

Control Number: 43572



Item Number: 74

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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2014 NOV 13 AM 11:00
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Number of Pages (including this one): 9 Date: 7/14/2006**To confirm receipt, or if you do not receive all pages, please call: Nina Hall****Reference:** 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

San Antonio Water System's Second Motion to Intervene and Adoption of Bitterblue's Motion for Summary Disposition (w/o Exhibit A)

ORIGINAL WILL FOLLOW

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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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**SAN ANTONIO WATER SYSTEM'S
SECOND MOTION TO INTERVENE AND
ADOPTION OF BITTERBLUE'S MOTION FOR
SUMMARY DISPOSITION**

COMES NOW, San Antonio Water System ("SAWS") and files this, its Second Motion to Intervene, and would respectfully show as follows:

I. BACKGROUND

These proceedings pertain to an application filed with the Texas Commission on Environmental Quality ("TCEQ") by Bexar Metropolitan Water District ("Bexar Met") to include within its water Certificate of Convenience and Necessity ("CCN") No. 10675 approximately 5,543 acres of land located within the City of San Antonio's extraterritorial jurisdiction ("ETJ"). SAWS opposes Bexar Met's application and SAWS has filed an application with the TCEQ requesting authority to become the water service provider for the area where Bexar Met desires to provide service.

On August 17, 2005 SAWS filed its original Motion to Intervene and to Remand/Abate. At that time, SAWS argued its motion should be granted because: (1) SAWS had a justiciable interest in the outcome of these proceedings; (2) SAWS demonstrated it had good cause and that extenuating

circumstances existed regarding the timing for filing its motion; and (3) the hearing would not be unreasonably delayed by granting its motion.

The Administrative Law Judge (“ALJ”) agreed that SAWS demonstrated it had a justiciable interest in these proceedings because it is a potential competitor of Bexar Met for the service area identified in Bexar Met’s application. The ALJ, however, also concluded that: (1) SAWS’ motion for intervention was not timely; (2) SAWS did not demonstrate good cause regarding the late filing of its motion; and (3) SAWS had not demonstrated granting its motion would not unreasonably delay the hearing. As a result, the ALJ denied SAWS’ original motion to intervene.

II. LEGAL STANDARD

As was the case regarding its original motion to intervene, the legal standard that applies to this motion is as follows. SAWS must demonstrate that good cause and extenuating circumstances exist regarding the timing for filing its motion to intervene, and that the hearing in progress will not be unreasonably delayed. 30 TAC §80.109 (a).

III. CHANGED CIRCUMSTANCES

Since the ALJ’s decision regarding SAWS’ original motion to intervene, there have been changed circumstances, which require that SAWS be admitted as a party to these proceedings at this time. These changed circumstances include: (1) SAWS filing its own CCN application, which is scheduled for hearing on October 16, 2006; (2) SAWS entering into a utility service agreement (“USA”) to provide water service to the Kinder and Bass tracts; (3) Order No. 22 determining that BexarMet lacks the statutory authority to serve the Kinder tract, but making no such determination with regard to the Bass tracts or the remainder of Bexar Met’s requested area; and (4) SAWS contracting to acquire BSR’s CCN, which is in the process of being transferred. Based on these

changed circumstances, the ALJ should reconsider Order No. 15 and grant SAWS' request to intervene in this matter.

SAWS' application for its own CCN amendment for substantially the same area as that requested by Bexar Met was filed on August 16, 2005, and deemed administratively complete on October 14, 2005. An initial pre-hearing conference was held at SOAH on February 15, 2006, and a second prehearing conference was held on June 7, 2006. BexarMet is the only intervenor in SAWS' application. Pursuant to the schedule adopted by the ALJ in that proceeding, SAWS' testimony was filed on May 24, 2005, BexarMet's testimony is due to be filed on August 4, 2006, the Executive Director's testimony is due on September 20, 2006, and the hearing on the merits is scheduled for October 16-20, 2006.

On January 24, 2006 SAWS entered into a utility service agreement ("USA") to provide service to Bitterblue in the Kinder and Bass tracts (Exhibit A). Pursuant to the USA, SAWS is obligated to provide water and sewer service to the Kinder and Bass Tracts, and sewer service to the Friesenhahn tracts.

On May 5, 2006, Judge Gary Steel of the 274th District Court ruled, based on Bexar Met's enabling legislation as amended by SB 1494, that Bexar Met cannot provide water service outside the district's statutory boundaries and that Bexar Met has no authority to annex or incorporate additional area into its statutorily defined territory. Based on Judge Steel's ruling, this tribunal, on July 7, 2006, entered Order No. 22 concluding that Bexar Met's application is subject to SB 1494 and Judge Steel's ruling, but applied this conclusion solely to the Kinder tract, even though the Bass tracts and remainder of the area Bexar Met seeks to include in its amended CCN are also subject to the same provisions.

Finally, BSR and SAWS have entered into an agreement to transfer all of BSR's service area to SAWS. BSR and SAWS filed a sale, transfer and merger application with the TCEQ to authorize the transfer of all of BSR's service area to SAWS. On June 16, 2006, the Executive Director determined that no public hearing would be held on the application. SAWS anticipates that transfer of BSR's CCN will occur in the near future.

These events represent significant changed circumstances from those existing when the ALJ entered Order No. 15 denying SAWS party status, and provide sufficient basis for the ALJ to reconsider her prior order and grant SAWS party status so that it may protect its legitimate interests in this matter. SAWS' interests in the matter are now broader (the USA for both the Kinder and Bass Tracts, and the imminent hearing on its own CCN application) than when SAWS filed its original motion to intervene, and SAWS' interests are becoming unique with its acquisition of BSR's CCN and the possibility that Bitterblue's participation in this matter may become limited in light of Order No. 22.

IV. No Delay

Granting SAWS' motion will not delay the hearing schedule. Based on the rationale for decision in Order No. 22, SAWS sees no need for an evidentiary hearing in this matter. The ALJ has concluded that "the provisions of SB 1494 affect BexarMet's application, making it subject to the ruling issued on May 5, 2006, by Judge Steel."¹ Thus, the ALJ has concluded that BexarMet lacks the necessary statutory authority to provide water service beyond the statutory boundaries of the district. The service territory Bexar Met seeks to add to its CCN No. 10675 lies beyond the

¹ Order No. 22 at 7.

boundaries of the district.² Based on this conclusion, no set of facts exist that could justify proceeding to hearing on BexarMet's application.³ It would be pointless to force the parties to the burden and expense of an evidentiary hearing that will serve no purpose.

If the ALJ concludes that a full evidentiary hearing on the merits is necessary, and if SAWS' intervention is granted, SAWS would commit to following the existing procedural schedule as modified by agreement of the Parties. Under the current agreement of the parties, BSR and Bitterblue's testimony is due to be filed on August 11, 2006. SAWS can file testimony by that date.

