

Control Number: 43572



Item Number: 59

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

43572

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June 1, 2006

Via Hand Delivery

Honorable Cassandra J. Church
Administrative Law Judge
State Office of Administrative Hearings
300 W. 15th Street
Austin, Texas 78701

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 Judge Church:

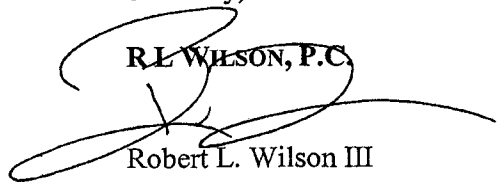
Pursuant to your request made during the hearing which occurred in the above-referenced case on May 30, 2006, please find enclosed SAWS's Third Amended Petition, which has been filed in Cause No. D-1-GV-000053; *City of San Antonio By and Through the San Antonio Water System v. Kathleen Hartnett White, et al.*; Pending in the 200th District Court of Travis County, Texas. Please be reminded that such lawsuit has been specially assigned to the Honorable Scott Jenkins, Judge of the 53rd District Court.

I have also enclosed correspondence from SAWS attorney Max Renea Hicks to Judge Jenkins wherein Mr. Hicks (in the last paragraph of his letter) has expressed SAWS' desire to consolidate the appeal of Judge Steel's Comal County ruling with any appeal which may arise from the Travis County proceeding. BexarMet maintains that a determination on Bitterblue's Motion for Dismissal by Summary Disposition (if not this entire proceeding) should be abated pending the outcome of such appeal(s), so that the Courts may address the applicability and constitutionality of SB 1494.

By copy of this letter, together with enclosures, all persons on the service list are being served with this filing.

Thank you for your attention to this matter.

Sincerely,

RL WILSON, P.C.

Robert L. Wilson III

CC: Service List

RECEIVED
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
JUN 1 10 58 AM '06
COMAL COUNTY CLERK
COUNTY CLERK
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SERVICE LIST

**AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
(TCEQ)**

**STYLE/CASE: IN THE APPLICATION OF BEXAR METROPOLITAN WATER
DISTRICT TO AMEND WATER CCN NO. 10675 IN BEXAR
COUNTY**

SOAH DOCKET NUMBER: 582-03-3725

TCEQ DOCKET NUMBER: 2003-0664-UCR

ADMINISTRATIVE COURT

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**CASSANDRA J. CHURCH
PRESIDING ADMINISTRATIVE LAW JUDGE**

PARTIES

REPRESENTATIVE/ADDRESS

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SOAH DOCKET NO. 582-03-3725
TCEQ DOCKET NO.2003-0664-UCR

SERVICE LIST

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**COURTESY COPY OF ORDER MAILED OR
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SOAH DOCKET NO. 582-03-3725
TCEQ DOCKET NO. 2003-0664-UCR

SERVICE LIST

PAGE 3

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May 2, 2006

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rhicks@renea-hicks.comThe Honorable Scott H. Jenkins
53rd Judicial District
Travis County District Court
1000 Guadalupe
Austin, Texas 78701

by courier

Re: No. D-1-GV-000053; *City of San Antonio v. White, et al.*;
In the 200th Judicial District; Travis County, Texas

Dear Judge Jenkins:

We are providing you the enclosed notebook to assist in your preparation for the two upcoming hearings in the above-referenced matter. The first hearing is tomorrow, May 3rd, at 9:00 a.m. on Defendant Bexar Metropolitan Water District's special exception and plea to the jurisdiction. The second hearing is on May 18th at 2:00 p.m. on Plaintiff San Antonio Water System's Motion for Partial Summary Judgment (and on a cross-motion for summary judgment by BexarMet that it is scheduled to file by Friday at noon, May 5th). The notebook provides the relevant pleadings and exhibits in both matters, plus copies of case and statutory authority cited in the submissions thus far. (*The notebook does not have SAWS's as-yet un-filed response to BexarMet's as-yet un-filed cross-motion.*)

It is our suggestion that the Court take the issues raised by BexarMet's Plea to the Jurisdiction under advisement after the May 3rd hearing and hold them until the Court hears and determines the summary judgment issues, too. While every one of BexarMet's jurisdictional arguments seems to us plainly and directly refuted by the case it recently lost in the Third Court of Appeals – *Bexar Metropolitan Water District v. City of Bulverde*, 156 S.W.3d 79 (Tex.App.—Austin 2004, rev. denied), a copy of which is attached to this letter – deciding the jurisdictional and merits issues at the same time, after the May 18th hearing, seems the best way to ensure that *all* the issues can be taken up at the same time in the event of an appeal.

