks that the TCEQ force GBRA to commit to BexarMet on a long-term basis water from Canyon Reservoir for BexarMet to use to provide retail treated water service to areas in Comal County that are outside BexarMet's current boundaries.

22. Also in recent weeks, the BexarMet's Board of Directors approved the purchase of nine (9) water systems in Comal County and north Bexar County for approximately \$4 million. Four (4) of these water systems are located in Comal County. The systems in Comal County include Rimrock Ranch, Windmill Ranch and Kestrel Airport, all of which are owned by Diamond Water and are covered by TCEQ CCN No. 12865. The fourth system is Oaks Village North, which is owned by Water Services Inc. and is covered by TCEQ CCN No. 11106.

2003 Amendment of the Pre-2003 Enabling Act

23. In its regular session in 2003, the Texas Legislature added new section 5A to BexarMet's organic statute. Act of June '18, 2003, 78th Leg., Reg. Sess., ch. 375, 2003 Gen. Laws 1593 ("SB 1494"). BexarMet's Current Enabling Act section 5A(a) provides that "[t]he District's boundaries for purposes of the exercise of its powers and duties is defined in Section 5 of this Act." BexarMet's Current Enabling Act § 5A(a) (2003) (citing section 5, which is the metes and bounds description believed to be the territorial limits of the City of San Antonio in 1945).

24. BexarMet's Current Enabling Act section 5A(b) provides that
for the purpose of its current retail water utility services, the District's boundaries shall include the territory defined in all or applicable portions of census tracts or property situated within any area certificated by the Texas Commission on Environmental Quality on the date of the passage of the Act adding this section pursuant to Certificates of Convenience and Necessity Nos. 10675, 12759, and 12760.

BexarMet's Current Enabling Act, § 5A(b). TCEQ CCN No. 10675 includes the four (4) distinct territories in Comal County previously identified, but not the area in Comal County that BexarMet has sought to add to TCEQ CCN No. 10675 in the TCEQ administrative proceeding.

25. In 2003, sections 6 and 6a of the Pre-2003 Enabling Act, the sections that contained the annexation provisions, were repealed. SB1494, § 4. Consequently, there no longer is any mechanism by which BexarMet may annex territory to the District under authority of BexarMet's Current Enabling Act.

26. The same legislation also provides that the repeal of sections 6 and 6a of the Pre-2003 Enabling Act did "not affect an annexation proceeding initiated before the effective date of this Act [*i.e.*, SB1494]," which continues to be "governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose."

SB1494, § 5(b). Since there are no formal annexation proceedings pending for BexarMet, there is no expansion proposed by BexarMet which is to be governed by the law in effect immediately before the effective date of the 2003 legislation.

27. The 2003 legislation further provides that the repeal of sections 6 and 6a of the Pre-2003 Enabling Act “does not affect a pending application for a certificate of convenience and necessity that has been referred by the Texas Commission on Environmental Quality to the State Office of Administrative Hearings before the effective date of this Act.” SB 1494, § 5(c). “An application referred before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.” *Id.*

28. The CCN proceeding in TCEQ Dockets No. 2001-0697-UCR & 2001-0951-UCR was referred by TCEQ to SOAH before the date of passage of SB 1494, so that application is governed by the pre-amendment law in effect, that is, by the Pre-2003 Enabling Act provisions including section 3, and sections 6 and 6a concerning annexation. Because the pre-amendment law prohibited BexarMet from providing service to any area outside its boundaries, however, BexarMet was required under the pre-amendment law to first annex any area outside its boundaries before seeking or purchasing a CCN to provide retail water utility service to that area. Thus, under pre-amendment law, because BexarMet failed to initiate an annexation proceeding covering that area, BexarMet had no authority to seek the new CCN in Comal County, nor does BexarMet have any authority to maintain an appeal from the TCEQ’s denial of BexarMet’s application.

V.

FIRST CLAIM

29. Paragraphs 1-28 are realleged as if fully set forth herein.

30. BexarMet never held any elections required to complete any annexation process for territory extending beyond that District territory originally described by metes and bounds in section 5 of the Pre-2003 Enabling Act. Thus, no annexations of territory by BexarMet have been effective to increase the territory of the District beyond that expressly described by metes and bounds in the Pre-2003 Enabling Act section 5.