Furthermore, BexarMet will not be disadvantaged in its ability to obtain discovery from SAWS. BexarMet is currently a party in SAWS' CCN application docket relating to the same proposed service area, and BexarMet is a party in at least two civil lawsuits with SAWS over BexarMet's ability to provide service to the area.

V. Adoption of Bitterblue's Motion for Summary Disposition

If SAWS is admitted as a party to this proceeding, SAWS fully adopts and re-urges the motion for summary disposition filed by Bitterblue on September 13, 2005, and as supplemented on May 12, 2006. SAWS adopts this motion as to all of the area included in BexarMet's application and not limited to the Kinder tract.

² The affidavit of Gene Dawson, Jr., in paragraph 4, expressly states that all of the service territory sought in the application is outside the area in which BexarMet is allowed to provide service. Additionally, as noted in Order No. 22, Bexar Met has conceded that most of the service territory sought lies outside of its boundaries.

³ Were a portion of Bexar Met's requested area situated within its statutory boundaries, it would already be authorized for service under CCN No. 10675, the only portion of Bexar Met's statutorily defined territory adjacent or proximate to the requested area.

VI. Conclusion

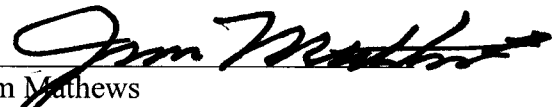
There can be no question but that SAWS has a justiciable interest in Bexar Met's application to provide water service within the City of San Antonio's ETJ. There is good cause, and extenuating circumstances exist, to justify SAWS filing its motion to intervene at this time, and the hearing would not be unreasonably delayed by granting SAWS' motion. Moreover, there is no need for an evidentiary hearing since the ALJ has concluded that as a matter of law, BexarMet lacks the statutory authority to provide water service in the requested area.

VI. Prayer

SAWS requests that the ALJ grant this motion to intervene and admit SAWS as a party to the contested case hearing in these proceedings and grant the motion for summary disposition dismissing Bexar Met's application for all of the requested area. Additionally, if a full evidentiary hearing on the merits of BexarMet's application continues to be needed, SAWS requests that it be allowed to file testimony on or before the date set by agreement of the Parties for the other Protestants, which currently is August 11, 2006.

Respectfully submitted,
MATHEWS & FREELAND, L.L.P.
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(512) 404-7800
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By: _____


Jim Mathews
State Bar Number 13188700

ATTORNEYS FOR SAWS

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of July 2006, a true and correct copy of SAWS Second Motion to Intervene was served on the parties of record by facsimile transmission and First Class Mail.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

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Presiding Administrative Law Judge
State Office of Administrative Hearings
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Jim Mathews

UTILITY SERVICE AGREEMENT

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This Utility Service Agreement ("Agreement") is entered into by and between the San Antonio Water System Board of Trustees, through Resolution Number 05-373, acting by and through its President/Chief Executive Officer ("SAWS") and Bitterblue, Inc., ("Developer") together the Parties ("Parties").

Recitals

Whereas, Developer has requested that SAWS provide water and wastewater service (the "Services") to an approximate collective total 1,088-acre tract of land, (the "Kinder, Friesenhahn, and Bass Tract" or "Tract"), which is located over the Edwards Aquifer Recharge Zone, such Tract being more particularly described in Attachment III hereto, as accepted by SAWS; and

Whereas, SAWS desires to provide the Services to the Developer pursuant to this Agreement, the SAWS Utility Service Regulations, and all applicable local, state, and federal regulations, as amended.

Now Therefore, The Parties Hereto Agree To The Following Terms and Conditions:

1.00 Interpretation of Agreement.

1.01 The Parties acknowledge that the Services contemplated by this Agreement shall be provided in accordance with the SAWS Utility Service Regulations, Design Criteria, Schedules, Attachments and Instruments thereto, as amended (together "USR"). In the event the specific terms of this Agreement are in conflict with the USR, the specific terms of this Agreement shall apply. The above notwithstanding, for the specific conflicting terms to prevail, the conflict must be expressly noted in the Agreement. The Parties further acknowledge that this Agreement is subject to future acts of the City Council of the City of San Antonio with respect to the adoption or amendment of impact fee ordinances/resolutions.

1.02 The Parties agree that the purpose of this Agreement is the reservation of the designated water supply and/or wastewater discharge capacity for the Tract. Any rights that the Developer claims arise under Chapter 245, Texas Local Government Code, that are related to this Agreement are dependent upon the provision of all information required by the Fair Notice Declaration that is attached hereto and is incorporated by reference as Attachment "IX."

2.00 Obligation Conditioned.

The obligation of SAWS to provide the Services is conditioned upon present rules, regulations and statutes of the United States of America and the State of Texas and any court order that directly affects the SAWS' Regional Water Production and Distribution System and/or Regional Wastewater Transportation and Treatment System and/or the utility infrastructure directly servicing the Tract. Developer acknowledges that if the rules, regulations and statutes of the United States of America and/or the State of Texas that are in effect upon the execution date of this Agreement are repealed, revised or amended to such an extent that SAWS becomes incapable of, or prevented from, providing the Services, then no liability of any nature is to be imposed upon SAWS as a result of SAWS' compliance with such legal or regulatory mandates. SAWS agrees that it will use its best efforts to prevent the enactment of such legal or regulatory mandates.

3.00 Term.

3.01 The term of this Agreement shall be seven (7) years from the Effective Date if the Developer complies with the requirements set out in G.C. 19.00 (attached) within the time period therein stated. This Agreement shall automatically expire if Developer fails to comply with the requirements of G.C. 19.00 within the time period therein provided. The term of this Agreement may be extended to fifteen (15) years from the Effective Date, if Developer complies with the requirements to extend the term set forth in G.C. 19.00 within the time period therein stated. Certain obligations of SAWS (described in Section 3.03 below) may survive the expiration of the term of this Agreement, to the extent that Developer has (i) paid all applicable impact fees for the Services at the then-current rate, and (ii) complied with all On-Site and Off-Site utility infrastructure requirements of this Agreement (described in the Special Conditions), including over-sizing requirements.

3.02 To the extent that SAWS' obligations do not survive the expiration of this Agreement, Developer understands and agrees that a new Utility Service Agreement must be entered into with SAWS to receive the Services for the development project that is the subject of this Agreement.

3.03 To the extent that Developer timely pays all applicable impact fees and complies with all On-Site and Off-Site utility infrastructure requirements prior to the expiration of this Agreement, the following obligations will survive expiration of this Agreement:

- (i) SAWS' recognition of Guaranteed Capacity.
- (ii) SAWS' continued recognition of impact fee credits previously earned by the Developer pursuant to Sections 15.8 and 15.9 of the USR.
- (iii) SAWS' continued provision of the Services to retail customers located in the Tract, so long as such customers pay for the services and comply with the regulations applicable to individual customers.

