SECTION 7. If passed by more than two-thirds of vote of both houses, this Act shall be effective immediately. Otherwise, this Act takes effect September 1, 2003. The repeal of Sections 6, 6a and 20, Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), does not affect any annexation proceeding initiated before the effective date of this Act, or any pending application for Certificate of Convenience and Necessity, provided that such application has been referred by the Texas Commission on Environmental Quality to the State Office of Administrative Hearings before the effective date of this Act.

By: Madla

S.B. No. 1494

(In the Senate - Filed March 13, 2003; March 20, 2003, read first time and referred to Committee on Natural Resources; May 2, 2003, reported adversely, with favorable Committee Substitute by the following vote: Yeas 10, Nays 0; May 2, 2003, sent to printer.)

COMMITTEE SUBSTITUTE FOR S.B. No. 1494

By: Hinojosa

A BILL TO BE ENTITLED
AN ACT

relating to the powers of Bexar Metropolitan Water District.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2, Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), is amended to read as follows:

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.

SECTION 2. Section 3, Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), is amended to read as follows:

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 develop, transport, deliver, distribute, store, and treat water for use within the District, including [~~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 within [~~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 second 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;

(s) to enter into planning agreements with the Texas Water Development Board under Subchapter C, Chapter 16, Water Code, for the purpose of conducting studies necessary to maintain retail water supply services to customers within the boundaries of the District; and

(t) to cooperate with and support local fire departments and economic development activities sponsored by local entities within the District that use water and water resources provided, or to be provided, by the District.

SECTION 3. Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), is amended by adding Section 5A to read as follows:

Sec. 5A. In addition to the territory described by Section 5 of this Act, and in conformity with the court's order dated April 22, 1996, in Rios v. Bexar Metropolitan Water District et al., No. SA-96CA-0335, in the United States District Court, Western District of Texas, for purposes of the exercise of the District's current retail water utility services the District's boundaries shall include the territory defined in all of the portions of, or the

applicable portions of, the census tracts or property situated within the area described by certificates of convenience and necessity numbers 10675, 12759, and 12760 issued by the Texas Commission on Environmental Quality as they are in effect on the effective date of this section.

SECTION 4. Sections 6, 6a, and 20, Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), are repealed.

SECTION 5. (a) This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2003.

(b) The repeal of Sections 6, 6a, and 20, Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), does not affect an annexation proceeding initiated before the effective date of this Act. An annexation proceeding initiated 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.

(c) The repeal of Sections 6, 6a, and 20, Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), 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. 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.

* * * * *

NO. C2003-1201A

CITY OF BULVERDE, TEXAS and GUADALUPE-BLANCO RIVER AUTHORITY,	§	**IN THE DISTRICT COURT OF**
Plaintiff	§	
v.	§	**COMAL COUNTY, TEXAS**
BEXAR METROPOLITAN WATER DISTRICT	§	
Defendant	§	**22nd JUDICIAL DISTRICT**

BEXAR METROPOLITAN WATER DISTRICT'S FIRST AMENDED MOTION TO TRANSFER VENUE, ANSWER, PLEA TO THE JURISDICTION, PLEA IN ABATEMENT AND AFFIRMATIVE DEFENSES

TO THE HONORABLE COURT:

Defendant Bexar Metropolitan Water District ("BexarMet") files this First Amended Motion to Transfer Venue, Answer, Plea to the Jurisdiction, Plea in Abatement and Affirmative Defenses and respectfully shows the Court as follows:

I. BACKGROUND

GBRA is a monopolist. It uses its dominant share of water rights in the Guadalupe River basin as a means of suppressing competition with BexarMet (and others) and extracting unrestrained rate increases for that water.

Pursuant to a permit from the Texas Commission on Environmental Quality ("TCEQ"), GBRA controls water rights for 90,000 acre-feet per year of raw water from Canyon Lake. That water is not owned by GBRA — it is a public resource, owned by the State in trust for the benefit of the people of Texas. TEX. WATER CODE § 11.021(a); *Lower Colorado River Authority v. Texas*

03.12.04

Dept. of Water Resources, 689 S.W.2d 873, 875 (Tex. 1984). Despite having almost 30,000 acre-feet per year of raw water available for commitment, GBRA has refused repeated requests by BexarMet to provide it with a mere 3000 acre-feet of water per year to serve its customers in Comal County.

In addition to controlling the predominant source of state-owned surface water in Comal County, GBRA recently began efforts to provide retail water service in Comal County in competition with BexarMet. GBRA has abused its position as the dominant holder of state-owned water to deny its retail water service competitor — BexarMet — the water needed for its retail service operations in Comal County. By denying BexarMet's request, GBRA has improperly exercised control of a public resource for its own advantage.

Moreover, notwithstanding the public nature of the water in Canyon Lake and the Guadalupe River, GBRA uses its control over those water rights to leverage one-sided "take-it-or-leave-it" contracts from those seeking water from Canyon Lake. GBRA's "take-it-or-leave-it" contracts instruct purchasers that if they want water, they must pay GBRA's basin-wide rate — whatever GBRA determines it to be. GBRA's water purchase contracts give GBRA the unilateral right to raise its prices at any time. That unrestrained right has led to price increases of almost 40% over the past 6 years.

BexarMet, created by the Legislature in 1945, currently provides water to over 70,000 locations and 250,000 individuals in Atascosa, Bexar, Comal and Medina Counties, Texas, and has provided retail water service in Comal County pursuant to TCEQ CCNs since 1998. BexarMet's overall operations include approximately 850 miles of pipeline, 105 wells, and 97 storage tanks, which contain about 50 million gallons of water. BexarMet is one of the largest purchasers of

GBRA's state-owned water.

GBRA's abuses of its control of state-owned surface water have given rise to a series of judicial and administrative proceedings involving BexarMet, including:

1. *Bexar Metropolitan Water District v. The Texas Commission on Environmental Quality*; Cause No. GV-302775, pending in the 250th Judicial District Court of Travis County, Texas.

2. *Canyon Regional Water Authority and Bexar Metropolitan Water District v. Guadalupe-Blanco River Authority, the Texas Commission on Environmental Quality, and Margaret Hoffman in her official capacity as Executive Director of the Texas Commission on Environmental Quality*; Cause No. GN-400211, pending in the 201st Judicial District Court of Travis County, Texas [consolidated with *Guadalupe-Blanco River Authority v. Canyon Regional Water Authority, Bexar Metropolitan Water District, Water Services, Inc., and the Texas Commission on Environmental Quality*; Cause No. GN-400105, pending in the 353rd Judicial District Court of Travis County, Texas].

3. *Petition of Canyon Regional Water Authority and Bexar Metropolitan Water District to Appeal the Wholesale Water Rate Increase of Guadalupe-Blanco River Authority*, SOAH Docket No. 582-03-1991, TCEQ Docket No. 2002-1400-UCR, pending at the State Office of Administrative Hearings.

4. *Petition of Canyon Regional Water Authority and Bexar Metropolitan Water District to Appeal the Wholesale Water Rate Increase of Guadalupe-Blanco River Authority*, SOAH Docket No. 582-04-1925, TCEQ Docket No. 2003-1571-UCR, pending at the State Office of Administrative Hearings.