31. Moreover, the Legislature expressly amended the Pre-2003 Enabling Act to provide explicitly that "The District's boundaries for purposes of the exercise of its powers and duties is defined in Section 5 of this Act [*i.e.*, BexarMet's Current Enabling Act]." SB1494, § 3 (adding new section 5A(a) to BexarMet's Current Enabling Act). This legislative pronouncement is conclusive as to what territory constitutes the District.

32. Plaintiffs therefore seek a declaration that BexarMet's District boundaries for purposes of its exercise of its powers and duties, other than the provision of retail water utility services, are those boundaries described in BexarMet's Current Enabling Act section 5.

VI.

SECOND CLAIM

33. Paragraphs 1-32 are realleged as if fully set forth herein.

34. The Legislature's addition in 2003 of new section 5A(a) in BexarMet's Current Enabling Act makes clear that BexarMet's territory for the purposes of "the exercise of its powers and duties" is that territory described by metes and bounds in the original section 5 to the

Pre-2003 Enabling Act. This legislative pronouncement is conclusive as to the territory constituting the District.

35. The Legislature's 2003 amendment also added new section 5A(b) in BexarMet's Current Enabling Act. That section provides that BexarMet's territory for the purposes of its retail water utility services include the same territory described in section 5, as well as certain specific additional territory described in new section 5A(b). That additional territory is described in section 5A(b) to be "the territory defined in all or applicable portions of census tracts or property situated within any area certificated by the Texas Commission on Environmental Quality to the District on the date of passage of the Act adding this section [*i.e.*, SB1494] pursuant to Certificates of Convenience and Necessity Nos. 10675, 12759, and 12760." SB1494 § 3.

36. TCEQ CCN No. 10675 comprises specific territory located in Comal County, Bexar County, and Medina County. TCEQ CCN No. 12759 consists of specific territory in Bexar County. TCEQ CCN No. 12760 is made up of specific territory in Atascosa County.

37. Plaintiffs seek a declaration that BexarMet's District boundaries for provision of retail water utility services include only the territory originally described by metes and bounds in BexarMet's Current Enabling Act section 5 and the territory defined in all or applicable portions of census tracts or property situated within any area certificated by the TCEQ pursuant to TCEQ CCNs No. 10675, 12759 and 12760 as those CCNs existed on the date of passage of SB 1494, and no other territory.

38. Plaintiffs also seek a declaration that BexarMet's District boundaries for provision of retail water utility services in Comal County include only the territory defined in all or applicable portions of census tracts or property situated within the areas in Comal County

certificated by the TCEQ pursuant to TCEQ CCN No. 10675, as that CCN existed on the date of passage of SB 1494, and no other territory in Comal County.

VII.

THIRD CLAIM

39. Paragraphs 1-38 are realleged as if fully set forth herein.

40. A district created under article 16, section 59 of the Texas Constitution may exercise only those powers that have been expressly delegated to it by statute or that are clearly implied from its express powers.

41. BexarMet no longer has authority under BexarMet's Current Enabling Act to annex territory to the District. Because no annexation proceeding was initiated by BexarMet before the date of passage of SB 1494, the District does not have the authority to annex any area pursuant to the law in effect immediately before the effective date of SB 1494.

42. BexarMet's Current Enabling Act now expressly defines and fixes the boundaries of the District, both for the exercise of BexarMet's general authority and for its provision of retail water utility services. BexarMet's Current Enabling Act, § 5A (2003). The Pre-2003 Enabling Act provisions regarding annexation were repealed. BexarMet's District boundaries thus have been fixed legislatively, and may not be altered by action of BexarMet.

43. Plaintiffs therefore seek a declaration that, with regard to its general powers and duties, other than provision of retail water utility service, BexarMet does not have the authority to annex any territory outside the boundaries of the District as those boundaries are expressly defined in BexarMet's Current Enabling Act section 5.

44. Plaintiffs also seek a declaration that, with regard to the provision of retail water utility services, BexarMet does not have the authority to annex any territory outside the

boundaries of the District as those boundaries are expressly defined in BexarMet's Current Enabling Act section 5 and new sections 5A(a) and 5A(b).

VIII.

FOURTH CLAIM

45. Paragraphs 1-44 are realleged as if fully set forth herein.

46. Plaintiffs seek a declaration that BexarMet does not have the authority to provide retail water utility service to any area outside the boundaries of the District as that territory is defined in section 5 and new sections 5A(a) and 5A(b), which is the territory defined by the metes and bounds description in section 5 of BexarMet's Current Enabling Act and the additional territory included within the scope of TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed at the time of passage of SB 1494.