4.00 Entire Agreement.

The following documents attached hereto and incorporated herein are as fully a part of this Agreement as if herein repeated in full, together with this Agreement, comprise the Agreement in its entirety:

Attachment I:	General Conditions
Attachment II:	Special Conditions
Attachment III:	Description of Tract
Attachment IV:	Board Summary & Recommendation and Resolution (if necessary)
Attachment V:	Developer Water and/or Wastewater Master Plan (if necessary)
Attachment VI:	Engineering Study
Attachment VII:	Lift Station & Force Main Supplemental Agreement (if necessary)
Attachment VIII:	Water Recycling and Conservation Plan (if necessary)
Attachment IX:	Fair Notice Declaration (if Developer claims rights under Chapter 245 of the Texas Local Government Code)

5.0 Developer's Obligations.

The Developer acknowledges and agrees that the capacity provided by this Agreement runs with the land and shall be an appurtenance to the Tract. The Developer acknowledges that recordation of this Agreement in the Real Property Records of the County in which the Tract is located within three (3) years of the Effective Date of this Agreement is required; otherwise, this Agreement will automatically terminate. Developer shall record the Agreement and supply the Director with a recorded copy. The Developer shall maintain records of EDU's remaining on the Tract pursuant to the approved Developer Master Plan. Developer shall provide SAWS with such records upon SAWS written request. Developer further agrees to defend, indemnify and hold harmless SAWS and its successor and assigns from the claims of third parties arising out of SAWS' recognition of the transfer of capacity under this Agreement to Developer's subsequent purchasers, successors and assigns.

6.00 Indemnity.

TO THE EXTENT ALLOWED BY LAW AND TEXAS CONSTITUTION, THE DEVELOPER FURTHER AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS SAWS AND ITS SUCCESSOR AND ASSIGNS FROM THE CLAIMS OF THIRD PARTIES ARISING OUT OF SAWS' RECOGNITION OF THE TRANSFER OF CAPACITY UNDER THIS AGREEMENT TO DEVELOPER'S SUBSEQUENT PURCHASERS, SUCCESSORS AND ASSIGNS.

7.00 Notices.

Any notice, request, demand, report, certificate or other instrument which may be required or permitted to be furnished to or served upon the parties shall be deemed sufficiently given or furnished or served if in writing and deposited in the United States mail, registered or certified, return receipt requested, addressed to such party at the address set forth below:

Utility Service Agreement
USA_Kinder, Friesenhahn, & Bass Tracts_rev.DOC
01/23/06, Page 3 of 5

IF TO SAN ANTONIO WATER SYSTEM:

SAN ANTONIO WATER SYSTEM

POST OFFICE BOX 2449

SAN ANTONIO, TEXAS 78298-2449

ATTN: SAM MILLS, P.E., DIRECTOR INFRASTRUCTURE PLANNING

IF TO DEVELOPER:

BITTERBLUE, INC.

11 LYNN BATTS LANE, SUITE 100

SAN ANTONIO, TEXAS 78218

ATTN: WILLIAM E. POWELL, CEO

8.00 Severability.

If for any reason any one or more paragraph of this Agreement are held legally invalid, such judgment shall not prejudice, affect impair or invalidate the remaining paragraphs of the Agreement as a whole, but shall be confined to the specific sections, clauses, or paragraphs of this contract held legally invalid.

9.00 Effective Date.

The Effective Date of this Agreement shall be the date signed by the authorized representative of the San Antonio Water System.

ACCEPTED AND AGREED TO IN ALL THINGS:

San Antonio Water System

Developer

David E. Chardavoyne

William E. Powell

By: David E. Chardavoyne

By: William E. Powell

Title: President/ Chief Executive Officer

Title: CEO

Date: 25 January 2006

Date: 1/24/06

ACKNOWLEDGEMENTS

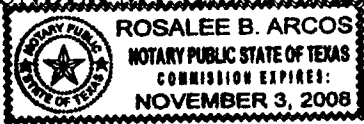
STATE OF TEXAS, COUNTY OF BEXAR

§

BEFORE ME, the undersigned Notary Public, on this day personally appeared William E. Powell known to me to be the person whose name is subscribed to the foregoing instrument and that he has executed the same as William E. Powell for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 24th day of January, 2006.

(seal)



Rosalee B. Arcos
Notary Public

STATE OF TEXAS, COUNTY OF BEXAR

§

BEFORE ME, the undersigned Notary Public, on this day personally appeared David E. Chardavoyne known to me to be the person whose name is subscribed to the foregoing instrument and that he has executed the same as David E. Chardavoyne for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 25th day of January, 2006.

(seal)

Greysa Pitman
Notary Public

GENERAL CONDITIONS OF THE UTILITY SERVICE AGREEMENT

G.C.1.00 Definitions.

G.C.1.01 Developer.

Owner of the tract, his subsequent purchasers, successors, and/or assigns.

G.C.1.02 Director of Infrastructure Planning.

The Director of Infrastructure Planning of the San Antonio Water System or his/her designated representative.

G.C. 1.03 Definition of Terms.

Unless defined in the Utility Service Agreement (the "Agreement"), the terms used in this General Conditions of the Utility Service Agreement (the "General Conditions") shall have the same definitions and meaning as those set out in Chapter 2, Definitions, of the Utility Service Regulations ("USR"). In the event a term is specifically defined in the General Conditions, and the definition is in conflict with that found in the USR, and such conflict is acknowledged in the General Conditions, the definition set out in the General Conditions shall apply.

G.C.2.00 Required Submittals.

If determined to be necessary by the Director of Infrastructure Planning ("Director"), the Developer hereby agrees to submit the following documents prior to the execution of the Agreement: Developer Master Plan, Developer Utility Layout, Water Recycling and Conservation Plan, and Engineering Report. The Parties agree that such documents are included instruments to the Agreement. The submittal of such documents is a condition precedent to plat recordation and initiation of Services. Developer shall modify such documents as may be reasonably required by the Director. Such documents shall be updated as required by the Director and the USR.

G.C.3.00 Dedication to SAWS.

The Developer agrees to dedicate, grant, and convey to SAWS all rights, title and interest of Developer in both the Off-Site and On-Site utility infrastructure that the Developer is required to construct under the Special Conditions of the Utility Service Agreement (the "Special Conditions"), and to dedicate, grant, and convey to SAWS easements for such utility infrastructure. Upon written acceptance of Off-Site and On-Site utility infrastructure by SAWS, the infrastructure shall be owned, operated and maintained by SAWS.

G.C.4.00 Design and Construction Requirements.

The design and construction of all Off-Site and On-Site utility infrastructure shall, at a minimum, comply with the requirements established by SAWS, including the USR, the City of San Antonio, the County of Bexar, the State of Texas, and any agency thereof with jurisdiction, including but not limited to the Texas Commission on Environmental Quality and the Texas Department of Health. Off-Site and On-Site utility infrastructure shall be constructed under the inspection of SAWS. Provision of the Services to the Tract shall not commence until the Director has accepted and approved Off-Site and On-Site utility infrastructure in writing.