5. *In Re Petition of Bexar Metropolitan Water to Compel Raw Water Commitment From Guadalupe-Blanco River Authority*, Administrative Review No. P-002-4, pending at the TCEQ.

BexarMet has initiated the above actions to challenge GBRA's refusal to sell it state-owned water for its Comal County customers, GBRA's nearly 40% rate increase to all its raw-water customers in only six years — in part to finance its retail aspirations, and, most importantly, to defend BexarMet's authority to serve in Comal County. This action is an attempt by GBRA to interfere with both the above courts' and the TCEQ's jurisdiction, and is brought in the absence of standing and of a ripe controversy.

II. DEFENDANT'S MOTION TO TRANSFER VENUE

1. BexarMet files this Motion to Transfer Venue requesting transfer of this case to Travis County.

2. This case must be transferred to Travis County because venue is mandatory in Travis County under TEX. CIV. PRAC. & REM. CODE § 15.016, which provides, "An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute."

3. Plaintiffs Guadalupe-Blanco River Authority ("GBRA") and City of Bulverde's ("Bulverde") requested declarations duplicate their claims and/or defenses in Cause No. GV-302775, *Bexar Metropolitan Water District v. Texas Commission on Environmental Quality*, in the 250th Judicial District Court of Travis County, Texas. Therefore, mandatory venue for this action is in Travis County pursuant to TEX. GOV'T CODE § 2001.176(b)(1).

4. GBRA and Bulverde's requested declarations challenge, affect or seek review of rulings, orders, decisions and/or other acts of the TCEQ. Therefore, mandatory venue for this action is in Travis County pursuant to TEX. GOV'T CODE § 2001.176(b)(1) and TEX. WATER CODE § 5.354.

5. GBRA and Bulverde have not and cannot allege that venue is mandatory in Comal County, and have merely alleged that venue is proper in Comal County pursuant to the general venue rule of TEX. CIV. PRAC. & REM. CODE § 15.002. Because the above-described claims are subject to mandatory venue in Travis County, all claims properly joined by the Plaintiffs' suit "shall be brought in the county required by the mandatory venue provision," Travis County. TEX. CIV. PRAC. & REM. CODE § 15.004.

6. For the foregoing reasons, BexarMet asks the Court to set this Motion to Transfer

Venue for hearing and, after the hearing, grant BexarMet's motion to transfer venue and transfer this case to Travis County.

III. General Denial
(Subject to Motion to Transfer Venue)

7. Defendant BexarMet generally denies each and every, all and singular, of the allegations contained in Plaintiff's Original Petition ("Petition") and demands strict proof thereof, as authorized by Rule 92 of the Texas Rules of Civil Procedure.

IV. Plea to the Jurisdiction
(Subject to Motion to Transfer Venue)

8. BexarMet respectfully requests that this Court dismiss this cause for lack of subject matter jurisdiction. Subject matter jurisdiction is the power to deal with the abstract legal question presented, but also includes the fact-specific concepts of both ripeness and standing as necessary components. This Court lacks subject matter jurisdiction because it is without the power to decide the legal questions presented, and because that jurisdiction is exclusively in the Travis County District Court or exclusively and/or primarily in the TCEQ. This Court further lacks subject matter jurisdiction because GBRA lacks standing to bring its claims, and because its claims are unripe for consideration.

A. Lack of subject matter jurisdiction over issues raised.

9. Plaintiffs GBRA and Bulverde are parties in several currently pending litigation and administrative cases at the Texas Commission on Environmental Quality ("TCEQ") involving BexarMet and the issues raised in this case. Those litigation and administrative matters include the following:

a. *Bexar Metropolitan Water District v. The Texas Commission on*

Environmental Quality; Cause No. GV-302775, pending in the 250th Judicial District Court of Travis County, Texas ("Bulverde CCN Appeal"). The Bulverde CCN Appeal is an appeal by BexarMet of a TCEQ order denying it a Certificate of Convenience and Necessity ("CCN") to serve certain areas in Comal County. The order appealed further grants Bulverde the CCN, which in turn relies totally on GBRA to fulfill Bulverde's legal obligations as CCN holder. GBRA and Bulverde have intervened as Defendants in the Bulverde CCN Appeal. BexarMet filed its Bulverde CCN Appeal on July 10, 2003.

b. *Canyon Regional Water Authority and Bexar Metropolitan Water District v. Guadalupe-Blanco River Authority, the Texas Commission on Environmental Quality, and Margaret Hoffman in her official capacity as Executive Director of the Texas Commission on Environmental Quality*; Cause No. GN-400211, pending in the 201st Judicial District Court of Travis County, Texas [consolidated with *Guadalupe-Blanco River Authority v. Canyon Regional Water Authority, Bexar Metropolitan Water District, Water Services, Inc., and the Texas Commission on Environmental Quality*; Cause No. GN-400105, pending in the 353rd Judicial District Court of Travis County, Texas].

c. *Petition of Canyon Regional Water Authority and Bexar Metropolitan Water District to Appeal the Wholesale Water Rate Increase of Guadalupe-Blanco River Authority*, SOAH Docket No. 582-03-1991, TCEQ Docket No. 2002-1400-UCR, pending at the State Office of Administrative Hearings ("2002 Rate Appeal"). BexarMet brought its 2002 Rate Appeal challenging GBRA's 2002 increase to its basin-wide Firm Water Rate on November 15, 2002.

d. *Petition of Canyon Regional Water Authority and Bexar Metropolitan Water District to Appeal the Wholesale Water Rate Increase of Guadalupe-Blanco River Authority*, SOAH Docket No. 582-04-1925, TCEQ Docket No. 2003-1571-UCR, pending at the State Office of Administrative Hearings ("2003 Rate Appeal"). BexarMet brought its 2003 Rate Appeal challenging GBRA's 2003 increase to its basin-wide Firm Water Rate on October 31, 2003.

e. *In Re Petition of Bexar Metropolitan Water to Compel Raw Water Commitment From Guadalupe-Blanco River Authority*, Administrative Review No. P-002-4, pending at the TCEQ ("Petition to Compel"). BexarMet brought its Petition to Compel proceeding against GBRA in response to GBRA's refusal to provide BexarMet available, state-owned surface water under GBRA's control. BexarMet filed its Petition to Compel at the TCEQ on November 7, 2003.

f. *Application of Water Services, Inc. ("WSI") and Diamond Water Company*

("Diamond") to Sale Water Utility Facilities and to Transfer Portions of CCN Nos. 11006 and 12865 to Bexar Metropolitan Water District (CCN No. 10675) in Bexar and Comal Counties ("STM Application"), filed December 08, 2003 with the Water Quality Application Team of the TCEQ. WSI, Diamond, and BexarMet have invoked the jurisdiction of the TCEQ to approve their STM Application. The purpose of the STM application is to obtain TCEQ approval of BexarMet's acquisition of additional certificated areas in Comal and Bexar Counties.

10. Each of the above-described prior pending actions involving GBRA, Bulverde, and BexarMet involve the exclusive jurisdiction of the Travis County District Courts, or the exclusive and/or primary administrative jurisdiction of the TCEQ. By bringing this action in Comal County, GBRA and Bulverde attempt to divest other courts and the TCEQ of their exclusive and/or primary jurisdiction over the issues raised by this suit. Dismissal for want of subject matter jurisdiction is required because this court lacks jurisdiction over the legal questions presented.