47. Plaintiffs also seek a declaration that BexarMet does not have the authority to provide retail water utility service to any area in Comal County beyond those four (4) discrete areas included within the scope of TCEQ CCN No. 10675, as that CCN existed at the time of passage of SB 1494.

IX.

FIFTH CLAIM

48. Paragraphs 1-47 are realleged as if fully set forth herein.

49. Plaintiffs seek a declaration that BexarMet does not have the authority to seek or acquire any CCN or supply of water to provide retail water utility service to any area outside the boundaries of the District as that territory is defined in section 5 and new sections 5A(a) and 5A(b) of BexarMet's Current Enabling Act, that is, to any area outside the boundaries of the District as defined in the metes and bounds description in section 5 and the additional area

included within the scope of TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed at the time of passage of SB 1494.

50. Plaintiffs also seek a declaration that BexarMet does not have the authority to seek or acquire any CCN or supply of water to provide retail water utility service to any area in Comal County other than in those four (4) discrete areas included within the scope of TCEQ CCN No. 10675, as that CCN existed at the time of passage of SB 1494.

X.

SIXTH CLAIM

51. Paragraphs 1-50 are realleged as if fully set forth herein.

52. Under applicable law and regulation, the authority of a utility to provide retail water utility service in a certificated area is exclusive, unless the CCN expressly provides that the area is dually certificated. Bulverde received a CCN to provide retail water utility service to certain areas in Comal County in TCEQ CCN No. 12864. The area covered by TCEQ CCN No. 12864 is not dually certificated.

53. Nevertheless, BexarMet continues to seek water for, and customers in the area included in, TCEQ CCN No. 12864. For example, representatives of BexarMet are actively soliciting retail water customers in the area certificated to Bulverde. Additionally, BexarMet recently filed with the TCEQ a petition "to compel raw water commitment" from GBRA, asking that the TCEQ force GBRA to commit to BexarMet water from Canyon Reservoir for BexarMet to use to provide retail treated water service to the area certificated to Bulverde (as well as other areas in Comal County that are outside BexarMet's current boundaries).

54. Plaintiffs therefore seek a declaration that TCEQ CCN No. 12864 grants Bulverde the exclusive right to provide retail water utility service in that area.

55. Plaintiffs also seek a declaration that BexarMet is without legal authority to provide, or to seek to provide, retail water utility service in the areas in Comal County that have been certificated to Bulverde in TCEQ CCN No. 12864.

XI.

PRAYER

56. Plaintiffs request that this Court make the following declarations under the Texas Declaratory Judgment Act:

- (i) that BexarMet's district boundaries for purposes of the exercise of its powers and duties, other than the provision of retail water utility services, are those boundaries described in BexarMet's Current Enabling Act section 5;
- (ii) that BexarMet's District boundaries for provision of retail water utility services include only the territory described by metes and bounds in BexarMet's Current Enabling Act section 5 and the territory defined in all or applicable portions of census tracts or property situated within any area certificated by the TCEQ pursuant to TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed on the date of passage of SB 1494, and no other territory;
- (iii) that BexarMet's District boundaries for provision of retail water utility services in Comal County include only the territory defined in all or applicable portions of census tracts or property situated within the areas in Comal County certificated by the TCEQ pursuant to TCEQ CCN No. 10675, as that CCN existed on the date of passage of SB 1494, and no other territory in Comal County;
- (iv) that, with regard to the exercise of its general powers and duties, other than provision of retail water utility service, BexarMet does not have the authority to

annex any territory outside the boundaries of the District as those boundaries are expressly defined in BexarMet's Current Enabling Act section 5.