G.C.5.00 Joint Venture Agreements.

In the event the Developer enters into a Joint Venture Agreement covering the costs for supplying the Services to the Tract, the Developer shall send a copy of such agreement to the attention of the Director.

G.C.6.00 Assignment.

The Agreement may not be assigned in whole or in part.

G.C.7.00 Event of Foreclosure.

In the event Developer's interest in the Tract described in Attachment III are extinguished by an act of foreclosure, and the foreclosing party has supplied sufficient evidence to SAWS that they are the successor in interest to the Tract as a result of such foreclosure, and that there are no lawsuits pending concerning the Tract, SAWS shall consider the foreclosing party a successor in interest if the foreclosing party executes a utility service agreement with SAWS after the Director determines that the execution of such an agreement will not be adverse to SAWS' interest.

G.C.8.00 Payment for Provision of Utility Service.

In the event payment for the Services provided to a subdivision plat within the Tract is not billed by SAWS, the amount of the monthly fees for the provision of the Services will be those charged to the various customer classifications as set by City Ordinances, with the billing and collection thereof on behalf of SAWS, being the responsibility of the billing utility purveyor. To facilitate this arrangement, Developer is to insert into any utility agreement with whatever utility purveyor is to bill for utility services to a subdivision plat within the Tract, a provision requiring said purveyor to enter into a Contract with SAWS to bill and collect SAWS' monthly utility services fees and transmit said fees to SAWS. The billing utility purveyor shall advise customers that delinquent non-payment of any of SAWS' fees will result in interruption and/or termination of the Services provided by SAWS, in accordance with applicable interruption and termination policies and procedures, as amended. SAWS shall not be obligated to provide the Services to any plat within the Tract unless and until the utility purveyor has executed a contract with SAWS to provide for the billing and collection of the Services provided by SAWS.

G.C.9.00 Enforcement of Industrial Waste Ordinance if Required by SAWS.

The Developer shall cause to be recorded in the Deed and Plat Records of the counties in which the Tract is located, a restrictive covenant covering the entire Tract. This restrictive covenant shall run with the land in the Tract described in Attachment III. Such covenant shall contain language expressly granting to SAWS the right, should SAWS so elect, to enforce and or otherwise pursue to the extent provided at law or in equity, the provisions of the City's Industrial Waste Ordinance No. 57214, as amended or as may be amended (codified as Chapter 34, Article V, Division 3 of the City Code). SAWS' right shall include, to the extent provided at law or in equity, the right to inspection, sampling and monitoring of the collection system to assure ordinance compliance.

Recordation of the Covenant shall be a condition precedent for SAWS' provision of the Services to any portion of said Tract.

G.C.10.00 Oversizing.

Developer must pay for all mains and other utility facilities needed to serve the Tract. SAWS may require the installation of oversized water mains and wastewater mains and related facilities. SAWS' requirements for oversizing, if any, are set forth in the Special Conditions. SAWS will execute a trilateral contract with Developer and a contractor for the construction of oversized facilities. Contracts for the construction of oversized facilities must be competitively bid as required by law. SAWS will reimburse the Developer for the oversize construction cost differential upon completion of the approved facility installation and SAWS' acceptance of such facility. SAWS will determine whether to provide such reimbursement in the form of a cash reimbursement or in credits to be applied to impact fees. All oversizing shall be done in accordance with the USR.

G.C.11.00 Off-Site /On-Site Facilities.

Developer shall construct and install all required Off-Site and On-Site utility infrastructure in accordance with the USR and Special Conditions, at no cost to SAWS. Any specific requirements related to the facilities are set forth in the Special Conditions.

G.C.12.00 Impact Fee Payment.

Developer agrees that the Agreement does not constitute an assessment of impact fees. Developer agrees to pay all applicable impact fees at the time and in the amount prescribed by ordinance or resolution of the City Council of the City of San Antonio and the USR, as amended. An estimate of the impact fees for the development Tract is provided in the Special Conditions. The estimate does not constitute an assessment of impact fees, and the amount of impact fees is subject to change by the City Council of the City of San Antonio as provided by law.

G.C.13.00 SAWS' Obligation to Supply Service.

To the extent that Developer pays all applicable impact fees and complies with all Off-Site and On-Site utility infrastructure requirements, Developer shall be entitled to the permanent use and benefit of the Services and is entitled to receive immediate service from any existing facilities with actual capacity to serve the development for which impact fees were paid, subject to compliance with other valid regulations. If, after collecting the impact fees, there is no actual capacity in existing facilities to provide the Services, SAWS will provide the Services within a reasonable period of time not to exceed five (5) years, as prescribed by Chapter 395 of the Local Government Code, as amended. In the event Services are required by Developer earlier than the five (5) year period, Developer and SAWS may agree that Developer may construct or finance the capital improvements or facility expansions required to provide Services, and the costs incurred or funds advanced will be credited against impact fees otherwise due from the new development or reimbursed to Developer from impact fees paid from other new developments that will use such capital improvements or facility expansions, which fees shall be collected and reimbursed to Developer at the time the other new development records its plat.

G.C.14.00 Facility Design and Construction.

The Developer shall design and construct all On-Site and Off-Site utility infrastructure described in the Special Conditions, including any oversizing, in accordance with the USR and all applicable local, state and federal requirements. Developer further recognizes that SAWS' approval in all respects as to facility right-of-way adequacy, location, size, grade and invert elevation is a condition precedent to any further obligation of SAWS. Specific design and construction requirements are set forth in the Special Conditions.

G.C.15.00 Use of Capacity by SAWS.

Developer understands that capacity in Off-Site and On-Site utility infrastructure resulting from the Agreement for the Tract may be utilized by SAWS for other tracts requesting service from SAWS. SAWS shall keep accurate records of the capacity provided to the Tract under the Agreement, whether Set-Aside or Guaranteed Capacity, and in no event will Developer be denied capacity as a result of SAWS' utilization of such capacity for another tract. Set-Aside capacity shall not survive the expiration of the Agreement.

G.C.16.00 Utility Master Plan Requirements.

The Developer will prepare a utility master plan, which details the water and/or wastewater systems for the Tract pursuant to the USR, as amended.

G.C.17.00 Phased Utility Master Plans.

If the Developer's water and/or wastewater systems are to be installed in phases or units, the Developer shall submit overall utility master plans to SAWS for review and approval. The overall utility master plan(s) shall be submitted before the first construction phase is submitted for plat approval. The overall utility master plan(s) shall show the development phases or units including the sequence and a timetable for build-out. The Developer shall also provide SAWS with a digital version of the proposed recorded plat, as submitted for plat recordation in a format acceptable to SAWS, for each phase or unit of the development project.