11. This court lacks subject matter jurisdiction because GBRA and Bulverde's claims are barred by sovereign immunity.

B. GBRA and Bulverde lack standing.

12. Dismissal for want of subject matter jurisdiction is further required because GBRA and Bulverde lack standing to challenge BexarMet's authority to provide water service in Comal County.

13. GBRA and Bulverde lack the necessary justiciable interest to challenge BexarMet's boundaries and authority to provide service in Comal County. GBRA and Bulverde have brought this suit in an attempt to thwart lawful competition in Comal County — challenging that competition as purportedly outside of BexarMet's boundaries and, thus, an ultra vires act. The alleged ultra vires acts of BexarMet, without an alleged specific injury, are not a justiciable wrong to a competitor.

Therefore, GBRA and Bulverde lack standing to complain of BexarMet's authority to serve Comal County.

14. GBRA and Bulverde lack standing to challenge BexarMet's boundaries, because BexarMet is a district created pursuant to TEX. CONST art. XVI. § 59.

15. GBRA and Bulverde lack standing to challenge BexarMet's boundaries, because BexarMet is a district created under TEX. CONST art. XVI. § 59 and the Water Code.

16. GBRA and Bulverde's lack of standing requires dismissal of this case for lack of subject matter jurisdiction.

C. GBRA and Bulverde's claims are not ripe.

17. Dismissal for want of subject matter jurisdiction is further required because GBRA and Bulverde have failed to exhaust their administrative remedies regarding matters under the jurisdiction of the TCEQ. Plaintiffs' failure to exhaust their administrative remedies renders those claims unripe for consideration. GBRA and Bulverde's claims in this suit seek to avoid the TCEQ's jurisdiction with regard to the 2002 Rate Appeal, the 2003 Rate Appeal, the Petition to Compel, and the STM Application.

18. Because GBRA and Bulverde have failed to exhaust their administrative remedies with respect to the 2002 Rate Appeal, the 2003 Rate Appeal, the Petition to Compel, and the STM Application, this Court must dismiss this case for lack of subject matter jurisdiction.

19. As alleged by GBRA, after the 2003 amendment to BexarMet's enabling legislation, "there no longer is any mechanism by which BexarMet may annex territory to the District . . . ." Assuming, for the sake of argument, that proposition is correct, then S.B. 1494 effects a change in qualifications, prerequisites, standards, practices, or procedures with respect to voting in force or

effect under BexarMet's enabling legislation. Such changes lack required approval. Questions concerning S.B. 1494 are, therefore, not ripe for adjudication, and any judgment concerning S.B. 1494 would be impermissibly advisory.

V. Plea in Abatement
(Subject to Motion to Transfer Venue)

20. BexarMet realleges all of the matters set forth in the Plea to the Jurisdiction as a Plea in Abatement and, without specifically realleging those paragraphs, adopts them as a plea in abatement in this cause.

VI. Affirmative Defenses
(Subject to Motion to Transfer Venue)

21. Plaintiffs fail to state a claim upon which relief can be granted.

22. Plaintiffs do not state facts sufficient to constitute a cause of action.

23. Plaintiffs lack standing to sue.

24. Plaintiffs claims are not ripe.

25. Plaintiffs claims are barred by sovereign immunity.

26. Plaintiffs claims are barred by waiver, estoppel and/or laches.

27. Plaintiffs claims are barred by limitations.

VII. Alternative Request to Recover Attorneys' Fees
(Subject to Motion to Transfer Venue)

28. As set forth above, all of Plaintiffs' claims, including Plaintiffs' claims for attorneys' fees, should be dismissed. In the alternative, and without waiving its sovereign immunity, if the Court does not sustain BexarMet's plea to the jurisdiction regarding any of the Plaintiffs' claims, BexarMet seeks recovery of its reasonable and necessary attorneys' fees from GBRA and Bulverde under the Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code §§ 37.001 – 37.011.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant BexarMet respectfully prays that the Court grant its Motion to Transfer Venue and that the case be transferred to the proper venue in Travis County, Texas.

Subject to BexarMet's Motion to Transfer Venue, BexarMet further prays that the Court grant its Plea to the Jurisdiction and dismiss Plaintiffs' lawsuit. Alternatively, BexarMet prays that the Court grant its Plea in Abatement and abate Plaintiffs' lawsuit. Alternatively, BexarMet prays that Plaintiffs take nothing by their suit and upon final hearing, that BexarMet have judgment against the Plaintiffs for attorneys' fees and costs, as allowed by law, and for such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

HAZEN & TERRILL, P.C.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing pleading was delivered as indicated below this 12th day of March, 2004, to the following counsel of record:

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Bexar Metropolitan Water District, Appellant v. City ofBulverde, Texas; Guadalupe-Blanco River Authority; City of Boerne; and City ofFair Oaks Ranch, Appellees
NO. 03-04-00367-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

2004 Tex. App. LEXIS 10254

November 18, 2004, Filed

SUBSEQUENT HISTORY: 53.7(F) mot. for extension of time filed by, 02/16/2005

PRIOR HISTORY: [*1] FROM THE DISTRICT COURT OF COMAL COUNTY, 22ND JUDICIAL DISTRICT NO. C2003-1201A, HONORABLE GARY L. STEEL, JUDGE PRESIDING.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant water district challenged a decision of the District Court of Comal County, 22nd Judicial District (Texas), which denied its plea to the jurisdiction in an action brought against it by appellees, a City and a river authority, for declaratory judgments. Appellees sought a determination of the district's boundaries, as well as a determination of whether the district could provide water-utility services outside its boundaries.

OVERVIEW: The district argued that the trial court did not have subject-matter jurisdiction and that Tex. Water Code Ann. § 49.066 (2000) prohibited appellees from contesting its boundaries. The court held that requesting a declaration regarding the location of a district's boundaries and the district's authority to provide service and expand its boundaries was not the same as challenging the validity of those boundaries. Accordingly, such determinations were not prohibited by § 49.066. Because appellees were alleging that the district's actions were beyond the scope of its statutory authority, and because both were parties affected by the district's actions, they had standing to seek a declaratory judgment. There was no statute giving the Texas Commission on Environmental Quality the exclusive authority to determine what a water district's enabling statute meant. Statutory interpretation was not something that needed to be left to the Commission to decide, as the Commission had no expertise that was greater than the courts in determining what a statute meant. Because the river authority was a corporation, it qualified as a person under the Texas Uniform Declaratory Judgment Act.

OUTCOME: The court affirmed the trial court's decision.

CORE TERMS: water, territory, enabling act, exclusive jurisdiction, water-utility, competitor, cause of action, water district, annex, quo warranto proceeding, administrative agency, primary jurisdiction, overrule, enabling statute, third-party, contesting, contest, qualify, void, distribute, Code Construction Act, administrative remedies, writ of quo warranto, subject-matter, declaration, declaratory, attacking, declaratory judgment, water service, certificated

LexisNexis(R) Headnotes

Governments: Public Improvements: Sanitation & Water
[HN1] Water districts are created by statute and can only exercise powers clearly given to them by the legislature. The boundaries of water districts are defined by statute. A specific water district cannot sell water outside of its boundaries, where its enabling statute limits sale of water to within the district.

Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Motions to Dismiss
Governments: Local Governments: Claims By & Against
[HN2] A person may file an interlocutory appeal from either the granting or the denial of a plea to the jurisdiction brought by a governmental unit. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8). Tex. Civ. Prac. & Rem. Code Ann. § 100.001 (Supp. 2004-05) includes agencies and water districts as part of the definition of governmental unit. A plea to the jurisdiction contests a trial court's authority to adjudicate the subject matter of the cause of action. In reviewing the grant or denial of a plea to the jurisdiction, an appellate court does not review the merits of the case.

Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders
Governments: Legislation: Interpretation
[HN3] Because the statute authorizing interlocutory appeals is a narrow exception to the general rule that only final judgments and orders are appealable, an appellate court must give it a strict construction.

Civil Procedure: Appeals: Standards of Review: De Novo Review
Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Action
Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Motions to Dismiss
[HN4] An appellate court reviews a district court's ruling on a plea to the jurisdiction de novo. The appellate court's task is to take the facts pled in the petitions as true and determine if subject-matter jurisdiction is present. Unless the face of a petition affirmatively demonstrates a lack of jurisdiction, the allegations in the petition will be liberally construed in favor of jurisdiction.

Civil Procedure: Remedies: Extraordinary Writs
Governments: State & Territorial Governments: Claims By & Against
[HN5] 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. 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. Tex. Civ. Prac. & Rem. Code Ann. § 66.001 (1997). A quo warranto proceeding may be instituted by the attorney general or by a district or county attorney. Tex. Const. art. IV, § 22; Tex. Civ. Prac. & Rem. Code Ann. § 66.002 (1997).

Governments: State & Territorial Governments: Boundaries
Governments: State & Territorial Governments: Claims By & Against
[HN6] Tex. Water Code Ann. § 49.066 (2000) states that no suit may be instituted in any court of the state contesting the validity of the creation and boundaries of a district created under the water code. Tex. Water Code Ann. § 49.066(d) (2000). 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. The third-party prohibition only applies to claims attacking the validity of a legislative act creating a water district's boundaries.

Civil Procedure: Justiciability: Standing
Governments: Local Governments: Duties & Powers
Governments: Public Improvements: Sanitation & Water
[HN7] If a water district acts beyond its statutory powers, its actions are void. If a governmental authority's actions are void, as opposed to voidable, the actions can be challenged by affected persons.

Civil Procedure: Remedies: Declaratory Relief
[HN8] Suits under the Texas Uniform Declaratory Judgment Act (UDJA) are not limited to cases where the parties have a cause of action separate and apart from the UDJA. The UDJA provides a basis for a claimant to obtain a declaration of rights, status, or other legal relations under a writing or statute. Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (1997). The legislature has 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 (1997). 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. A person seeking a declaratory judgment need not have incurred actual injury. The UDJA may be used to clarify the meaning of statutes. Courts have also issued declaratory judgments construing a statute before the statute is violated.

Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue

Administrative Law: Separation & Delegation of Power: Jurisdiction
Governments: Legislation: Interpretation
[HN9] An administrative agency has exclusive jurisdiction when the legislature gives the agency the sole authority to make an initial determination in a dispute. 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. Statutory interpretation is used to determine if an administrative agency has exclusive jurisdiction.

Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue
Administrative Law: Judicial Review: Standards of Review: De Novo Review
[HN10] In determining whether an agency has exclusive jurisdiction, an appellate court uses a de novo standard.

Administrative Law: Separation & Delegation of Power: Jurisdiction
Administrative Law: Separation & Delegation of Power: Legislative Controls
Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Jurisdiction Over Action
Governments: Legislation: Interpretation
[HN11] Trial courts have general jurisdiction. Unless a contrary showing is made, trial courts presumably have subject matter jurisdiction over a dispute. 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. Courts have the authority to determine what a statute means. Statutory construction is a question of law and for a court to decide. 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.

Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue
[HN12] Primary jurisdiction is a prudential doctrine. Primary jurisdiction occurs when both the courts and administrative agencies have the authority to make initial determinations in a dispute. 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.

Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue
Governments: Legislation: Interpretation
[HN13] Statutory interpretation or construction is not something that needs to be left to the Texas Commission on Environmental Quality to decide. The Commission has no expertise that is greater than the courts in determining what a statute means.

Civil Procedure: Remedies: Declaratory Relief
[HN14] The Texas Uniform Declaratory Judgment Act (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) (1997). The definition of a person under the UDJA includes a corporation of any character. Tex. Civ. Prac. & Rem. Code § 37.001 (1997).

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JUDGES: Before Justices Kidd, Patterson and Puryear.

OPINIONBY: Mack Kidd

OPINION: 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[*2] 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

[HN1] Water districts are created by statute and can only exercise powers clearly given to them by the legislature. Tri-City Fresh Water Supply Dist. v. Mann, 135 Tex. 280, 142 S.W.2d 945 (Tex. 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. [*3] , 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 (District 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[*4] 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 Commission n1 in order to serve the water needs of cities and rural areas throughout the state. n2

----------Footnotes----------

n1 For convenience, we will refer to both the Commission and its predecessor, the Texas Natural Resource Conservation Commission, as the Commission.

n2 BexarMet, through the CCN process, has expanded its service to areas in Atascosa, Comal, and Medina counties.

----------End Footnotes----------

[*5]

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 [*6]"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[*7] 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[*8] Commission's executive 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[*9] 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

[HN2] A person may file an interlocutory appeal from either the granting or the denial of a plea to the jurisdiction brought by a governmental unit. n3 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, 43 Tex. Sup. Ct. J. 143 (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. & Sand Supply v. Texas Natural Res. Conservation Comm'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.)).

----------Footnotes----------

n3 Section 100.001 of the Texas Civil Practice and Remedies Code includes agencies and water districts as part of the definition of governmental unit. Tex. Civ. Prac. & Rem. Code Ann. § 100.001 (West Supp. 2004-05).

----------End Footnotes----------

[*10]

[HN3] 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.

[HN4] We review a district court's ruling on a plea to the jurisdiction de novo. State Dep't. of Highways & Pub. Transp. v. Gonzalez, 82 S.W.3d 322, 327, 45 Tex. Sup. Ct. J. 925 (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 pet.). Unless the face of the petition affirmatively demonstrates a lack of jurisdiction, the allegations in the[*11] 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

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[*12] be brought by the attorney general in a quo warranto proceeding.

[HN5] 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 [HN6] 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[*13] 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, 4 Tex. Sup. Ct. J. 627 (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. [*14] --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. [*15]

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.

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 [*16]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[*17] 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.

[HN7] 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, 23 Tex. Sup. Ct. J. 294 (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[*18] 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.

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.

However, [HN8] 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[*19] 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, 38 Tex. Sup. Ct. J. 768 (Tex. 1995); City of Waco, 83 S.W.3d at 177.

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 Dep't., 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, 39 Tex. Sup. Ct. J. 204 (Tex. 1996). A person seeking[*20] a declaratory judgment need not have incurred actual injury. City of Waco, 83 S.W.3d at 175; Texas Dep't 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[*21] court.