- (v) that, with regard to the provision of retail water utility services, BexarMet does not have the authority to annex any territory outside the boundaries of the District as those boundaries are expressly defined in BexarMet's Current Enabling Act section 5 and new sections 5A(a) and 5A(b);
- (vi) that BexarMet does not have the authority to provide retail water utility service to any area outside the boundaries of the District as that territory is defined in section 5 and new sections 5A(a) and 5A(b) of BexarMet's Current Enabling Act, which is the territory defined by the metes and bounds description in section 5 of BexarMet's Current Enabling Act and the additional territory included within the scope of TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed at the time of passage of SB 1494;
- (vii) that BexarMet does not have the authority to provide retail water utility service to any area in Comal County beyond those four (4) discrete areas included within the scope of TCEQ CCN No. 10675, as that CCN existed at the time of passage of SB 1494;
- (viii) that BexarMet does not have the authority to seek or acquire any CCN or supply of water to provide retail water utility service to any area outside the boundaries of the District as that territory is defined in section 5 and new sections 5A(a) and 5A(b) of BexarMet's Current Enabling Act, that is, to any area outside the boundaries of the District as defined in the metes and bounds description of BexarMet's Current Enabling Act section 5 and the additional area included

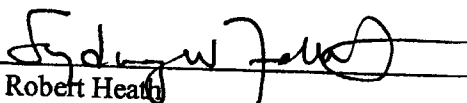
within the scope of TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed at the time of passage of SB 1494;

- (ix) that BexarMet does not have the authority to seek or acquire any CCN or supply of water to provide retail water utility service to any area in Comal County other than in those four (4) discrete areas included within the scope of TCEQ CCN No. 10675, as that CCN existed at the time of passage of SB 1494;
- (x) that TCEQ CCN No. 12864 issued to Bulverde grants Bulverde the exclusive right to provide retail water utility service in that area; and
- (xi) that BexarMet is without legal authority to provide, or seek to provide, retail water utility service in the areas in Comal County that have been certificated to Bulverde in TCEQ CCN No. 12864;

57. Plaintiffs request that the Court award Plaintiffs' attorneys' fees and other costs, and grant such other relief at law or in equity to which the Plaintiffs may show themselves entitled.

Respectfully submitted,

BICKERSTAFF, HEALTH, SMILEY, POLLAN,
KEVER & McDANIEL, L.L.P.

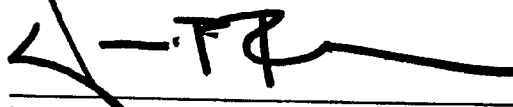


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October 11, 2005

LaDonna Castanuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087 MC 105
Austin, Texas 78711-3087

Via Fax: 512/239-3311
Total Pages: 18

RE: SOAH Docket No. 582-03-3725; TCEQ Docket No. 2003-0664-UCR, *In Re: The Application of Bexar Metropolitan Water District To Amend Water CCN No. 10675 in Bexar County*, Before the State Office of Administrative Hearings

Dear Ms. Castanuela:

With regard to the above-referenced matter, please find enclosed "*Bexar Metropolitan Water District's Response in Opposition to Intervenor's 'Motion for Dismissal by Summary Disposition.'*" Please note that the Exhibits to enclosed Response will be sent under separate cover.

I have this day dispatched the original of this pleading to you by mail, and furnished all parties with a copy.

Thank you for your attention to this matter. Please feel free to contact me with questions or concerns.

Sincerely,

R.L. WILSON, P.C.


Robert L. Wilson III

COPY

Cc: Honorable Cassandra J. Church
Administrative Law Judge

Via Fax 512/475-4995

Service List

F. Gilbert Olivares, Esq.,
General Manager
Bexar Metropolitan Water District

COPY

10-11-05 10:00 AM
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10-11-05 10:00 AM

EXHIBIT A

Art. 8280—126. Bexar County Metropolitan Water District

Section 1. In obedience to the provisions of Article 16, Section 59 of the Constitution of Texas, there is hereby created Bexar Metropolitan Water District, hereinafter in this Act sometimes called the "District."

Sec. 2. The District is hereby created as a governmental agency, a body politic and corporate, and a municipal corporation, vested with all the authority as such under the Constitution and laws of the State of Texas; and shall have and be empowered to exercise all the rights, privileges, functions, and powers of such governmental agency and body politic and corporate as authorized or implied by the provisions of Article 16, Section 59 of the Constitution and as have been or may be conferred by General Law upon conservation districts and as authorized or implied by the provisions of this Act, for the purpose of controlling, conserving, protecting, preserving, distributing, and utilizing the storm and flood waters of the rivers and streams situated in said District and the underground waters situated thereunder and for the purpose of regulating and controlling the disposal of sewage, wastes, and other refuse, and the collection and disposal thereof, to prevent the contamination and pollution of the public waters of the District. It shall have the power to formulate and execute any and all plans deemed essential to the accomplishment of the purposes for which it is created and shall be recognized to have such authority and power of control and regulation over the storm and flood waters of its rivers and streams and its underground waters as may be exercised by the State of Texas, subject to the provisions of the Constitution and Section 4 of this Act.

