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Vinson &amp; Elkins

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From:

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Date:

March 9, 2005

Regarding:

GUA160/23007

Number of Pages:

27

Hard Copy Follows:

Yes

To:

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SOAH

Fax:

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Brenda Bishop for Judge Mike Rogan

cc: Docketing

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Message:

Re: SOAH Docket No. 582-05-1005; TCEQ Docket No. 2004-0384-UCR

Please see the attached filing.

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March 9, 2005

**Via Telefax**

LaDonna Castañuela  
Chief Clerk  
Texas Commission on Environmental Quality  
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P.O. Box 13087  
Austin, TX 78711-3087

Re: 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

Dear Ms. Castañuela:

By copy of this letter, we are filing via facsimile in the above referenced docket Guadalupe-Blanco River Authority's Motion to Dismiss. Thank you.

Respectfully submitted,

  
Molly Cagle

Enclosures

cc: Judge Mike Rogan (Via Facsimile)  
Brenda Bishop, SOAH Docket Clerk (Via Facsimile)  
Service List (Via Facsimile)

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

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

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**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**

§  
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**BEFORE THE STATE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

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

**TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:**

COMES NOW Guadalupe-Blanco River Authority ("**GBRA**") and, pursuant to TEX. R. Civ. P. 85, 1 TEX. ADMIN. CODE § 155.56(b), and the Administrative Law Judge's ("**ALJ's**") Order No. 1, files this motion to dismiss this proceeding brought by Bexar Metropolitan Water District ("**BexarMet**" or the "**District**"). GBRA requests that the ALJ either (i) grant this motion now, by ruling on the dispositive legal issues raised by GBRA in this Motion other than the dispositive issue relating to construction of BexarMet's enabling act that properly will be decided by the courts in pending litigation; or (ii) defer ruling on those other dispositive legal issues at this time, and instead monitor the pending litigation in anticipation of rulings by the courts on the dispositive legal issue relating to construction of BexarMet's enabling act. If the courts rule as requested by GBRA, such rulings would entitle GBRA to dismissal of this proceeding, in which case it would be unnecessary for the ALJ and the Commission to rule on any issue.

**SOAH DOCKET NO. 582-05-1005  
TCEQ DOCKET NO. 2004-1384-UCR  
GBRA's Motion to Dismiss – Page 1**

## I.

## INTRODUCTION

In this proceeding BexarMet seeks "3000 acre-feet of water per year to serve its customers in Comal County."<sup>1</sup> BexarMet seeks to compel GBRA to provide this water under § 11.041 of the Texas Water Code. In pertinent part, that statute authorizes a "person *entitled to receive water* from any . . . reservoir . . . or lake" to file a petition to compel when "the party owning or controlling the water supply *fails or refuses to supply the available water* to the petitioner."<sup>2</sup>

This proceeding is but one of several fronts on which BexarMet and GBRA battle over BexarMet's designs on expanding its retail water utility services beyond the boundaries the Legislature has imposed on the District. Under Texas law, the powers of water districts, such as BexarMet, "are measured by the terms of the statutes which authorized their creation, *and they can exercise no authority that has not been clearly granted by the legislature.*"<sup>3</sup> "The statutes envision an orderly development of the State's . . . water. . . , through the formation of *definite* districts with *geographical boundaries* where waters of the State will be conserved through primary utilization *within* the district."<sup>4</sup> Thus, when the Legislature fixes a district's boundaries, the district is to operate within those boundaries, unless the Legislature specifies otherwise. In

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<sup>1</sup> Original Petition of Bexar Metropolitan Water District to Compel Raw Water Commitment from Guadalupe-Blanco River Authority ("*BexarMet's Petition*") at 1.

<sup>2</sup> TEX. WATER CODE § 11.041(a) (Vernon 2000).

<sup>3</sup> *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 135 Tex. 280, 142 S.W.2d 945, 948 (1940) (emphasis added).

<sup>4</sup> *Harris County Water Control and 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.) (emphasis added).

other words, "*the statutes do not authorize [a] District to roam at large throughout the State and distribute water wherever it wishes without regard to limitations placed on it by statute.*"<sup>5</sup>

BexarMet, though, is incorrigible. Though by statute it is authorized to provide retail water utility service only to four CCN areas specifically identified in its enabling act, BexarMet persists in seeking to buy retail water utilities that operate outside its statutory boundaries, in soliciting customers that reside outside its boundaries, and in applying for service areas that are located outside its boundaries. And, in this proceeding, BexarMet insists that GBRA is obligated to provide the District whatever water it announces that it wants for its insatiable expansion plans.