BexarMet also insists that boundary disputes cannot be litigated under the UDJA. See Martin v. Amerman, 133 S.W.3d 262, 267-68, 47 Tex. Sup. Ct. J. 285 (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

In its next issue on appeal, BexarMet contends that the Commission has exclusive jurisdiction or primary jurisdiction over the issues raised in this appeal. [HN9] 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, 45 Tex. Sup. Ct. J. 907 (Tex. 2002) (citing Cash Am. Int'l, Inc. v. Bennett , 35 S.W.3d 12, 15, 43 Tex. Sup. Ct. J. 1047 (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[*22] manner of resolving problems the regulation addresses. Id. Statutory interpretation is used to determine if an administrative agency has exclusive jurisdiction. Id. [HN10] In determining whether an agency has exclusive jurisdiction, an appellate court uses a de novo standard. Id. at 222.

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[*23] 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, n4 the determination of these issues will depend on the construction of a statute.

----------Footnotes----------

n4 See Howell v. Texas Workers' Comp. Comm'n, 143 S.W.3d 416, 435 (Tex. App.--Austin 2004, no pet.) (finding Workers' Compensation Commission had "sole authority to 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").

----------End Footnotes----------

[HN11] 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[*24] 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.

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, 32 Tex. Sup. Ct. J. 504 (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.). n5

----------Footnotes----------

n5 See In re Entergy Corp., 142 S.W.3d 316, 322-23, 47 Tex. Sup. Ct. J. 729 (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 jurisdiction over the rates, operations, and services of an electric utility," citing Tex. Util. Code Ann. §§ 31.001(a), 32.001(a) (West 1998)).

----------End Footnotes----------

[*25]

In this case, there is no statute giving the Commission the exclusive authority to determine what a water district's enabling statute means. n6 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 territory by obtaining CCNs, and whether BexarMet may provide water services outside the boundaries established by its enabling statute.

----------Footnotes----------

n6 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, 45 Tex. Sup. Ct. J. 907 (Tex. 2002) (vehicle board has exclusive jurisdiction when statute said board had exclusive jurisdiction).

----------End Footnotes----------

BexarMet also asserts that the Commission has primary jurisdiction over the claims in question. [HN12] Primary jurisdiction is a prudential[*26] 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.

[HN13] 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

In its final claim of error, BexarMet contends that GBRA cannot bring a cause of action under the UDJA because it does not qualify as a person entitled to bring a UDJA claim. [HN14] The UDJA creates a remedy for "persons . . . whose rights, status, [*27] 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, 38 Tex. Sup. Ct. J. 533 (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 [*28]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.

Mack Kidd, Justice

Editorial: Mismanagement root of BexarMet problems

Web Posted: 02/22/2005 12:00 AM CST

San Antonio Express-News

The Bexar Metropolitan Water District has serious management problems, and fixing them will take drastic measures.

The board's suspension Friday of General Manager Tom Moreno for 60 days without pay comes as no surprise given recent audit findings.

Voters sent a loud message at the polls earlier this month when they elected two reform candidates to form a progressive board majority that appears ready to address the problems.

The old board was cognizant of problems, suspending Moreno for 30 days last year because contracts were enacted without board approval. But it didn't go far enough.

When Moreno returned, he received his first job evaluation in 20 years as head of the water district. The board gave him a one-year extension on his five-year contract before any of the management problems were resolved. That didn't make sense.

Moreno has a lot of explaining to do for the way the agency has been operating and why checks and balances were circumvented. As Express-News staff writer Jerry Needham reported, auditors found $155,000 in questionable spending within the agency during the past two years. Included were questionable spending of petty cash, use of credit cards and the overpayment of salaries, including $30,000 to Moreno.

If the board decides to terminate Moreno, it needs to proceed with caution. Moreno is paid $180,000 a year. A buyout of his contract could cost the district $900,000.

The board appears to have enough reason to terminate. If done properly, that action should not end up costing the taxpayers additional money.

Online at: http://www.mysanantonio.com/opinion/editorials/stories/MYSA0222005.06B.bexmet2ed.ce750806.html

SOAH DOCKET NO. 582-05-1005
TCEQ DOCKET NO. 2004-1384-UCR

PETITION OF BEXAR METROPOLITAN WATER DISTRICT TO COMPEL RAW WATER COMMITMENT FROM GUADALUPE-BLANCO RIVER AUTHORITY	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

APPENDIX TO GUADALUPE-BLANCO RIVER AUTHORITY'S MOTION TO DISMISS

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Attorneys For Guadalupe- Blanco River Authority

SAN ANTONIO EXPRESS-NEWS THURSDAY, JANUARY 20, 2005

'Steak and fixings' at BexarMet targeted by board reformers

"Between June 24, 1998, and June 25, 1999, Tom Moreno, the general manager of Bexar Metropolitan Water District, dined 15 times at Ruth's Chris Steak House at ratepayers' expense.

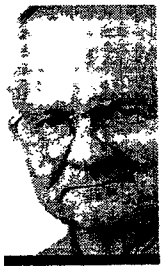
"The cost to those ratepayers — many of whom live in the town's low-income neighborhoods — was $6,642.38.

"Who enjoyed the steaks and fixings besides Moreno?

"You don't know. I don't know. And if Moreno knows, he isn't telling."

— From a Feb. 13, 2000, column — "Introducing: King of Squandermania" — the first of a series of columns about Bexar County's most prodigal public agency

Since that exposé was published five years ago, irate BexarMet customers have asked me repeatedly: "What can I do to change things?"



RODDY STINSON

In every case, I have replied that the only way to turn BexarMet into an efficiently managed, fiscally responsible utility is to elect directors who want to do what's best for ratepayers and who have enough backbone to confront the agency's squandermaniacs.

In 2003, a giant step toward BexarMet's betterment was taken when two reform candidates — Jose "Joe" Gallegos Jr. (District 1) and Victor Villarreal (District 4) — were elected to the seven-member board.

On Feb. 5, ratepayers will have an opportunity to elect two more reformers — Jim Clement (District 5) and Lesley Wenger (District 6) — thereby creating a board majority committed to ending financial abuse of customers and providing the best possible water service at the lowest possible price.

Early voting for the election begins today and will continue through Feb. 1.

Voting locations include:

For District 5 ratepayers — South Park Mall and Palo Alto College Student Center.

For District 6 ratepayers — Blossom Athletic Center, Crossroads Mall and Westlakes Mall.

BexarMet customers who reside outside the two districts but who want to support the campaigns of reformers Clement and Wenger should call the Committee to Reduce Water Rates (210) 377-3636 and offer assistance.

For the retrospective benefit of ratepayers who are trying to decide if they should aid the reformers ...

■ *From a Dec. 12, 2000, column:*

"BexarMet officials shelled out $898,809 to three law firms. .... That was 3.6 percent of the utility's revenue for the year.

"To put it another way, every time ratepayers sent $75 to Bexar Met, they bought a lawyer a Happy Meal."

■ *From a May 20, 2003, column:*

"On April 29 — one day after Bexar Metropolitan Water District officials approved a rate increase to balance the district's ever-rising budget — four district staffers began a Las Vegas junket. Approximate cost: $3,000."