As you probably are aware, in § 51.014 of the Civil Practice and Remedies Code, the legislature has established an interlocutory appeal mechanism that authorizes piecemeal appeals of jurisdictional issues that, in relevant circumstances, halt further trial proceedings pending the appeal's disposition. BexarMet has agreed in a Rule 11 agreement not to invoke that mechanism to stall the May 18th summary judgment hearing. Thus, holding the jurisdictional issues for disposition with the merits would not work any harm to BexarMet.

Board Certified CIVIL APPELLATE LAW - Texas Board of Legal Specialization

MAX RENEA HICKS
ATTORNEY AT LAW

May 2, 2006
Page 2

Finally, you should be aware that about two weeks ago Judge Steel of the 274th Judicial District Court in Comal County rejected the same jurisdictional arguments that BexarMet is making here and, in addition, ruled against BexarMet on the merits of the SB1494 issue. It is anticipated that there will be an appeal from the final judgment in that case, so there is an additional reason for ruling on the merits and jurisdictional arguments together: to allow any appeals in the Comal County case and this case to be consolidated at the appellate level, with both jurisdictional and merits issues in the mix.

Sincerely,


Max Renea Hicks

encl.

cc: Brian Berwick (by fax) (w/o encl.)
Celina Romero (by fax) (w/o encl.)
Laurence S. Kurth (by fax) (w/o encl.)
Jim George/Catherine Robb (by courier)

COPY

No. D-1-GV-06-000053

CITY OF SAN ANTONIO, acting by
and through the
SAN ANTONIO WATER SYSTEM,
Plaintiff,

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

vs.

FOR TRAVIS COUNTY, TEXAS

KATHLEEN HARTNETT WHITE, *et al.*,
Defendants.

200th JUDICIAL DISTRICT

THIRD AMENDED ORIGINAL PETITION

Nature of suit

1. This is a declaratory judgment action in which the City of San Antonio, acting by and through the San Antonio Water System ("SAWS"), seeks a declaratory judgment that the defendant officials of the Texas Commission on Environmental Quality do not have the authority to allow Defendant Bexar Metropolitan Water District to seek a Certificate of Convenience and Necessity to provide retail water utility services in areas outside the area authorized by its enabling act, as amended by Act of June 18, 2003, 78th Leg., R.S., ch. 375, 2003 Gen. Laws 1593. For the commission defendants to even entertain an application to provide retail water services outside the statutory area would violate the laws of the state and require the commission defendants to evaluate the minority voter impact of their actions to ensure compliance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

Parties

2. SAWS is an agency of the home rule city of San Antonio; it has management and control of the water system for San Antonio, as authorized under TEX.

LOC. GOV'T CODE § 402.142 and City of San Antonio Ordinance No. 75686, passed April 30, 1002. SAWS is based in Bexar County.

3. Defendant Kathleen Hartnett White is Chairman of the Texas Commission on Environmental Quality ("TCEQ"). Defendants Ralph Marquez and Larry Soward are Commissioners of TCEQ. Defendant Glenn Shankle is the Executive Director of TCEQ. (Collectively, they sometimes will be referred to as TCEQ.) They are sued in their official capacities only. Their offices are in Travis County, Texas, which also is the location of TCEQ's principal office.

4. Defendant Bexar Metropolitan Water District ("BexarMet") is a political subdivision and local water district created through special legislation by the Texas Legislature. It is centered in Bexar County, Texas.