G.C.18.00 Conformance of Plans to Utility Master Plan.

All water and wastewater system facilities to serve the Tract shall be designed and constructed in conformance with the approved utility master plan. Changes in the water and wastewater system design shall be resubmitted to SAWS for written approval.

G.C.19.00 Timing Requirements for Submission of Plans.

Developer shall have three (3) years from the Effective Date of the Agreement to complete and submit the required utility master plan and to start construction of the Off-Site and On-Site utility infrastructure described in the Special Conditions. Developer agrees that the Agreement for the provision of Services shall automatically expire if Developer has not submitted a utility master plan and started construction of required Off-Site and On-Site utility infrastructure within three (3) years of the Effective Date of the Agreement, and a new request for the Services must be submitted to SAWS, which SAWS will grant based on then existing policies and regulations. In the event Developer meets the above-mentioned requirements within the three (3) year period provided, the Agreement shall remain in effect for seven (7) years from the Effective Date. If Developer submits a revised Utility Master Plan in accordance with the USR prior to the expiration of the seven (7) year period, the Agreement for the provision of Services may be extended to a maximum term of fifteen (15) years from the Effective Date.

SPECIAL CONDITIONS OF THE UTILITY SERVICE AGREEMENT

WATER SERVICE

S.C.1.00 Tract Location and Ultimate Demand.

Kinder and Bass, a 987-acre tract, as part of the collective total 1,088-acre tract, is located outside the City limits and outside SAWS' service area, north of Estate Gate, and west of US Highway 281, as shown in Attachment III (the "Tract"). A portion of the tract is located over the Edwards Aquifer Recharge Zone.

The ultimate demand on the SAWS' facilities shall not exceed 4,031 equivalent dwelling units (EDUs) of water supply, for the proposed development.

S.C.2.00 Infrastructure Requirements.

Water Supply to the tract will be from Pressure Zone 11A. To supply water to the 987-acre Tract consistent with the Board's USR, the flow capacity of a 24-inch main is required. There are existing 24-inch mains along Bulverde Road and US Highway 281, within the vicinity of the proposed Tract to which connections can be made. The Developer will be required to construct a looped 24-inch main through the Tract, by connecting to the existing 24-inch mains along Bulverde Road and US Highway 281.

Furthermore, all other requirements will be determined at the time master plans are submitted, to SAWS, for each development. *Note:* water service to the proposed Tract may be contingent upon SAWS acquiring the Certificate of Convenience and Necessity (CCN) for this particular area of Bexar County.

S.C. 3.00 SAWS Master Plan and Oversizing Requirements.

Not Applicable.

S.C.4.00 Eligibility for Impact Fee Credits.

Not Applicable.

S.C.5.00 Engineering Study Report and/or Pro-Rata Fee Eligibility.

The engineering study report "Kinder, Friesenhahn, and Bass, 1,258-Acre Tracts, Utility Service Agreement Engineering Report", by Bitterblue, Inc., dated August 9, 2005 is included as Attachment VI.

S.C.6.00 Developer On-Site Requirements.

The Developer shall acquire any right-of-way or easements, and install all On-Site utility infrastructure required to serve the Tract in accordance with SAWS' USR, solely at the Developer's cost. Other On-Site requirements within the Tract will be determined at such time

Special Conditions of USA

USA_Kinder, Friesenhahn, & Bass Tracts_rev.DOC

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as the engineer submits an overall Utility Master Plan, and any subsequent revisions, for the Tract.

S.C.7.00 Requirement to Install Approved Pressure Regulators and/or Booster Pumps.

A portion of the tract is below the ground elevation of 1,215 feet where the static pressure will normally exceed 80 psi. At all such locations, the Developer or builder shall install at each lot, on the customer's side of the meter an approved type pressure regulator in conformance with the Plumbing Code of the City of San Antonio.

S.C.8.00 Time for Water Impact Fee Assessment and Payment.

Water Impact Fees will be assessed at the rates in effect at the time of plat recordation or the latest date allowed by law. Impact fees will be collected at either the time of plat recordation or connection to the SAWS' water system, as determined by SAWS.

S.C.9.00 Water Impact Fee Estimates Based Upon Current Charges.

Following is an estimate of impact fees for the provision of Services contemplated under the Agreement, which are based on current impact fee rates. This estimate shall not constitute an assessment of impact fees and impact fee rates are subject to change by the San Antonio City Council.

Type of Impact Fee	EDUs	\$/EDUs	Current Total
Flow Development	4,031	\$ 362.00	\$ 1,459,222.00
System Development (PZ 11A)	4,031	\$ 945.00	\$ 3,809,295.00
Water Supply	4,031	\$ 852.00	\$ 3,434,412.00
Total		\$ 2,159.00	\$ 8,702,929.00

S.C.10.00 Pro-Rata Charge Requirement.

Developer shall be required to pay a Pro-Rata Charge pursuant to the USR, as amended, prior to connection to the SAWS water system if Developer is tying into a main that is subject to a pro-rata refund.

S.C.11.00 Additional Terms.

Additional terms and provisions for construction of the water infrastructure improvements are set forth in the 24-inch water main construction agreement between the San Antonio Water System and Bitterblue, Inc., of event date herewith ("Construction Agreement"). In the event of any conflict or inconsistency between the terms of this Agreement and the Construction Agreement, the terms of the Construction Agreement shall control.

SPECIAL CONDITIONS OF THE UTILITY SERVICE AGREEMENT

WASTEWATER SERVICE

S.C.1.00 Tract Location and Ultimate Demand.

Kinder, Friesenhahn, and Bass, a collective total 1,088-acre tract outside the City limits and outside SAWS' service area, is located north of Estate Gate, west of US Highway 281, as shown in Attachment III (the "Tract"). A portion of the Tract is located over the Edwards Aquifer Recharge Zone.

The ultimate demand on the SAWS' facilities shall not exceed 4,031 equivalent dwelling units (EDUs) of wastewater discharge, for the proposed development.

S.C.2.00 Infrastructure Requirements.

The Tract is situated within SAWS' Outer Service Area (OSA) and lies within the Cibolo Creek and Upper Salado Creek Watersheds. Wastewater service to the tract requires the capacity of a paralleled 12-inch gravity main at 0.30 percent minimum slope for 1,291 EDU's of the 4,031 EDU's to flow through the Mud Creek Outfall and the extension of an 18-inch gravity main at 0.17 percent minimum slope for the remaining 2,740 EDU's to flow through the Indian Springs Outfall. The Developer may use the existing capacity not already used or previously committed in the Mud Creek Outfall main, within the Oliver Ranch or Canyon Springs developments. The nearest accessible wastewater main is a 30-inch gravity wastewater main crossing US Highway 281, north of Sonterra Boulevard. The Developer will be required to construct a 12-inch main from the Tract, which will parallel the existing wastewater infrastructure and connect to the existing 30-inch main crossing US Highway 281, north of Sonterra Boulevard. Each segment of the required 12-inch parallel wastewater main along the Mud Creek Outfall must be constructed once the capacity of the existing outfall main has been exceeded by flows generated from the proposed Tract on a segment by segment basis. The Developer may be required to upgrade the existing lift station/force main system located south of Evans Road, west of US Highway 281 to accommodate the required wastewater flows from the proposed Tract. The Developer may connect a maximum of 1,291 EDU's of capacity to the existing lift station/force main system and to the existing 30-inch main along US Highway 281.