■ *From an Oct. 16, 2003, column detailing an outside auditor's findings:*

"BexarMet provides 17 vehicles for 17 employees 'where there are elements of personal use involved. ... Currently there is nothing to prevent an employee from taking a district vehicle on an extended vacation.' "

And: "BexarMet has no written policy regulating the use of credit cards."

And: "Use of cell phones is not monitored."

And: "Official petty cash procedures are routinely ignored."

And: "Some travel expenses were paid for non-district personnel."

■ *From a Sept. 23, 2004, column detailing another Bexar Met auditor's findings:*

"Capital assets are not tagged for accountability and inventory purposes."

And: "There is no control or accountability of the receipt books."

And: "Documentation was unavailable to support $2 million of land recorded in the general ledger."

And: "Issuance of blank checks is not controlled."

Etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc. etc.

To contact Roddy Stinson, call (210) 250-3155 or e-mail rstinson@express-news.net. His column appears on Sundays, Tuesdays and Thursdays.

Bexar Met continues bad cycle

BRUCE DAVIDSON

The Bexar Metropolitan Water District is soaring to new heights of chaos.

In a jolting move last week, the Bexar Met board extended General Manager Tom Moreno's contract for an additional year.

The extension came on the heels of a 30-day unpaid leave that the water agency boss received from the same board in November because of contracts that were enacted without board approval.

First slap him. Then reward him.

The main change that occurred between the conflicting board decisions seems to be that the board developed an "evaluation tool" for measuring Moreno's performance.

Not to be forgotten: When Moreno returned from his unpaid leave, he rehired a manager whom his interim replacement had fired because a legal team reported her behavior created a culture of fear and intimidation. The controversial manager already had been replaced.

For the record, board members Jose Gallegos, Victor Villarreal and Dean Perry stubbornly stuck to reason and opposed the contract extension for Moreno.

Last week's contract extension evolved from Moreno's evaluation, the first he has received in his 20 years as general manager.

The extension follows a thoroughly disastrous year for Bexar Met that would lead almost any outsider to conclude that the agency is poorly managed.

Bexar Met attempted to redraw board district lines twice in a single year.

The U.S. Justice Department shot down the second attempt, causing U.S. District Judge Orlando Garcia to order the agency to move its board elections from November to February.

The agency also lost a state district court battle after it filed a lawsuit to force its way into serving Bulverde in Comal County.

Express-News staff writer Jerry Needham recently reported that an audit released last year showed Bexar Met overspent its budget by 24 percent.

Other audit findings reported by Needham: The agency failed to conduct an inventory of assets for the past five years and has purchased hundreds of acres of property without getting appraisals.

Showing a unique brand of leadership, a majority of the board rewarded Moreno with another year on his contract, which now runs through March 2007.

Moreno's board supporters are Jim Lopez, Herman Sanchez, Ysidro Solis and John Longoria, the board president.

Eight-year veteran Lopez is the lone incumbent on the Feb. 5 ballot. Perry opted not to seek re-election.

Lopez made the motion to extend Moreno's contract. He said he supported the November unpaid leave as a concession to other board members, but he didn't believe it was justified.

"I think Mr. Moreno was prejudged. I think mostly by our new board members," Lopez said, referring to Villarreal and Gallegos.

Jim Clement, who is challenging Lopez, said Bexar Met is "like a train out of control."

He said Moreno's actions "put a scar on that company that shouldn't be there."

Lopez acknowledged that Bexar Met has some flaws. "There are some things that we need to work on. Some of these changes that we need to make cost money," Lopez said.

But Lopez warned against micromanaging by the board.

In the race for Perry's seat, Lesley Wenger is facing Blanche Atkinson.

Wenger said last week that she would support firing Moreno. Atkinson said in a recent interview that she wouldn't judge the situation until she was on the board to see it firsthand.

Nobody will be watching the Bexar Met election results more closely than Moreno.

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S.A.'s worst prodigal agency rewards top squandermaniac

RODDY STINSON

No more Mr. Nice Guy ...

Par for the chorus. Despite back-to-back annual audits that revealed dumbfounding mismanagement and staggering financial prodigality, Bexar Metropolitan Water District's off-key board of directors — conducted by Chairman John Longoria — rewarded the utility's general manager, Tom Moreno, by adding a year to his employment contract.

Ergo: Bexar Met's customers have nothing to look forward to except months and months and more months of rising water bills and deplorable service from San Antonio's hands-down worst public agency.

The plague spreads. Longoria, a longtime Democratic kingpin, has been in the news recently for another reason. Last month, he announced that he would back a fellow Democratic loyalist, Phil Hardberger, in the upcoming mayoral campaign.

"(Hardberger) has spent his life fighting for justice," the Bexar Metropolitan Water District board chairman declared in his endorsement of the man he believes can instill Bexar Met-esque virtues at San Antonio City Hall.

Tell him you want 'justice'.

A Bexar Met customer reports: *"Roddy, I took an extended out-of-town holiday and was surprised to see the following figures on my Bexar Met water bill: 'Gallons used: 0 ... Charges: $69.01.' HELP!"*

Heaven knows I wish I could do something, but there is no help in sight for Bexar Met ratepayers.

The only thing I can do is encourage all customers with billing problems and service complaints to call board chairman Longoria at his law office (223-9422). Last week, he carved "inept status quo" in stone, and only he can erase it.

To contact Roddy Stinson, call (210) 250-3155 or e-mail rstinson@express-news.net. His column appears Sundays, Tuesdays and Thursdays.

Editorial: Bexar Met needs new executive management

Web Posted: 12/28/2004 12:00 AM CST

San Antonio Express-News

An Express-News report on the latest turn of events at Bexar Metropolitan Water District exposed the staggering chaos that is hampering the agency.

Castro & Associates, a legal team hired to investigate leadership at Bexar Met, found the agency's human resources department has become "entirely dysfunctional," the newspaper revealed.

Tom Moreno, the agency's general manager, returned from his 30-day suspension and rehired Sylvia Gamez, the supervisor who oversaw the department. She had been fired by Moreno's interim replacement during his absence.

And Moreno's interim replacement, Gil Olivares, has been given a contract that places him outside of Moreno's supervision. Does the board not trust Moreno to deal fairly with Olivares?

According to copies of the Castro & Associates reports obtained by the Express-News, Gamez's behavior "has created a culture of fear and intimidation within the organization." The legal team recommended immediate termination of the deputy general manager.

Bexar Met board President John Longoria defended Moreno's decision to rehire Gamez, saying she had not had an opportunity to respond to the complaints from employees that are detailed in the Castro & Associates reports.

Meanwhile, after sputtering for weeks, the board has set a Jan. 3 date for Moreno's first evaluation since he became Bexar Met's general manager in 1985.

Clearly, Bexar Met is in shambles. The buck should stop at the top, and Moreno should be ousted.

It is difficult to imagine Moreno leading the agency out of the chaos that engulfs it. Bexar Met needs a fresh start with new executive leadership.

Online at: http://www.mysanantonio.com/opinion/editorials/stories/MYSA122804.6B.ed.bexarmet.4bdb035f.html

SAN ANTONIO EXPRESS-NEWS EDITORIAL PAGE SUNDAY, DECEMBER 19, 2004

Bexar Met still awash in turmoil

BRUCE DAVIDSON

The Bexar Metropolitan Water District continues to be plagued by turmoil as February elections for two board seats approach.