BexarMet, however, cannot satisfy the standing and pleading requirements to maintain this action. First, BexarMet's petition is devoid of any "explanation of why [the District] is entitled to receive or use the [disputed] water," contrary to the pleading requirement in 30 TEX. ADMIN. CODE § 291.44(a)(1). Second, and more fundamentally, BexarMet is *not* a person "entitled to receive or use water from any reservoir . . . or lake" owned or controlled by GBRA. Third, GBRA has not "fail[ed] or refus[ed] to supply" water BexarMet is entitled to receive. GBRA does *not* refuse to supply BexarMet water for the four service areas that BexarMet is authorized to service. GBRA declines only to provide BexarMet water for use *outside* those service areas – where BexarMet is prohibited from operating.

For these reasons, which will be explained in greater detail below, BexarMet's petition should be dismissed.

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<sup>5</sup>

*Id.* at 795 (emphasis added).



## II.

## STATEMENT OF FACTS

The grounds on which GBRA requests that this case be dismissed are best understood against an overview of the legal framework in which water districts operate, the legislation that specifically circumscribes BexarMet's authority, and the pending litigation between GBRA and BexarMet over that legislation.

**A. An Overview of Water Districts**

As noted above, in Texas, the powers of water districts, such as BexarMet, "are measured by the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the Legislature."<sup>6</sup> A survey of water district enabling acts confirms the Legislature uses the terms "within" and "without" purposefully, to specify whether a water district is vested with extraterritorial powers, particularly the power to make extraterritorial sales of water. A number of districts are authorized to sell or distribute water only "within" their boundaries.<sup>7</sup> Locally, the Lower Colorado River Authority ("LCRA") "may use, distribute, and sell [its] waters, *within* the boundaries of the authority or *within* the boundaries of the watershed that contributes inflow to the Colorado River below the intersection of Coleman, Brown, and McCulloch counties[.]"<sup>8</sup> By contrast, a number of districts are

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<sup>6</sup> *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 142 S.W.2d at 948.

<sup>7</sup> See, e.g., Tex. H.B. 592, 45th Leg., R.S. (ch. 454, § 2(a)) (1937), as amended by Tex. S.B. 559, 59th Leg., R.S. (ch. 557) (1965) (authorizing Upper Red River Flood Control and Irrigation District to "sell . . . within the boundaries of the District").

<sup>8</sup> TEX. WATER CODE ANN. § 222.004(b) (Vernon Supp. 2004) (emphasis added).

authorized to transport or sell water "within or *without* the District."<sup>9</sup> For its part, GBRA may "sell . . . *within* the boundaries of the District,"<sup>10</sup> as well as "*without* the boundaries of the District," but in the latter case it may do so only if certain conditions are met to ensure the adequacy of the in-district water supply.<sup>11</sup>

In 1947, the Attorney General opined that a water district empowered to distribute and sell water only "within" its boundaries **cannot** lawfully sell water to an out-of-district customer.<sup>12</sup> The Attorney General concluded that LCRA's enabling act must be given precedence over the general law permitting inter-watershed transfers. "If the district is not authorized to sell or distribute waters beyond its boundaries" under its enabling act, the Attorney General reasoned it "then necessarily follows that the Legislature intended that these waters be used *only within such boundaries*."<sup>13</sup> Any other reading, he concluded, "*would nullify whatever purpose the Legislature had in mind in placing restrictions on sales by the district of such waters*."<sup>14</sup>

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<sup>9</sup> Tex. H.B. 1345, 60th Leg., R.S. (ch. 653, § 6) (1967) (emphasis added) (regarding Lamar County Water Supply District); *see also* Tex. S.B. 368, 57th Leg., R.S. (ch. 114, § 5(f)) (1961) (authorizing Bowie County Water Supply District to "sell . . . water within or without the boundaries of the district"); Tex. H.B. 1038, 59th Leg., R.S. (ch. 629, § 16) (1965) (authorizing the Mason County River Authority to "distribute [water] within or without the boundaries of the District").