Venue

5. Venue in Travis County is proper under TEX. CIV. PRAC. & REM. CODE §§ 15.001(b)(2), 15.002(a)(1), 15.002(a)(3), and 15.005.

Discovery track

6. The Level 2 discovery control plan under TEX. R. CIV. PROC. 190.3 is appropriate for this case.

Factual background to claim

7. BexarMet is a conservation district created in 1945 by special act of the Texas Legislature under authority of the Conservation Amendment, article 16, section 59, of the Texas Constitution and is subject to the continuing broad supervisory authority of TCEQ. The 1945 act creating BexarMet (Act of May 1, 1945, 49th Leg., R.S., ch. 306, 1945 Gen. Laws 456) was amended three times before 2003: in 1953 (Act of April 21,

1953, 53rd Leg., R.S., 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., R.S., ch. 91, 1997 Gen. Laws 178). The 1945 Act, as amended prior to 2003, shall be referred to as the "Historical Enabling Act." The original act and the three subsequent amendments are attached as Exhibits 1-4 to the original petition in this action; they are incorporated by reference into this amended petition.

8. BexarMet's Historical Enabling Act was amended again in 2003 (Act of June 18, 2003, 78th Leg., R.S., ch. 375, 2003 Gen. Laws 1593), through Senate Bill 1494 ("SB1494"). BexarMet's organic statute, as most recently amended by SB1494, shall be referred to as the "Current Enabling Act." SB1494 is attached as Exhibit 5 to the original petition in this action; it is incorporated by referenced into this amended petition.

9. Under Section 5 of the Historical Enabling Act, BexarMet's territory is geographically defined by a metes and bounds description to encompass an area within Bexar County. The area described by this metes and bounds description is understood, based on analysis, to coincide essentially with the area inside the then-existing city limits of San Antonio at the time BexarMet was created in 1945, exclusive of the area inside the city limits of Alamo Heights, Olmos Park, and Terrell Hills as of the 1945 act's effective date. Under Section 3(c) of the Historical Enabling Act, BexarMet was authorized to provide retail water utility service for "inhabitants" of the district.

10. Section 6 of the Historical Enabling Act authorized annexation outside the original area under certain conditions. Section 6a of the Historical Enabling Act provides for the automatic extension of BexarMet's territory if San Antonio annexed the territory, but only if "an election has been held and a majority of the qualified property taxpaying

voters residing in the city-annexed territory have voted to assume” certain indebtedness and taxes owed.

11. While operating under its Historical Enabling Act, BexarMet did not provide retail water utility service to all inhabitants within its territory. Its potential service area coincided with the service area of San Antonio, and the City of San Antonio provided service to most of those inhabitants. The areas served by BexarMet were not contiguous; instead, they were interspersed as pockets inside the broader area served by San Antonio.

12. In 1996, Rolando Rios sued BexarMet, claiming that the district’s at-large method of electing directors violated Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The suit, filed in the United States District Court for the Western District of Texas, San Antonio Division, is styled *Rolando Rios v. Bexar Metropolitan Water District*, No. SA-96-CA-335 (“*Rios* litigation”).

13. Shortly after the *Rios* litigation was filed, BexarMet and Rios, who was the plaintiff in that suit, settled the case and submitted a proposed consent decree to the federal court; the court approved the consent decree on or about April 22, 1996. Among other things, at page 15, the consent decree conformed BexarMet’s electoral boundaries to the areas where BexarMet was actually providing retail water utility service. The consent decree also required single-member district elections for BexarMet’s board. As authorized by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the United States Department of Justice (“DOJ”), on September 16, 1996, administratively precleared the electoral changes contained in the 1996 consent decree in the *Rios* litigation.

14. In 2003, the Texas Legislature acted to clarify and restrict BexarMet's boundaries by enacting SB1494, amending the Historical Enabling Act to become the Current Enabling Act. SB1494 complies with all requirements under the Texas Constitution. BexarMet initiated the drafting of the bill leading up to the Act and testified in support of it to Texas House and Senate committees considering the bill; thus, it had full advance notice of the legislation. Section 2 of SB1494 amended Section 3 of the Historical Enabling Act by deleting BexarMet's authority to control waters of the watershed of the San Antonio River and its tributaries and restricting its water delivery authority so that it could only be for "use within the District[.]"