In a marathon meeting last week, the utility's board failed to agree on an evaluation process for embattled General Manager Tom Moreno. A week earlier the board failed to get a quorum to address the issue.

Moreno, who has not been formally evaluated by the board since becoming general manager in 1985, returned to work in early December after a 30-day suspension.

Board President John Longoria said Moreno was suspended because he failed to present contracts to the board in a timely manner and other governance issues.

"Everything I've seen him do has been good stuff. He was used to doing it his way," said Longoria, noting that the historically weak board is attempting to do its job of setting policy.

"It's a new process," said Longoria, who has been a board member for a little more than a year. Longoria added that he can't stomach management by crisis.

Not all observers agree with Longoria's positive assessment of Moreno's performance, and the general manager is sure to be a major issue in the upcoming campaigns.

Board member Victor Villarreal said he hopes the board will adopt an evaluation process at its regular meeting Monday and that Moreno's evaluation is completed before the end of the year.

As board members debated the evaluation process, the biggest development at the meeting was District 6 incumbent Dean Perry's announcement that he will not seek re-election.

Perry is now supporting candidate Blanche Atkinson, a neighborhood activist who is seeking the post he has occupied for 10 years. She faces another activist, Leslie Wenger, who has been one of the most vocal critics of Bexar Met's management.

Atkinson said she is not willing to pass judgment until she is elected and sees the Bexar Met situation firsthand.

"I'm just a novice at this. Mr. Perry is helping me. He is an expert on this. He's teaching me," Atkinson said.

Wenger, treasurer of the Committee to Reduce Water Rates, helped lead the fight against Bexar Met's second redistricting plan of 2005.

"I just think that there has been poor management on every level," Wenger said, adding the Bexar Met spends big money in ways that don't benefit the ratepayers.

Wenger added that Bexar Met's meter fees are problematic. Earlier this year, Wenger said, she compared water rates and found that "if I were in the San Antonio Water System, I would be paying $12.75 a month for the same meter that I'm paying $75 for."

The Committee to Reduce Water Rates is backing James Henry Clement in the District 5 race. Clement is challenging incumbent Jim Lopez. Nick Pena also is a candidate for the seat.

The election was originally scheduled for last month. However, U.S. District Judge Orlando Garcia ordered the board to cancel it and move the voting to Feb. 5 after the U.S. Justice Department rejected the agency's latest redistricting plan. That plan would have prevented some Castle Hills residents from voting for board members for an additional two to four years.

Garcia also ordered Bexar Met to start following state law by establishing four-year terms for board members instead of six-year terms. He had called for six-year terms when single-member districts were created, but state lawmakers later set water district terms at four years. Bexar Met ignored the change in state law.

Bexar Met desperately needs a high-profile election so voters can examine the massive problems at the agency and decide which candidates can best deal with them.

Voters have a lot at stake. Longoria noted that 10 years ago the agency's budget was $6 million and has grown to $48 million.

The wisdom of the rapid growth and Bexar Met's difficulties in coping with it are issues that candidates must address.

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OUR TURN

Bexar Met needs new executive management

The controversial water agency is hopelessly mired in debilitating internal chaos.

An Express-News report on the latest turn of events at Bexar Metropolitan Water District exposed the staggering chaos that is hampering the agency.

Castro & Associates, a legal team hired to investigate leadership at Bexar Met, found the agency's human resources department has become "entirely dysfunctional," the newspaper revealed.

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And Moreno's interim replacement, Gil Olivares, has been given a contract that places him outside of Moreno's supervision. Does the board not trust Moreno to deal fairly with Olivares?

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Clearly, Bexar Met is in shambles. The buck should stop at the top, and Moreno should be ousted.

It is difficult to imagine Moreno leading the agency out of the chaos that engulfs it. Bexar Met needs a fresh start with new executive leadership.

Metro

Story Tools:

BexarMet suspends its general manager

Web Posted: 11/06/2004 08:57 AM CST

Jerry Needham
Express-News

The Bexar Metropolitan Water District board unanimously voted late Friday to place its longtime general manager, Tom Moreno, on administrative leave without pay for 30 days for apparently failing to carry out board policy and keep the board informed.

The action followed an almost six-hour closed-door session. Moreno has been with the district for 35 years and has been general manager since 1985.

Immediately after the vote by the seven-member body, Board President John Longoria read a public statement.

"The board recognizes the valuable service that the general manager has provided to BexarMet. However, in carrying out its governance duties, the board of directors must at all times be fully informed. ...

"The actions of the board are not to be taken as actions that result from findings of theft, dishonesty, collusion or misuse of funds whatsoever. The board takes this action in clearly establishing that board governance demands certain actions by the general manager and staff while at the same time governance makes specific demands of responsibility on the board itself.

"At the end of 30 days, Mr. Moreno shall fully return to his duties."

After the meeting, Longoria said, "Governance means the board calls the shots on all policies, and it's his job to carry out our policies, and we had some significant problems that we thought were significant enough for us to make this decision. But again, no question at all about his honesty or his dedication or his hard work."

Moreno — who long ran the agency with oversight from directors who served for decades — recently has drawn heat from the board, which has several new members.

He reportedly had an attorney present in talks with the board as he tried to avoid the suspension.

Lottery
Celebrations
Crimebase
Legal Resources
Personals
What's Happening
TV Listings
MARKETPLACE
Classifieds
Yellow Pages
Newspaper Ads
Video Ads
Coupons
Shopping
E-N Subscriptions
E-N Archives
E-N Store
What's New America?
ABOUT US
Express-News
KENS 5
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Corrections

Longoria said he still expects an evaluation of Moreno's performance — possibly the first ever — to be done by Dec. 13.

"As chairman of the evaluation committee, I think it's our charge to come up with an instrument that the entire board can use to evaluate the performance of the general manager," said Director Jose Gallegos Jr., one of the new members.

Among problems recently surfacing at the utility:

A federal judge canceled the utility's Nov. 2 elections after a botched redistricting attempt pulled 27,000 people from districts scheduled to vote. The election has been rescheduled for Feb. 5.

An audit released last month found spending by the agency last year was $8.2 million, or 24 percent, over budget, while it took in an extra $1.2 million in penalties and fees from its mostly low-income customers.

The audit noted that no inventory of assets has been conducted in at least five years, and large properties were bought without any appraisals.

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OUR TURN

Bexar Met taking too many missteps

The Bexar Metropolitan Water District's misguided attempt to draw new districts for the second time in less than a year has backfired.

In addition to creating a mess that resulted in delayed elections, the redistricting bid raised serious questions about the water agency's commitment to giving all voters a fair say in electing board members.

The U.S. Justice Department rejected the latest redistricting plan until Bexar Met provided thorough information about the impact and origin of the plan. U.S. District Judge Orlando Garcia then stopped the effort in its tracks.

Garcia ordered Bexar Met to use already existing boundaries and delay elections for District 5 and District 6 board members until February.

Garcia's order, which was obeyed by the board Monday night, prevented Bexar Met from holding elections under new lines that would have deprived about 27,000 customers from voting for an additional two or four years.