<sup>10</sup> Tex. S.B. 97, 43rd Leg., 1st C.S. (ch. 75, § 2(a)) (1933), as amended by Tex. S.B. 1028, 64th Leg., R.S. (1975) (ch. 433) (emphasis added).

<sup>11</sup> *Id.* at § 2(d).

<sup>12</sup> *See* Tex. Att'y Gen. No. V-319 (1947).

<sup>13</sup> *Id.* at 8 (emphasis added).

<sup>14</sup> *Id.* (emphasis added); *see also id.* ("We have covered at length the various conservation and reclamation district acts because we believe that these acts, with the exceptions

Subsequent to the Attorney General's opinion, the Legislature continued to carefully distinguish between water districts' powers "within" and "without" their boundaries. Thus, for example, in 1971, the Legislature amended the Upper Guadalupe River Authority's enabling act to extend its water powers to "without the boundaries of the District."<sup>15</sup> In 1975, the Legislature likewise amended the Nueces River Authority's enabling act to permit it to sell water "outside the authority."<sup>16</sup> Then, this past legislative session, at the same time it cabined BexarMet's water powers to "within the District," the Legislature created the Cameron-Hidalgo-Willacy Regional Water Authority, and empowered that "authority . . . to provide its services outside the boundaries of the authority."<sup>17</sup>

## **B. Review of BexarMet's Enabling Act**

### **1. BexarMet's Enabling Act Before Senate Bill 1494**

Section 3 of BexarMet's enabling act sets forth the District's powers.<sup>18</sup> Prior to Senate Bill 1494, which was passed this last legislative session, subsection 3(c) of that enabling act vested BexarMet with the authority to "conserve and *distribute*" water essential for domestic and other uses by "the *inhabitants of the District*," and for "cities and towns situated *within the*

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indicated, show an overall purpose by the Legislature to preserve for the benefit of the inhabitants of these districts the waters stored by such districts and to permit a purchaser to remove such waters beyond district boundaries would circumvent this purpose.").

<sup>15</sup> Tex. H.B. 989, 62nd Leg., R.S. (ch. 430, § 16(a)) (1971) .

<sup>16</sup> Tex. S.B. 437, 64th Leg., R.S. (ch. 699, § 3.02(c)) (1975)

<sup>17</sup> Tex. S.B. 721, 78th Leg., R.S. (ch. 1184, § 3.04) (2003).

<sup>18</sup> See Pre-2003 Enabling Act at § 3. The enabling act as it existed before it was amended by Senate Bill 1494 in 2003 is referred to as the "*Pre-2003 Enabling Act*." The enabling act after it was amended by Senate Bill 1494 is referred to as the "*Current Enabling Act*."

*District.*"<sup>19</sup> The remainder of section 3 likewise circumscribed BexarMet's services to areas "of the District"<sup>20</sup> or "within the District."<sup>21</sup>

In limited circumstances, some of the section 3 authorizations grant BexarMet power to act outside the District's boundaries. But each such provision involves only the acquisition or operation of property or facilities needed for BexarMet's services *within* the District's boundaries.<sup>22</sup> Thus, when the Legislature has intended BexarMet to have the authority to act outside the District's territory, the Legislature has explicitly conferred that power to BexarMet.

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<sup>19</sup> Pre-2003 Enabling Act at § 3(c) (emphasis added).

<sup>20</sup> *Id.* at § 3(e) (allowing BexarMet to provide and operate facilities for preserving purity of the "surface and underground waters of *the District* for the protection and health of *its inhabitants*." (emphasis added).

<sup>21</sup> *Id.* at § 3(a) (providing BexarMet with certain authority to control waters of the San Antonio River watershed "in the District" and the storm and flood and underground waters "in the District."); *id.* at § 3(b) (providing BexarMet authority to store, control and conserve storm and flood waters of "its rivers and streams"); *id.* at § 3(d) (giving BexarMet authority to develop drainage and other systems to dispose of storm and flood waters "of the District."); *id.* at § 3(i) (permitting BexarMet to make contracts with persons or entities, public or private, "operating water distribution facilities for the benefit of a city or town *within the District* . . . " for the operation of those facilities by one entity for the other, or jointly) (emphasis added); *id.* at § 3(r) (authorizing BexarMet 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 necessary or convenient to the accomplishment of the purposes for which the District was created) (emphasis added).