15. Section 3 of SB1494 also amended the Historical Enabling Act by adding a new Section 5A. Subsection (a) of Section 5A of the Current Enabling Act provides that BexarMet's territory "for purposes of the exercise of its powers and duties" is as provided in Section 5 of the Current Enabling Act. As explained in the letter of March 29, 2004, from the Director of Elections for the Texas Secretary of State to the Chief of the Voting Section of the United States Department of Justice, submitting SB1494 for preclearance under Section 5 of the Voting Rights Act, SB1494's amendment to the original Section 5 conformed BexarMet's limits to those ordered by the federal court in the *Rios* litigation. Through the new Section 5A(a), SB1494 eliminates from BexarMet's potential service area any territory added over the years through Sections 6 and 6A from the category of areas where BexarMet may exercise its powers and deliver its services. Section 4 of SB1494 further constricts the potential scope of BexarMet's service area by repealing the two provisions of the Historical Enabling Act – §§ 6 and 6a – that authorized potential service area extensions through annexations, either directly by

BexarMet itself or indirectly by BexarMet through City of San Antonio annexations (if certain voter approval requirements are met).

16. Over the years, BexarMet has applied for and received a number of Certificates of Convenience and Necessity (“CCN”), as well as amendments to pre-existing CCNs, to provide retail water utility service. Retail water utility service is the sale of potable water by a retail public utility to consumers. *See* TEX. WATER CODE § 13.002(20). Insofar as retail water utility service is concerned, CCNs are essentially TCEQ authorizations for the provision of retail water service to specified geographic areas.

17. Subsection (b) of Section 5A of the Current Enabling Act specifically confined both the service and the electoral areas of BexarMet to conform to the *Rios* litigation consent decree and “for the purpose of the exercise of its current retail water utility services[.]” Under this subsection, BexarMet’s authority to provide retail water utility services was expressly confined, for the purpose of exercising its then-current retail water utility services, to the part of a census tract or property lying within the area of three CCNs issued by TCEQ to BexarMet as they existed on May 30, 2003 (which was the date of SB1494’s passage). Those three CCNs are Nos. 10675, 12759, and 12760. It is important to emphasize that, after SB1494, the BexarMet service area is not to extend beyond the areas embraced by CCN Nos. 10675, 12759, and 12760 as they were on May 30, 2003 (or, if the date of passage of the Act is deemed to be the date the Governor signed it, June 18, 2003). Amending these three CCNs to add territory to them does not add territory to BexarMet.

18. DOJ administratively pre-cleared SB1494 on May 5, 2004.

19. After SB1494's passage and preclearance, the federal court presiding in the *Rios* litigation clarified its order of April 22, 1996, approving the consent decree. In an order of August 13, 2004, the federal court specifically added the following as a clarification of the 1996 order:

The Court's April 22, 1996 order was not intended to override, usurp or conflict with any state or general law relating to the expansion of retail water utility service areas. Should Bexar Metropolitan Water District seek to expand its service areas, in accordance with state or general law, this Court has no jurisdiction or authority to either allow or disallow such expansion, or to determine whether such expansion is lawful or unlawful under state or general law. That is an issue for state agencies and/or state courts to decide. *In the event such expansion is allowed by state authorities, however, the Court's 1996 order does provide that consumers within that expanded service area have the right, under federal law, to vote for a director to represent their interests under the single member district electoral scheme.*

(emphasis added).

The court concluded this clarification by noting its presumption that election officials will carry out their duties so that consumers may exercise their right to vote and, also, with a footnoted reference describing BexarMet's "service areas" as being those added "in accordance with state law."

20. There are two noteworthy consequences of the *Rios* litigation's federal court clarification of August 2004. First, the areas in which BexarMet may provide retail water utility service is determined, and restricted, by state law. Second, whenever the state authorizes a new area to be added to BexarMet's authorized service area, it necessarily has extended the electoral franchise to those residing in that area, so that they have a right to vote in BexarMet board elections.