Sec. 3. In addition to the powers vested by the Constitution and general laws in such public agency for the greatest practicable measure of the conservation, preservation, and beneficial utilization of its public waters, the power to control and utilize its public waters and to regulate the disposal and the disposal of sewage, waste, and refuse, the District shall have the following general powers:

(a) Through every practical and legal means to control and regulate and to coordinate the control and regulation of the waters of the watershed of the San Antonio River and tributaries in the District and the storm and flood and underground waters of the District, including the power to cooperate with the United States Government or any agency thereof, or any municipality, public, quasi-public or private agency and to contract, negotiate, and enter into agreements with any one or more of such agencies in effecting such purposes;

(b) to store, control, and conserve storm and flood waters of its rivers and streams and to prevent the escape of any such waters without first obtaining therefrom a maximum of public service; to prevent devastation of property from overflow and to protect life and property from uncontrolled flood and storm waters;

(c) to conserve and distribute waters essential for domestic and other uses by the inhabitants of the District, including necessary water supply for cities and towns situated within the District;

(d) to provide for the development of drainage systems to control, regulate, and dispose of all storm and flood waters of the District so as to protect effectively lives and property, and to utilize such waters for each and every purpose for which flood and storm waters when controlled, conserved, or regulated may be utilized as contemplated by the Constitution and the public policy therein declared;

(e) to provide by purchase, construction, lease, gift, or in any other manner and to operate any and all facilities deemed by the District essential for preserving the purity of all the surface and underground waters of the District for the protection of the health of its inhabitants, and to formulate plans to make and enforce rules and regulations for the effective disposal of any and all sewage wastes, refuse, or residuum, however accumulated; which otherwise would contaminate, pollute, or render unsafe and insanitary the surface and underground waters of the District and which might threaten or impair the health of its inhabitants or which might adversely affect the health of the inhabitants downstream below the District;

(f) to acquire by purchase, construction, lease, gift, or in any other manner (otherwise than by condemnation) and to maintain, use, and operate any and all property of any kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District deemed by its Board of Directors necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act;

(g) to acquire by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein, within or outside of the boundaries of the District, necessary to the exercise of the powers, rights, privileges, and functions conferred by this Act, in the manner provided by General Law relative to condemnation, or at the option of the District, in the manner provided by law with respect to condemnation by agencies organized pursuant to Section 59, Article 16 of the Constitution of the State of Texas; provided that the District shall not have the right or power to so condemn any such property that may be owned by any other political subdivision, city, or town located within the District;

(h) to cooperate, contract, and enter into agreements with towns, cities, districts, or political subdivisions located in or outside of the

District and with Bexar County, in the construction, purchase, lease, maintenance, improvement, use, and operation of any and all facilities, works, and plants necessary or convenient to the accomplishment of the purposes for which the District was created;

(i) to make contracts with any person, private corporation, municipal corporation, political subdivision, or the Board of Trustees thereof, operating water distribution facilities for the benefit of a city or town within the District, under which the District may perform services for such parties or such parties may perform services for the District, or under which either may operate all or any part of the facilities of the other, having due regard for the duties and obligations of such parties in the instrument prescribing their or its duties;

(j) to construct, extend, improve, maintain, and reconstruct, to cause to be constructed, extended, improved, maintained, or reconstructed and to use and operate any and all facilities of any kind necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred by this Act;

(k) to sue and be sued in its corporate name;

(l) to make by-laws for the management and regulation of its affairs conformably to the powers and purposes herein conferred and consistent with the Constitution of this State;