<sup>22</sup> Subsection 3(f) gives BexarMet authority to acquire property "within or without the boundaries of the District . . . necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act." Subsection 3(g) provides that BexarMet may condemn property "within or outside of the boundaries of the District . . . necessary to the exercise of the powers, rights, privileges and functions conferred upon it by this Act" — but, notably, not property owned "by any other political subdivision, city or town located within the District." Subsection 3(h) gives BexarMet authority to cooperate and contract with local governmental entities "located in or outside of the District" for construction, acquisition or operation of "facilities, works and plants necessary or convenient to the accomplishment of the purposes for which the District was created." These provisions are retained unchanged in the Current Enabling Act.

**2. Senate Bill 1494 Limits BexarMet's Retail Water Utility Service to Areas "Within" the District**

The Legislature again made clear this past legislative session with Senate Bill 1494 that BexarMet's authority to provide retail water utility service extends no further than the District's statutory boundaries. Thus, for example, in amending subsection 3(a), the Legislature confirmed that BexarMet is empowered only to "develop, transport, *deliver, distribute*, store and treat water *for use within the District*, including the storm and flood waters *within the District*."<sup>23</sup> In like manner, Senate Bill 1494's amendments to the remainder of section 3 make clear that BexarMet's power to provide retail water utility service is confined to the area *within* the District's boundaries.<sup>24</sup>

That BexarMet is limited to serving only within its territorial confines is further supported by Senate Bill 1494's legislative history. As originally filed, Senate Bill 1494 would have amended § 3(a) of BexarMet's enabling act to authorize BexarMet to provide retail water utility service to areas "within *or without*" the District's boundaries:

Through every practical and legal means to develop, transport, deliver, distribute, store and treat water including the storm and flood [and underground] waters within or without the District . . .<sup>25</sup>

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<sup>23</sup> Current Enabling Act § 3(a) (emphasis added).

<sup>24</sup> The 2003 legislation also added new subsections 3(s) and 3(t), both of which grant new authority, also to be exercised only within the District. New subsection 3(s) gives BexarMet authority to enter into certain planning agreements with the Texas Water Development Board "for the purpose of conducting studies necessary *to maintain retail water supply services to customers within the boundaries of the District*." Current Enabling Act § 3(s) (emphasis added). New subsection 3(t) gives BexarMet authority "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." Current Enabling Act at § 3(t) (emphasis added).

<sup>25</sup> Initial Version of Senate Bill 1494 at § 2 (modifying § 3(a) of the Pre-2003 Enabling Act) (underscore (additions) and brackets (deletions) in original).

Similarly, the original version of the Bill would have expanded other of BexarMet's extraterritorial powers.<sup>26</sup> *But the original version was changed in the legislative process.*

The substituted version produced in the Senate Natural Resources Committee *removed* any authorization for BexarMet to provide retail water utility service outside ("without") the District:

Through every practical and legal means to develop, transport, deliver, distribute, store and treat water for use within the District, including the storm and flood waters within the District. . . .<sup>27</sup>

Likewise, the other proposed expansions of BexarMet's extraterritorial powers were deleted.<sup>28</sup>

### 3. Senate Bill 1494 Expressly Fixes the Boundaries of BexarMet's District Territory

The 2003 Legislature also spelled out the boundaries "within" which BexarMet is to operate:

[F]or the purpose of the exercise of its current retail water utility services, the District's boundaries shall include the territory defined in all or applicable portions of census tracts or property situated within any area certificated by the Texas Commission on Environmental Quality to the District on the date of

<sup>26</sup> The initial version of Senate Bill 1494 also would have added different subsections 3(s) and 3(t), providing BexarMet, respectively, with authority to enter into agreements with cities and other political subdivisions "located in or *outside* of the District" for regional water resource development and with the authority to enforce the Clean Water Act "within or *without* the District." Initial Version of Senate Bill 1494 at § 2 (modifying Pre-2003 Enabling Act § 3) (emphasis added). Those "outside the district" provisions were rejected, however, and the new sections' subject was altered. *See supra* at note 25.