21. Thus, the current status of BexarMet's ability to provide retail water utility service is that the legislature has prohibited it from obtaining or amending a CCN to

serve anyone on property other than that permitted by the Current Enabling Act. Moreover, TCEQ's issuance of a CCN to BexarMet to provide service to any people holding property outside the Current Enabling Act's restrictions or any area inside that Act's restrictions who had not heretofore received BexarMet retail water utility service automatically extends the right to vote to persons residing within such areas. Stated another way, through its CCN decisionmaking for retail water utility service concerning BexarMet, TCEQ has become a state agency determining questions of the right to vote. Hence, TCEQ has brought its CCN decisions on BexarMet retail water utility service within Section 5 of the Voting Rights Act and its preclearance requirements.

22. Since passage of SB1494, BexarMet has chosen to disregard the legislature's limitation of its permissible area for providing retail water utility services. It has done this both in legal argument and, more importantly, in action. The BexarMet actions occur in the guise of its seeking either new or amended CCNs from TCEQ for the provision of retail water utility services in areas walled off by the Current Enabling Act. For example, BexarMet is seeking to amend its CCN No. 10675 to add approximately 5,543 acres of service area in an area outside the permissible service area under the Current Enabling Act. This BexarMet effort is pending before TCEQ as *In Re: The Application of Bexar Metropolitan Water District To Amend Water CCN No. 10675 in Bexar County*, SOAH Docket No. 582-03-3725, TCEQ Docket No. 2003-0664-UCR ("*South-of-Cibolo* CCN request"). BexarMet also acted in another post-2003 instance to extend its service to areas outside its legislatively permissible purview. It sought to amend CCN No. 10675 to add approximately 896 acres of service area in northwestern Bexar County, in an area known as the Pinson Tract, which is outside the BexarMet

service area under the Current Enabling Act. TCEQ approved the CCN amendment in May of 2004, with the result that BexarMet is dually certificated in that area with SAWS. While SAWS did not oppose the dual certification, it specifically stated that its non-opposition was not to be construed as any kind of recognition of BexarMet's statutory authority to serve the area.

23. On September 28, 2005, the Administrative Law Judge presiding over the State Office of Administrative Hearings contested case proceeding concerning BexarMet's *South-of-Cibolo* CCN request denied a request by SAWS to intervene in the proceeding, even though SAWS was recognized as having a justiciable interest in the dispute. The Administrative Law Judge abated the administrative proceeding until January 15, 2006.

24. BexarMet requests to amend existing water CCNs, or obtain new ones, in areas BexarMet has no legal authority to serve. If the amendment is granted, or the new water CCN is approved, the result is that TCEQ, as the administrative decisionmaker on such issues, is violating the provisions of the Current Enabling Act by officially authorizing BexarMet to provide retail water utility service in an area the state legislature has declared is off limits to BexarMet. Furthermore, by these same actions, TCEQ is expanding the BexarMet electorate, thereby subjecting TCEQ's final CCN determinations concerning BexarMet to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

25. TCEQ has no jurisdiction or other legal authority under Texas law to define and expand BexarMet's political boundaries. Even entertaining BexarMet's water CCN applications for areas outside the district's statutorily authorized domain requires TCEQ to evaluate the anticipated impact of adding the new area and the people in it on the

power of minority voters already within BexarMet's service areas. That is, in considering BexarMet CCN applications that would add new service areas to BexarMet's authorized areas of service, TCEQ is placing itself in the position of evaluating whether adding the requested new area will have a retrogressive effect on the voting opportunities of minority voters in BexarMet's electoral area. Such considerations should be outside TCEQ's state law purview, but the combination of the 2004 judicial clarification in the *Rios* litigation and the disregard by TCEQ and BexarMet of SB1494's state law limitation on BexarMet's possible service areas nonetheless would require such an undertaking if TCEQ is to confront and address the legal consequences of its CCN actions.