The delay is necessary; it is too late for the district to hold a new candidate-filing period in time for the Nov. 2 election.

Garcia, who earlier ordered Bexar Met to follow state law by reducing board terms from six years to four years, also will determine whether board members now in the fourth year of six-year terms should be on the February ballot.

Poor management is causing problems for the water agency on numerous fronts.

The judge's findings on that issue will be released in time to put two additional districts on the February ballot, if necessary.

None of these judicial actions would have occurred if Bexar Met officials hadn't attempted to pursue the late-hour and suspicious restricting plan, which critics say was designed to limit the voice of opponents of the board's status quo.

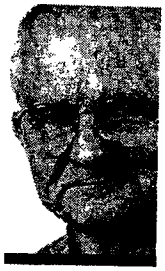
The redistricting mess shows the status quo could use some shaking up.

Bexar Met officials also have been hit with an embarrassing management letter from its new auditing firm revealing a series of bad management practices, as recently detailed by Express-News columnist Roddy Stinson.

Add the agency's recent state district court loss in its effort to force its services on the city of Bulverde, and the pattern of misguided actions by Bexar Met is devastating.

Bexar Met is a troubled agency woefully in need of a major housecleaning.

Bexar Met bad? Dreadful? Horrid? Rotten? Pick your poison



RODDY STINSON

San Antonio's premier public-sector basket case — Bexar Metropolitan Water District — has gone from bad to dreadful.

Or dreadful to horrid.

Or horrid to unspeakably rotten.

(Pick your adjectival poison.)

Pundits who monitor the goings-on at the ineptly managed utility will soon run out of words to describe the depths to which it has sunk.

Here is the latest stinking news about the public agency:

An independent audit of Bexar Met's books, covering the period of May 2003 through April 2004, was released last week.

In a "management letter" addressed to Bexar Met officials, the auditing firm, Garza/Gonzalez & Associates, described in no-nonsense terms the "material weaknesses" and "reportable conditions" that its staff uncovered:

- "A physical inventory count of capital assets has not occurred within the last five years."
- "Capital assets are not tagged for accountability and inventory purposes."
- "Documentation was unavailable to support $2 million of land recorded in the general ledger."
- "Real estate appraisals are generally not obtained prior to real property being purchased."
- "Board approval was not obtained for the extension of an existing contract, for the awarding of several construction projects or for change orders for two different construction projects."
- "There is no control or accountability of the receipt books maintained or issued."
- "Total expenditures for the year ended April 30, 2004, exceeded the total budgeted expenditures, and item expenditures exceeded the item budget by more than 25 percent in various budget areas, without Board approval."
- "... issuance of blank checks is not controlled."
- "Of the 55 items selected for physical inventory counts from all locations, including the truck and stock inventory, there were 23 instances in which the physical count differed from the quantity reflected in the inventory system."

Space limitation forces me to end the list of horrors with that 42 percent inventory "error." But those examples should be sufficient to leave the most cynical public-agency critics shaking their heads in disbelief.

Those same cynics will probably not be surprised to learn that the telling audit report will lead to little change at Bexar Met.

During an interview about the auditor's findings, I asked Bexar Met Board Chairman John Longoria if he felt that longtime CEO Tom Moreno was incapable of managing the utility.

His response: "I consider him competent."

Longoria also insisted that "we've changed quite a few things, and we'll continue to do that until we get things as they should be."

I asked him specifically if the board planned to do anything about the lax control of employee vehicles.

"Hell, yes," he said.

Yet similar laxity was described in the 2003 audit. ("There is nothing to prevent an employee from taking a District vehicle on an extended vacation.") And at that time, CEO Moreno promised: "Those employees who exceed the established mileage limits will pay for those excess miles."

One year later, auditors discovered:

"Vehicles are provided to the CEO, all deputies and most managers for their exclusive use. ... Employees do not maintain or report their business or personal use of vehicles to the District as required by Board Administrative Policies."

So nothing has changed.

Bexar Met mismanagement continues.

And the abuse of ratepayers goes on.

To contact Roddy Stinson, call (210) 250-3155 or e-mail rstinson@express-news.net. His column appears on Sundays, Tuesdays and Thursdays.

Spending through the roof

An audit of the Bexar Metropolitan Water District books shows that the utility's spending during the fiscal year ending April 30 far exceeded its budget.

	ORIGINAL BUDGET	ACTUAL AMOUNT	VARIANCE	PERCENTAGE
[illegible]	$19,999,917	$22,890,396	$2,890,479	+14.5%
[illegible]	$7,572,308	$10,906,697	$3,334,389	+44.0%
[illegible]	$6,600,000	$8,578,274	$1,978,274	+30.0%
[illegible]	$34,172,225	$42,375,367	$8,203,142	+24.0%
[illegible]	$7,593,475	$1,528,310	$6,065,165	-79.9%

Source: Bexar Metropolitan Water District audit by Garza/Gonzalez & Associates

HARRY THOMAS/STAFF

Major overspending cited at Bexar Met

Managers say problem found in audit resulted from unforeseen events.

By Jerry Needham
EXPRESS-NEWS STAFF WRITER

The Bexar Metropolitan Water District spent $8.2 million more than it budgeted last year, a new audit has found. Managers blamed the overspending on unforeseen events that probably won't be repeated.

An independent audit of the water utility, released Tuesday, found that spending for the fiscal year that ended in April was 24 percent over budget.

The auditor, Garza/Gonzalez & Associates, said that Bexar Met's management attributed the excessive spending to unscheduled needs that included expansion of its treatment plant and repair of Medina Dam, higher fuel costs, flood debris cleanup that threatened the quality of water used by the treatment plant, and professional fees related to lawsuits.

The utility also collected more money than it expected, with total operating revenues 5.1 percent higher than projected at $43.9 million, according to the audit.

Water sales were only 2.6 percent higher than budgeted, at $37.3 million. Most of the extra revenue came from an unanticipated 83 percent jump, of $1.2 million, in customer penalties and fees collected.

That has been a sore point with many customers, who claim the utility is too quick to turn off service for slow payment, and is balancing its books on the backs of its

mainly low-income customers.

The auditing firm, in a separate letter on management of the utility, also made a number of recommendations to bring things in line with generally accepted accounting practices.

It noted that the utility has not conducted a physical inventory of its capital assets in at least five years and recommended that one be conducted every two years.

The firm also said that real estate appraisals generally are not obtained before property is purchased, and they should be.

The current operating budget is $39.2 million, with a projected bottom line of $3.8 million.

The utility would have shown a significant loss for the year, if not for taking in one-time extra revenues of $3.8 million from an interest rate swap transaction on some of its debt, and $6.4 million in capital assets from developers who handed over water systems they had built in new neighborhoods.

Instead, the utility posted a profit of $1.5 million, which was almost 80 percent below projections, and added $5.2 million to its net assets. Even though Bexar Met owes $213 million in debt, its assets exceed debts by $48.2 million.

Jose Gallegos Jr., one of four members who have joined the seven-member board in the past year or so, said the panel is turning things around.

"I think the management letter pointed out a lot of areas the company needs to look at," said Gallegos, who added that he is bothered by [redacted] spending. "Certainly, we will be correcting those areas."

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