<sup>27</sup> Senate Committee Substitute Version of Senate Bill 1494 at § 1 (modifying § 3(a) of the Pre-2003 Enabling Act) (underscored and bracketed text in original; emphasis added). Those "outside the district" provisions were rejected, however, and the new sections' subject was altered.

<sup>28</sup> *See* Initial Version of Senate Bill 1494 at § 2 (p. 7) (amended proposal which would add substituted new §§ 3(s) & 3(t) to the enabling act.) *See also supra* at note 25.

passage of the Act adding this section pursuant to Certificates of Convenience and Necessity Nos. 10675, 12759, and 12760.<sup>29</sup>

The amendment's legislative history confirms the Legislature's intent to confine BexarMet to the specific areas described in the listed CCNs. In the original version of Senate Bill 1494, the proposal was that the CCNs "existing at the time of passage of this act *and established in the future* [would] define the boundaries of the District."<sup>30</sup> But the allowance for additional CCN areas "established in the future" was deleted by the Senate.<sup>31</sup>

### C. BexarMet's Continued Extra-Territorial Expansion Efforts

Notwithstanding the statutory limits imposed by Senate Bill 1494, BexarMet seeks to provide retail water utility service to areas outside its statutory territory.<sup>32</sup> For example,

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<sup>29</sup> Current Enabling Act § 5A(b); *see* Senate Bill 1494 at § 3 (adding § 5A(b)). A CCN is a permit issued by TCEQ that authorizes and obligates a retail public utility to provide specified service to customers in the area designated in the CCN. 30 TEX. ADMIN. CODE § 291.3(10) (2003) (Commission on Environmental Quality, Definition of Terms). CCN No. 10675 identifies territory in Bexar, Comal and Medina counties. CCN No. 12759 identifies territory in Bexar County. CCN No. 12760 identifies territory in Atascosa County. In a Voting Rights Act lawsuit filed in 1996 against BexarMet, the federal district court entered a consent decree between BexarMet and the plaintiff, which among other things conformed by court order BexarMet's boundaries to the areas in which BexarMet was providing retail water utility service at that time. *Rios v. Bexar Metropolitan Water Utility*, No. 96-CV-335, slip op. at p. 15 (W.D. Tex. Apr. 25, 1996). This provision in Senate Bill 1494 references that case, and recognizes the effect of that court's order when it defines the retail service area of BexarMet to include the specific areas for which BexarMet holds CCNs as of the date of the passage of Senate Bill 1494.

<sup>30</sup> Initial Version of Senate Bill 1494 at § 4 (proposing amendment to existing § 5 of Pre-2003 Enabling Act) (emphasis added).

<sup>31</sup> *See* Senate Committee Substitute Version of Senate Bill 1494 at § 3 (rejecting original proposed amendment to Pre-2003 Enabling Act § 5, and adding instead what became new Current Enabling Act § 5A(b)).

<sup>32</sup> Based upon its sworn pleading filed in this case on January 5, 2005, BexarMet, for example, apparently believes it is entitled to serve the areas now served by Water Services Inc. and the Diamond Water Company. *See* First Amended Petition of BexarMet withdrawn January 11, 2005.

BexarMet is seeking to acquire two utilities, both of which are located outside the District's boundaries and serve only customers outside those boundaries.<sup>33</sup> The District also is seeking to displace Bulverde as the retail water utility service provider for many of the City's residents.<sup>34</sup> And in this contested case proceeding, BexarMet insists that GBRA is obligated to provide whatever water is required for the District's targeted extraterritorial operations.<sup>35</sup>

#### **D. Bulverde and GBRA's Declaratory Judgment Suit**

When it became apparent BexarMet would not heed the limitations the Legislature imposed, Bulverde and GBRA sued for declaratory judgment. The relief they seek is to cabin BexarMet to the service area territory the Legislature prescribed. More particularly, Bulverde and GBRA seek the following declarations:

- that BexarMet's District boundaries for provision of retail water utility services include only the territory defined in Current Enabling Act section 5A(b), being all or applicable portions of census tracts or property situated within any area certificated by the TCEQ pursuant to TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed on the date of passage of Senate Bill 1494, and no other territory;
- that BexarMet does not have the authority to annex any territory outside the boundaries of the District as those boundaries are expressly defined in BexarMet's Current Enabling Act section 5A(b);
- that BexarMet does not have the authority to provide retail water utility service to any area outside the boundaries of the District as that territory is defined in new

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<sup>33</sup> *Id.* at ¶ 5.