Furthermore, all other requirements will be determined at the time master plans are submitted, to SAWS, for each development. Capacity in the existing wastewater outfall between Oliver Ranch and US Highway 281 is currently committed to Stone Oak, Canyon Springs, and Oliver Ranch tracts. SAWS staff are currently working with representatives from the Stone Oak, Canyon Springs, and Oliver Ranch tracts to revise the contracted capacity requirements for these tracts. Based on the results of these proposed revisions, some capacity may become available in portions of the existing outfall to serve the tract, as warranted.

S.C.3.00 San Antonio Water System Master Plan and Oversizing Requirements.

SAWS is currently revising the Master Wastewater Infrastructure Plan to accommodate flows from undeveloped areas within the Cibolo Creek and Upper Salado Creek Watersheds. The revised San Antonio Water System Wastewater Master Plan and the anticipated growth in this area may include the oversizing of approximately 47,310-feet of proposed 12-inch main to a 27-inch main. The total estimated cost of the main is \$16,605,810. The Developer estimated share of the cost is \$3,280,160 and SAWS' estimated share of the cost is \$13,325,650.

S.C.4.00 Impact Fee Credit Eligibility.

The 27-inch main was not included as a Capital Improvement Project in the current impact fees. Therefore, the impact fee credits for the Developer's proportionate share of the oversizing, is contingent upon inclusion of the 27-inch outfall main in the proposed impact fee calculations.

S.C.5.00 Engineering Study Report and/or Pro-Rata Refund Eligibility.

The engineering study report "Kinder, Friesenhahn, and Bass, 1,258-Acre Tracts, Utility Service Agreement Engineering Report", by Bitterblue, Inc., dated August 9, 2005 is included as Attachment VI.

S.C.6.00 Developer On-Site and/or Off-Site Requirements.

The Developer will also be required to acquire any right-of-way and easements, install all On-Site and Off-Site utility infrastructure, and upgrade existing lift stations necessary to serve the Tract in accordance with SAWS' USR, solely at the Developer's cost. Other On-Site utility infrastructure requirements within the Tract will be determined at such time as the engineer submits an overall Utility Master Plan, and any subsequent revisions, for the Tract.

S.C.7.00 Lift Stations and Force Mains.

Lift stations and force mains are only allowed by prior written supplemental agreement with SAWS. Applicable fees, as set out in the supplemental agreement, must be paid in full prior to service connection.

S.C.8.00 Time for Wastewater Impact Fee Assessment and Payment.

Wastewater Impact Fees will be assessed at the rates in effect at the time of plat recordation or the latest date allowed by law. Wastewater Impact Fees will be collected at either the time of plat recordation or connection to the SAWS wastewater system, as determined by SAWS.

S.C.9.00 Wastewater Impact Fee Estimates Based Upon Current Charges.

Following is an estimate of impact fees for the provision of Services contemplated under the Agreement, which are based on impact fee rates in effect as of the Effective Date of the Agreement. This estimate shall not constitute an assessment of impact fees and impact fee rates are subject to change by action of the San Antonio City Council as permitted by law.

Type of Impact Fee	EDUs	\$/EDUs	Current Total
Wastewater Collection	4,031	\$ 366.00	\$ 1,475,346.00
Wastewater Treatment (OSA)	4,031	\$ 750.00	\$ 3,023,250.00
Total		\$ 1,116.00	\$ 4,498,596.00

S.C.10.00 Pro-Rata Payment Fee Requirement.

Developer shall be required to pay a pro-rata fee pursuant to the USR, as amended, prior to connection to the wastewater system, if Developer is tapping into a main that is subject to a pro-rata refund.

ATTACHMENT IX

FAIR NOTICE DECLARATION

Any rights that the Developer claims arise under Chapter 245, Texas Local Government Code that are related to this Agreement are dependent upon the provision of all information required by this Fair Notice Declaration. In the absence of any of the required information, fair notice of a project is not given.

1. A legal description of the Tract must be attached to the Agreement as Attachment IX (A).
2. A detailed plan must be attached to the Agreement as Attachment IX (B) that provides the following information:
 - a. lot configuration, size, and location for each lot within the Tract
 - b. a specific description of the proposed land use for each lot
 - c. street layout
 - d. easement locations
 - e. total number and types of units by land use (single-family, multi-family, school, hotel, office, restaurant, or other specific description)
3. A narrative description of the sequence and timetable for the build-out of the proposed development must be attached to the Agreement as Attachment IX (C).

RESOLUTION NO. 05-373

OF THE SAN ANTONIO WATER SYSTEM BOARD OF TRUSTEES APPROVING A UTILITY SERVICE AGREEMENT TO PROVIDE WATER AND WASTEWATER SERVICE TO THE KINDER, FRISENHAHN, AND BASS TRACT, 1,258-ACRE TRACT LOCATED NORTH OF ESTATE GATE, WEST OF US HIGHWAY 281, BEING DEVELOPED BY BITTERBLUE, INC., DEVELOPER, SUBJECT TO THE EXPIRATION OF SUCH AGREEMENT IF NOT EXERCISED IN THIRTY-SIX MONTHS; FINDING THE RESOLUTION TO HAVE BEEN CONSIDERED PURSUANT TO THE LAWS GOVERNING OPEN MEETINGS; PROVIDING A SEVERABILITY CLAUSE; AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, Bitterblue, Inc., a Developer Customer, has requested the San Antonio Water System (the "System") to provide water and wastewater service to the 1,258-acre tract of land (the "tract"), and has satisfied the requirements of the Board's Regulations for Developer Customer Applicants; and

WHEREAS, the tract is located outside the San Antonio City limits, north of Estate Gate, west of US Highway 281, within the System's Outer Service Area for wastewater service, within the Cibolo Creek and Upper San Antonio River Watersheds and Service Levels 11A and 12 for water service, and is generally illustrated in Attachment I hereto; and

WHEREAS, portions of the tract are located over the Edwards Aquifer Recharge Zone and are classified as a Category 3 Properties; and

WHEREAS, the proposed development of the tract will discharge a total wastewater flow estimated to be 4,031 equivalent dwelling units (EDUs) and total water demand estimated to be 4,031 EDUs; and

WHEREAS, to supply water service to the tract, the Developer will be required to provide the following infrastructure:

- Construct a looped 30-inch main through the Tract, by connecting to the existing 24-inch mains along Bulverde Road and US Highway 281.
- Construct a storage tank and booster station, within the Friesenhahn II/Dym development. The storage tank will float on Service Level 11, at an elevation of 1,400-feet. The storage tank shall be constructed at a location where the ground elevation is at or above 1,320-feet. The booster station will then boost the water from Service Level 11 to Service Level 12, at an elevation of 1,610-feet. The developer will be required to construct a storage tank sized for the development,

which will be oversized, by SAWS, to a 500,000-gallon tank. Based on the number of EDU's requested for this development, it is estimated that the developer will be required to construct a 110,000-gallon storage tank.