(m) to make rules and regulations and to prescribe penalties for the breach of any rule or regulation of the District, which penalties shall not exceed fines of more than Two Hundred Dollars (\$200), or imprisonment for more than thirty (30) days, or may provide both such fine and such imprisonment. The penalties hereby authorized shall be in addition to any other penalties provided by the laws of Texas and may be enforced by complaints filed in the appropriate court of jurisdiction in the county in which the district's principal office is located; provided, however, that no rule or regulation which provides a penalty for the violation thereof shall be in effect, as to enforcement of the penalty, until five days next after the district may have caused a substantive statement of the particular rule or regulation and the penalty for the violation thereof to be published, once a week for two consecutive weeks, in one or more newspapers affording general circulation in the area in which the property of the district is situated; and, the substantive statement so to be published shall be as condensed as is possible to afford an intelligent direction of the mind to the object sought to be accomplished or the act forbidden by the rule or regulation; one notice may embrace any number of regulations; there must be embraced in the notice advice that breach of the particular regulation, or regulations, will subject the violator to the infliction of a penalty and there also shall be included in the notice advice that the full text of the regulation sought to be enforced is on file in the principal office of the District, where the same may be read by any interested person. Five (5) days after the sec-

and publication of the notice hereby required, the advertised regulation shall be in effect, and ignorance of any such regulation shall not constitute a defense to a prosecution for the enforcement of a penalty; and, the rules and regulations authorized hereby, after the required publication, shall judicially be known to the courts and shall be considered of a nature like unto that of valid penal ordinances of a city of the State;

(n) to adopt, use, and alter a corporate seal;

(o) to appoint agents and employees; prescribe their duties and fix their compensation;

(p) to make contracts and execute instruments necessary or convenient to the exercise of the powers, rights, privileges, and functions herein conferred;

(q) to borrow money for its authorized purposes, to accept grants or loans or allotments from the United States Government or any of its agencies, or others, and in connection with any such grants, loans, or allotments to enter into such agreements as may be required to make them effective, and for the purpose of obtaining funds to issue its negotiable tax bonds and its negotiable revenue bonds in the manner and to the extent hereinafter provided;

(r) to operate and maintain with consent of the governing body of any city, town, or political subdivision located in the District any works, plants, or facilities deemed necessary or convenient to the accomplishment of the purposes for which the District is created.

Sec. 4. (a) The powers vested in and the duties devolved upon the District in this Act are subject to the continuing right of supervision of the flow waters of its rivers and streams and the impounding of flood waters, by the State Board of Water Engineers, and in instances where the plans of the District provide for the use of water from any rivers or streams or the impounding of any flood waters thereof, it shall submit such plans to the State Board of Water Engineers for approval as to efficacy and shall make application for a permit as required by law;

(b) Where the general plans of the District provide for the disposal of sewage and wastes, such plans shall be submitted to the State Board of Water Engineers for approval as to compliance with the provisions of Article 848a of the Penal Code of Texas.

Sec. 5. The District is hereby created and established, situated wholly in Bexar County, Texas, having the following metes and bounds:

Beginning at the intersection of the North line of Chavanaux Road with East line of U. S. Highway 281,

Thence North along East side of U. S. Highway 281 to its intersection with the North line of Ashley Road,

Thence West along the North line of Ashley Road to the East line of Pleasanton Road,

Thence South along the East line of Pleasanton Road to an intersection with the North line of Baatz Boulevard,

Thence West along the North line of Baatz Boulevard near Six Mile Creek to an intersection with the East line of the Right-of-Way boundary of the Sau & G Railroad,

Thence North along the East Railroad Right-of-Way line across Six Mile Creek to an intersection with the corporate city limits of San Antonio at Military Drive,

Thence West along the corporate limit line to an intersection with the West line of Somerset Road,

Thence Southwesterly along the West line of Somerset Road to a point on the South limits of South San Antonio being between Arcadia Avenue and Virginia Avenue,

Thence West along the South boundary of South San Antonio to its intersection with Washington Street,

Thence South along the East line of Washington Street which is the boundary of South San Antonio to its intersection with the South line of Virginia Avenue,

Thence West along the South line of Virginia Avenue which is the boundary of South San Antonio to its intersection with the West line of Quintana Road,

Thence Northeast along the West line of Quintana Road to its intersection with the South line of Military Drive,

Thence In a Westerly direction along the South line of Military Drive to its intersection with the west line of the G H & S A Right-of-Way,

Thence In a Southwesterly direction along the West Right-of-Way line of the G H & S A which line is also a boundary of Kelly Field to the Southeast corner of County Block No. 5441,

Thence West along the common boundary of County Block Nos. 5441 and 5442 to its intersection with the East bank of Leon Creek,

Thence In a Northwesterly direction along the East bank of the Leon Creek to its intersection with the North side of Military Drive,

Thence In a Northwesterly direction across Leon Creek and along the North side of Military Drive to its intersection with the South line of U. S. Highway No. 90,