<sup>34</sup> *Bexar Metropolitan Water District v. Texas Commission on Environmental Quality*, Cause No. GV-302775 in the 250th Judicial District Court of Travis County, Texas; judgment of the District Court affirming the decision of the TCEQ appealed by BexarMet as Cause No. 02-04-00574-CV in the 3rd Court of Appeals. (This is an appeal by BexarMet from the TCEQ order granting Bulverde's application for a CCN covering an area in Comal County and denying BexarMet's application for a CCN for a portion of that same area. BexarMet filed its CCN application after Bulverde filed its application.)

<sup>35</sup> BexarMet's Petition at ¶ 8.



section 5A(b) of BexarMet's Current Enabling Act, which is the territory included within the scope of TCEQ CCNs No. 10675, 12759 and 12760, as those CCNs existed at the time of passage of SB 1494;

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

BexarMet responded to the suit by filing a motion to transfer venue to Travis County, a plea to the jurisdiction, and a plea in abatement. In its plea to the jurisdiction, BexarMet pointed to this proceeding, as well as other TCEQ proceedings in which BexarMet and GBRA are pitted against each other, and argued that the Comal County state district court lacked subject matter jurisdiction because the TCEQ is vested with exclusive or primary jurisdiction over the issues raised by this suit.<sup>36</sup> The Court denied each of BexarMet's requests.<sup>37</sup> BexarMet then appealed the denial of its plea to the jurisdiction.<sup>38</sup>

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<sup>36</sup> Bexar Metropolitan Water District's First Amended Motion to Transfer Venue, Answer, Plea to the Jurisdiction, Plea in Abatement and Affirmative Defenses at 7.

<sup>37</sup> *City of Bulverde, Texas and GBRA v. BexarMet*, Cause No. C2003-1201A, in the 22<sup>nd</sup> Judicial District Court.

<sup>38</sup> *City of Bulverde, Texas and Guadalupe-Blanco River Authority v. Bexar Metropolitan Water District*, Cause No. C2003-1201A in the 22<sup>nd</sup> Judicial District Court of Comal County, Texas; judgment of the District Court denying BexarMet's plea to the jurisdiction as Cause No. 03 -04-00367-CV in the 3<sup>rd</sup> Court of Appeals.

On appeal, BexarMet again "contend[ed] that the Commission has exclusive or primary jurisdiction over the issues raised in this appeal."<sup>39</sup> The Austin Court of Appeals, however, rejected this contention. In doing so, the Court pointed out that "Courts have the authority to determine what a statute means. *Statutory construction is a question of law and for the court to decide.*"<sup>40</sup>

### III.

#### ARGUMENT AND AUTHORITY

##### A. Authority and Standard for Requested Relief

Pursuant to 1 TEX. ADMIN. CODE § 155.56(b), the ALJ may dismiss a case for, among other things, (i) "lack of jurisdiction over the matter by the referring agency" and (ii) "failure to state a claim for which relief can be granted."<sup>41</sup> A motion to dismiss under TEX. R. CIV. P. 85 for lack of jurisdiction is proper to challenge a party's lack of standing.<sup>42</sup> The standing inquiry focuses on whether the petitioner is the proper party to assert the claim at issue.<sup>43</sup> Standing to bring a claim may be conferred by statute.<sup>44</sup>

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<sup>39</sup> *Bexar Metropolitan Water District v. City of Bulverde*, Tex. App. LEXIS 10254 at \*21 (Tex. App. – Austin Nov. 18, 2004).

<sup>40</sup> *Id.* at \*24 (emphasis added).

<sup>41</sup> 1 TEX. ADMIN. CODE § 155.56(b)(1), (4), (5).

<sup>42</sup> *See M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710-11 (Tex. 2001).

<sup>43</sup> *See Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998).

<sup>44</sup> *See Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001).