- All other requirements will be determined at the time master plans are submitted, to SAWS, for each development. Water service to the proposed Tract is contingent upon SAWS acquiring the Certificate of Convenience and Necessity (CCN) for this particular area of Bexar County; and

WHEREAS, it is recommended that the required 110,000-gallon storage tank be oversized to a 500,000-gallon storage tank in conformance with the System Water Infrastructure Master Plan at this location; and

WHEREAS, for the oversizing of the required 110,000-gallon storage tank to a 500,000-gallon storage tank, the Developer's estimated proportionate share is 21.27% of the cost and SAWS' estimated proportionate share is 78.76% of the cost. The total estimated project cost is \$300,000. The System estimated share of the cost is \$236,280, and the Developer's estimated share is \$63,720. The System's proportionate share of the oversizing, which will be paid in the form of impact fee credits or cash reimbursements, is contingent upon the System adding the production facility to the current impact fee calculations; and

WHEREAS, to supply wastewater service to the tract, the Developer will be required to construct a 21-inch main from the Tract, which will parallel the existing wastewater infrastructure and connect to the existing 30-inch main crossing US Highway 281, north of Sonterra Boulevard. The Developer will also be required to upgrade the existing lift station/force main system located south of Evans Road, west of US Highway 281, to accommodate the required wastewater flows from the proposed tract. Furthermore, all other requirements will be determined at the time master plans are submitted, to the System, for each development; and

WHEREAS, it is recommended that approximately 47,310 feet of 21-inch wastewater main be oversized to a 27-inch wastewater main in conformance with the System's Wastewater Infrastructure Master Plan at this location; and

WHEREAS, for the oversizing of the required 21-inch wastewater main to a 27-inch wastewater main, the Developer's estimated proportionate share is 60.5% of the cost and the System's estimated proportionate share is 39.5% of the cost. The total estimated project cost is \$7,664,382. SAWS estimated share of the cost is \$3,027,904, and the Developer's estimated share is \$4,636,478. The System's proportionate share of the oversizing, which will be paid in the form of impact fee credits or cash reimbursements, is contingent upon the System adding the production facility to the current impact fee calculations; and

WHEREAS, the Developer Customer is obligated to pay the prescribed fees and to comply with other applicable requirements as set forth in the Regulations for Water and Wastewater Service; and

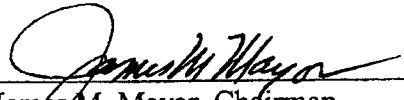
WHEREAS, the San Antonio Water System Board of Trustees desires (i) to agree to provide water and wastewater service to the Kinder, Friesenhahn, and Bass, 1,258-Acre Tract, as described above, and (ii) to provide that this agreement will be honored for a period of thirty-six months, and that if not exercised during this period, the utility service agreement will expire, and (iii) to require the oversizing of the required 110,000-gallon storage tank to a 500,000-gallon storage tank and oversize the required 21-inch wastewater main to a 27-inch wastewater main; now, therefore:

BE IT RESOLVED BY THE SAN ANTONIO WATER SYSTEM BOARD OF TRUSTEES:

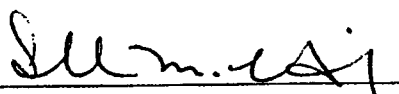
1. That the San Antonio Water System hereby agrees to provide water and wastewater service to the Kinder, Friesenhahn, and Bass, 1,258-Acre Tract being developed by Bitterblue, Inc., located north of Estate Gate, west of US Highway 281, as generally illustrated in Attachment I hereto, on a developer customer basis as provided for in the Board's Regulations, applicable amendments to the Regulations, and any other applicable federal, state or local regulations.
2. That this agreement shall be honored for a period of thirty-six months, and if not exercised during this thirty-six-month period, the utility service agreement will expire.
3. That the oversizing of the required, oversize the required 110,000-gallon storage tank to a 500,000-gallon storage tank and oversize the required 21-inch wastewater main to a 27-inch wastewater main is hereby approved.
4. It is officially found, determined and declared that the meeting at which this resolution is adopted was open to the public, and that public notice of the time, place and subject matter of the public business to be conducted at such meeting, including this resolution, was given to all as required by the Texas Codes Annotated, as amended, Title 5, Chapter 551, Government Code.
5. If any part, section, paragraph, sentence, phrase or word of this resolution is for any reason held to be unconstitutional, illegal, inoperative or invalid, or if any exception to or limitation upon any general provision herein contained is held to be unconstitutional, illegal, invalid or ineffective, the remainder of this resolution shall nevertheless stand effective and valid as if it had been enacted without the portion held to be unconstitutional, illegal, invalid or ineffective.

6. This resolution shall take effect immediately from and after its passage.

PASSED AND APPROVED this 13th day of September, 2005.