26. As far as research reveals, TCEQ has never construed its jurisdiction over water CCNs to extend to determining whether a CCN applicant has legal authority to provide service in the area in which the CCN or CCN amendment is sought. Specifically, TCEQ has never asserted or otherwise invoked its general jurisdiction under TEX. WATER CODE § 5.013 or its more specific jurisdictional authority under TEX. WATER CODE §§ 13.241, 13.246(c), or 13.254 to determine this question.

27. Both TCEQ and BexarMet threaten to continue with these illegal actions in the absence of a judicial determination that they are illegal.

28. SAWS is directly and adversely affected by these actions by TCEQ and BexarMet. In the case of the *South-of-Cibolo* CCN request in particular, SAWS is eligible to provide retail water utility service in the affected area and is seeking authority to provide such service.

Claim

29. By processing, acting upon, and granting BexarMet's water CCN applications and water CCN amendment applications, TCEQ is acting, and threatening to act, in direct contravention of the provisions of SB1494, as they amended BexarMet's 1945 organic statute, as amended. TCEQ has failed and refused to take these statutory limitations into account in its administrative determinations concerning BexarMet's efforts to provide retail water utility services.

30. By applying for and seeking water CCN applications and amendments in areas the legislature has established as off-limits to it, BexarMet has failed and refused, and will continue to fail and refuse, to abide by the provisions of SB1494, as they amended BexarMet's 1945 organic statute, as amended.

31. These actions by TCEQ and BexarMet violate, and threaten to continue to violate, the BexarMet's Current Enabling Act.

Relief requested

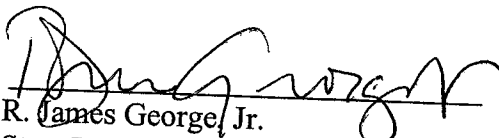
32. SAWS, therefore, seeks a declaratory judgment, under the provisions of TEX. CIV. PRAC. & REM. CODE § 37.004(a), that TCEQ and BexarMet are not authorized to process, seek to have processed, obtain, grant, or otherwise proceed in any fashion with a CCN or amended CCN for BexarMet to provide retail water utility service to any property in an area that BexarMet's Current Enabling Act, as amended by SB1494, prohibits BexarMet from serving.

33. SAWS further seeks a declaratory judgment under the provisions of TEX. CIV. PRAC. & REM. CODE § 37.004(a) that BexarMet's Current Enabling Act, as amended by SB1494, limits the permissible areas which BexarMet may serve, and TCEQ may

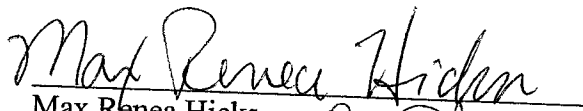
authorize BexarMet to serve, with retail water utility service to the areas receiving retail water utility service and encompassed as of May 30, 2003, by CCN Nos. 10675, 12759, and 12760.

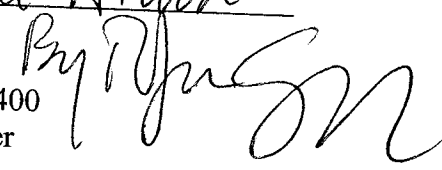
Respectfully submitted,

GEORGE & BROTHERS, L.L.P.

By: 

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**ATTORNEYS FOR PLAINTIFF CITY OF
SAN ANTONIO, ACTING BY AND
THROUGH THE SAN ANTONIO WATER
SYSTEM**

CERTIFICATE OF SERVICE

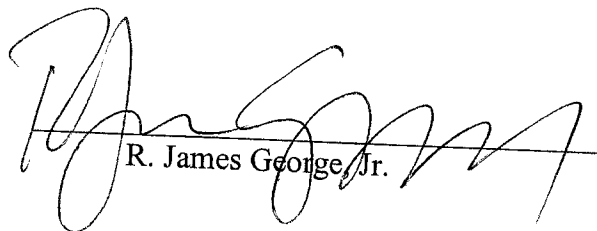
I hereby certify that a true and correct copy of the foregoing document was served, pursuant to Texas Rules of Civil Procedure, upon counsel of record on this **23rd day of May, 2006**, as indicated below:

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Gregg Abbott
Barry R. McBee
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