**B. BexarMet's Petition Fails to Properly Plead Any Standing**

As just noted, 1 TEX. ADMIN. CODE § 155.56(b) authorizes the ALJ to dismiss a case for "failure to state a claim for which relief can be granted." TEX. WATER CODE § 11.041(a)(1) requires BexarMet to demonstrate, in its petition, that it the District "is entitled to receive or use the water" it seeks. Furthermore, TCEQ's rules implementing this statutory provision required BexarMet to include, in its written petition to the Commission, "an explanation of why [BexarMet] is entitled to receive or use the water" at issue in the petition.<sup>45</sup> BexarMet wholly failed to provide any such explanation. BexarMet's petition only summarily concludes that "BexarMet is a 'person entitled to receive or use water' from Canyon Lake, for use within Comal County."<sup>46</sup> Lacking any supporting explanation for this claim, BexarMet's petition fails to properly state a claim or otherwise meet the barest minimum of pleading requirements. Accordingly, the ALJ may not grant relief on the basis of the petition and should dismiss the petition pursuant to 1 TEX. ADMIN. CODE § 155.56(b)(4).

**C. BexarMet Fails To Satisfy The Minimum Statutory Standing Requirements Necessary To Maintain Its Petition**

BexarMet's failure to explain its entitlement is no mere oversight. Fundamentally, BexarMet is not a "person entitled to receive or use water" from Canyon Lake under § 11.041 of the Texas Water Code and, therefore, the District fails to satisfy the minimum statutory standing requirements necessary to maintain a petition under § 11.041.

*BexarMet Is Not Entitled to Water for Its Illegal Extraterritorial Expansion.* As the Austin Court of Appeals noted, in the ongoing litigation, "Bulverde and GBRA seek declarations

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<sup>45</sup> 30 TEX. ADMIN. CODE § 291.44(a)(1).

<sup>46</sup> BexarMet Pet. at ¶ 17.

that actions undertaken by BexarMet are beyond the scope of its statutory authority and, therefore, void."<sup>47</sup> The court also pointed out that "[i]f a water district acts *beyond its statutory powers*, its actions *are void*."<sup>48</sup> To the extent BexarMet seeks water for its extraterritorial expansion (this is the great majority of the water sought in BexarMet's petition), it seeks water for a void pursuit. BexarMet cannot be "entitled" to water for use in a manner the law prohibits.

***BexarMet Otherwise Is Not Entitled to Compel Water from GBRA.*** In addition to actual, physical water rights (e.g., permits and Certificates of Adjudication), two principal kinds of entitlement to receive or use water have historically been recognized under Texas water law: (i) water supply contracts and (ii) possessory interests in lands adjoining irrigation canals.<sup>49</sup> Additionally, a third kind of entitlement was previously recognized by the Texas Water Commission and arguably upheld by a Texas court: specific representations made to the Commission by the water supplier upon which the Commission granted the supplier a permit to appropriate state water.<sup>50</sup>

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<sup>47</sup> *Bexar Metropolitan Water District v. City of Bulverde, Texas*, 2004 Tex. App. LEXIS 10254 at \*13.

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> See TEX. WATER CODE §§ 11.036(a) (Vernon 2004) (stating that any person conserving or storing water "may contract to supply the water to any person, association of persons, corporations, or water improvement districts having the right to acquire use of the water."); 11.038(a)-(b) (Vernon 2004) (stating a water supplier is obligated to furnish water to a person owning or holding "a possessory interest in land adjoining or contiguous to a canal, ditch, flume, lateral, dam, reservoir, or lake constructed and maintained").

<sup>50</sup> See *Texas Water Rights Comm'n v. City of Dallas*, 591 S.W.2d 609, 611 (Tex. Civ. App. — Austin 1979) (holding that two municipalities in Dallas County were "persons entitled to receive water" within the meaning of § 5.041 of the Texas Water Code, the precursor provision to § 11.041, "based upon representations made by Dallas to the Commission prior to the granting of certain permits to appropriate waters of the state."), *writ ref'd n.r.e.*, 674 S.W.2d 900 (Tex. 1984).

BexarMet does not claim any of these kinds of entitlement to the water it seeks from Canyon Reservoir. BexarMet does not claim that it holds a water right authorizing it to use or receive water from Canyon Reservoir. Nor does BexarMet claim an entitlement under a contract for water supply from Canyon Reservoir. Nor does BexarMet claim an entitlement based on a possessory interest in lands adjoining an irrigation canal. Nor does BexarMet claim that GBRA ever made any representation to the Commission that it would supply water to BexarMet.