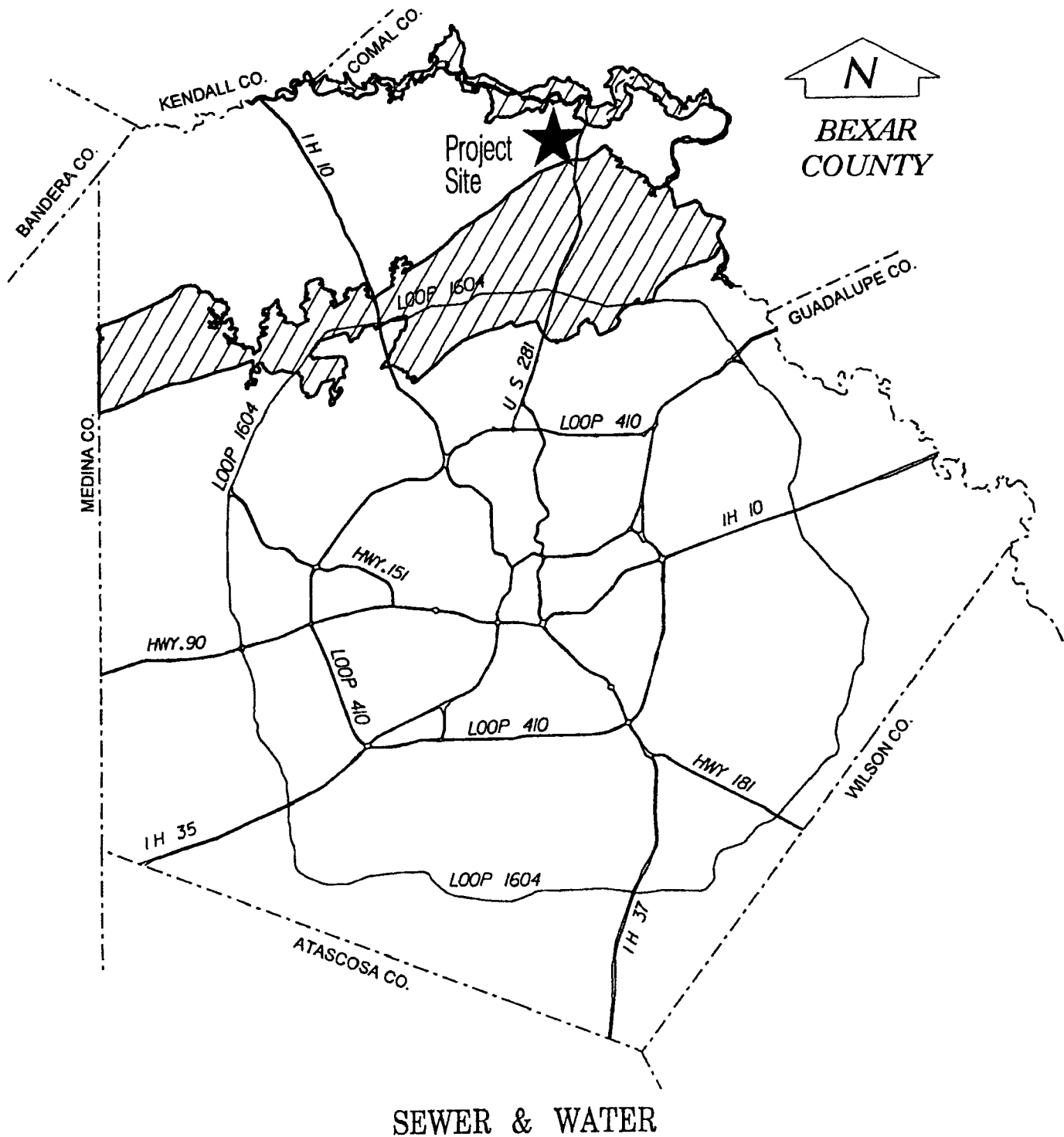

James M. Mayor, Chairman

ATTEST:


Salvadore M. Hernández, Secretary

ATTACHMENT I

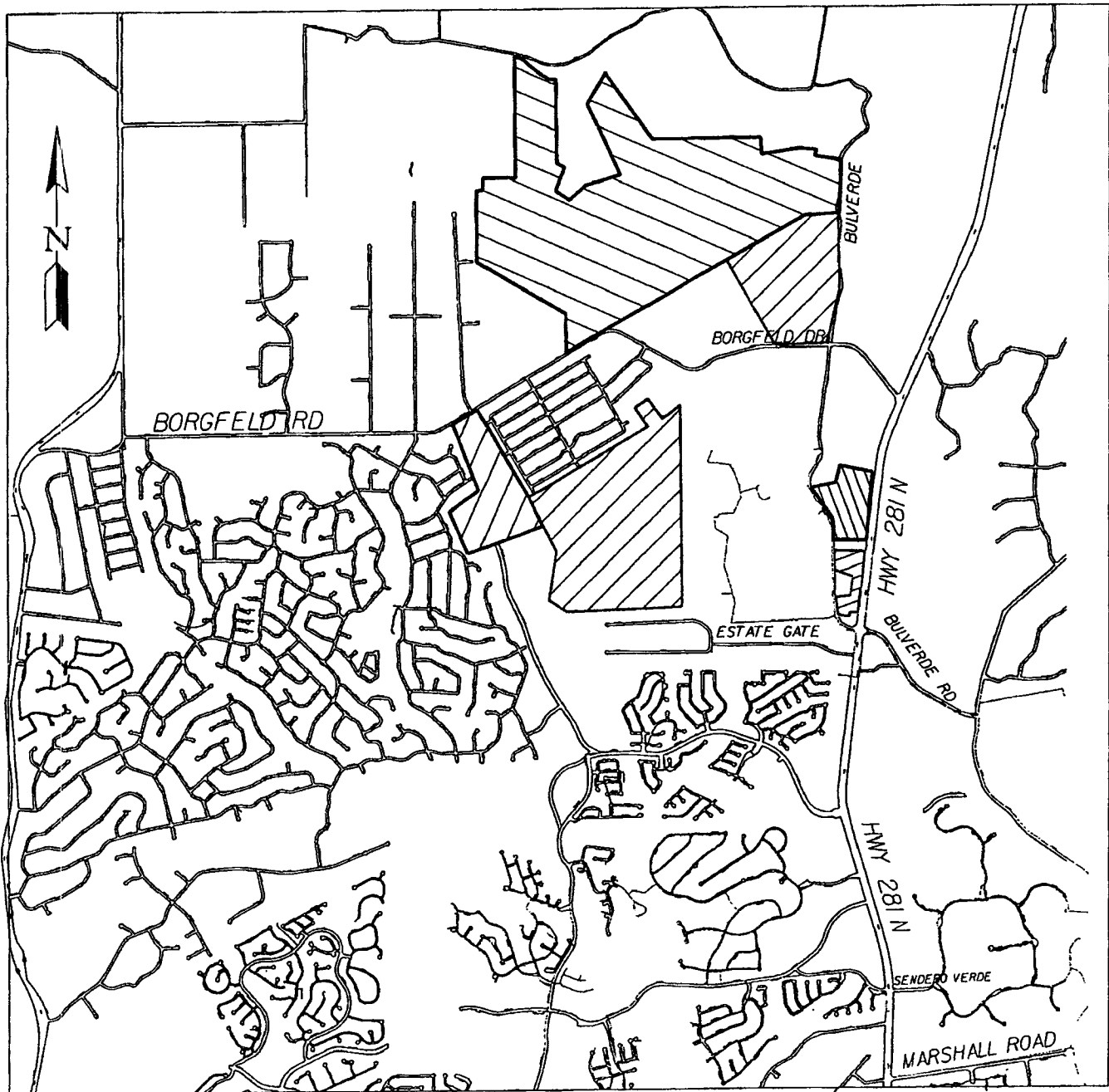
Kinder, Friesenhahn, Bass 1,258.00 - Acre Tract



Kinder, Friesenhahn, Bass

1,258.00 - Acres

----- 24" Main



WATER MAP

Kinder, Friesenhahn, Bass

1,258.00 - Acres

----- Sewer Main



SEWER MAP