Thence In an Easterly and Northeasterly direction along the South line of U. S. Highway No. 90 to its intersection with the East line of Acme Road,

Thence North along the East line of Acme Road to the North line of Commerce Street,

Thence West along the North line of Commerce Street to the East line of Callaghan Road,

Thence North along the East line of Callaghan Road which is the approximate divide between Leon Creek and Alazan Creek, and continuing along the Southeast line of Callaghan Road across the headwaters of Alazan to its intersection with the Northeast line of Fredricksburg Road,

Thence Northwest along the Northeast line of Fredricksburg Road to its intersection with the South line of Kenney Road,

Thence Northeast along the Southeast line of Kenney Road to its intersection with the Southwest line of Keller Road,

Thence Southeast along the Southwest line of Keller Road across the headwaters of Olmos Creek to its intersection with the East line of San Pedro Avenue,

Thence North along the East line of San Pedro Avenue across the upper reaches of Olmos Creek to the Southeast line of Isom Road,

Thence In a Northwesterly direction along the Southeast line of Isom Road to meet the City of San Antonio corporate line on the Northwest side of the Airport,

Thence Northeast along the City of San Antonio corporate line bounding the airport to the Bitters Road,

Thence Southeast along the City of San Antonio corporate line and the Airport boundary to the Wetmore Road,

Thence Southwest along the City of San Antonio corporate line and the Wetmore Road to the North Loop Road,

Thence Southeast following the City of San Antonio corporate line along the North Loop Road to its intersection with the South line of the Military (Camp Bullis) Road,

Thence East along the South line of the Military Road and South along the West line of Military Road across the upper reaches of Salado Creek and across U. S. Highway 81 to its intersection with the South line of Rittiman Road,

Thence East along the South line of the Rittiman Road to its intersection with the West bank of Salado Creek,

Thence Downstream along the West Bank of the Salado Creek and the West channel of the Salado Creek to a point where it intersects the South line of Johns subdivision,

Thence In a Southwesterly direction to a point on the West side of Goliad Road 2577' Northwest of the Goliad Road and Military Drive intersection.

Thence In a Southeasterly direction along the West line of Goliad Road across Military Drive and along the East boundary of Brooks Field to its intersection with the North line of San Juan Road,

Thence West along the North line of San Juan Road which is the boundary of Brooks Field to its intersection with Southton Road,

Thence North along the East line of Southton Road which is the boundary of Brooks Field to its intersection with the North line of the old Corpus Christi Road which is the boundary of Brooks Field,

Thence West and Northwest along the North and Northeast line of the old Corpus Christi Road the Right-of-Way of which is now included in the Brooks Field Reservation to its intersection with the South line of the South Loop Road,

Thence In a Westerly direction along the South line of the South Loop Road across U. S. Highway 181 of the Right-of-Way of the SA & AP Railroad to its intersection with the East bank of the San Antonio River,

Thence South along the meandering of the River to a point of intersection between the East bank of the River and the North line of Chavanaux Road, extended,

Thence West along the North line of Chavanaux Road, extended, and the North line of Chavanaux Road to the point of beginning,

except the area embraced within the corporate limits of the cities of Alamo Heights, Olmos Park and Terrell Hills as of the effective date of this Act.

Sec. 6. Areas of territory not included within the limits of any incorporated village, town or city, and not in the District, as hereinabove defined, may be annexed to the District in the following manner:

(1) A petition praying for annexation of such territory or by fifty (50) such taxpayers if the number of such taxpayers is more than fifty, may be presented to the Board of Directors and filed with the secretary of said Board. Said petition shall describe by metes and bounds the territory sought to be annexed.

(2) The Board of Directors after considering said petition may adopt a resolution fixing a time and place at which such petition shall be heard, which time shall be not less than thirty (30) days from the date of such resolution and notice of such hearing shall be posted in three (3) public places within the District and in one (1) public place in the territory proposed to be annexed, which posting shall be made not less than fifteen (15) days before the date of said hearing; also, said notice shall be published in a newspaper of general circulation in the County one time at least fifteen (15) days prior to the date of said hearing. Said notice shall state the time and place of the hearing and describe by metes and bounds the territory proposed to be annexed.

(3) If upon the hearing of such petition it is found by the Board that the annexation of such territory or any part thereof, would be to the advantage and best interest of the District and that the work,