BexarMet's entire effort to demonstrate that it is "entitled to receive or use water" from Canyon Reservoir consists of citing two cases in paragraph 17 of its petition: *City of San Antonio v. Texas Water Comm'n*<sup>51</sup> and *Texas Water Rights Comm'n v. City of Dallas*.<sup>52</sup> These cases are discussed below.

In *City of San Antonio v. Texas Water Comm'n*, after reviewing GBRA's enabling act and the Canyon Permit, the Court reasoned that "GBRA cannot legally refuse to sell municipal water to any particular municipality."<sup>53</sup> GBRA disputes that the terms of its enabling act or the Canyon Permit support such a broad conclusion overriding GBRA's critical responsibility to decide how the very limited remaining supply of water from Canyon Reservoir should be allocated across GBRA's huge ten-county statutory district. In any event, the broad conclusion made by the Court nearly 40 years ago does not control here, because the Court was not addressing any claim under § 11.041 of the Texas Water Code or its precursor provisions, and it certainly was not doing so under current law, in particular the relatively new provisions in the Water Code (e.g., §§ 11.0134(b)(3)(E), 16.051, and 16.053) that give significant importance to

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<sup>51</sup> 407 S.W. 2d 752 (Tex. 1966).

<sup>52</sup> 591 S.W.2d 609 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

<sup>53</sup> 407 S.W.2d 752, 768.

water planning. Nevertheless, the Court's conclusion is instructive in that it is limited *solely* to *municipalities*. BexarMet is *not* a municipality and, therefore, in any event cannot find support for its petition in the *City of San Antonio* opinion.

Moreover, BexarMet's proposed use of water from Canyon Reservoir is inconsistent with the state water plan and the approved regional water plan and BexarMet has not attempted in its petition to show or plead any reason that the Commission should waive the requirement set forth in TEX. WATER CODE §11.0134(b)(3)(E). Thus, the Commission would be required to deny an application by BexarMet for a water right for that proposed use, and for that reason alone BexarMet would not be "entitled to receive or use" water from Canyon Reservoir even if it were a municipality.

In *Texas Water Rights Comm'n v. City of Dallas*, the appellate court reversed and remanded a trial court ruling which set aside an order of the Texas Water Rights Commission ("TWRC") wherein the TWRC found that water permits held by Dallas were obtained based upon the city's representation that it would supply water to municipalities in Dallas County.<sup>54</sup> As recounted in the appellate court's opinion, the order of the TWRC held that two municipalities in Dallas County were "persons entitled to receive water" within the meaning of § 5.041 of the Texas Water Code, the precursor provision to § 11.041, "based upon representations made by Dallas to the Commission prior to the granting of certain permits to appropriate waters of the state."<sup>55</sup> GBRA never made a representation to the Commission that it would supply water to BexarMet in the process of obtaining the Canyon water right or any of the amendments thereto.

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<sup>54</sup> 591 S.W.2d 609, 611 (Tex. Civ. App.—Austin 1979).

<sup>55</sup> *Id.*

Accordingly, BexarMet cannot reasonably claim any entitlement to water in Canyon Reservoir based upon the kind of entitlement addressed in *Texas Water Rights Comm'n v. City of Dallas*.

**D. GBRA Has Not "Failed or Refused" to Supply Water to BexarMet for Use Within BexarMet's Four Statutorily-Defined Service Areas in Comal County**

A petition to compel the supply of water may be maintained under § 11.041 of the Texas Water Code only if "the party owning or controlling the water supply fails or refuses to supply the available water to the petitioner[.]" As discussed above, BexarMet lacks statutory power to provide retail water utility service to any area within Comal County, except for those four disconnected service areas in Comal County that are defined in BexarMet's current Enabling Act and included within BexarMet's statutory boundaries for that limited purpose. GBRA does refuse to supply any water to BexarMet for use in Comal County in any area outside BexarMet's four statutorily-defined service areas in Comal County. However, although GBRA may not be forced under § 11.041 to supply BexarMet any water from Canyon Reservoir for use within any area in Comal County (because BexarMet is not a person "entitled to receive or use" such water), GBRA does not refuse to provide water to those four CCN areas that BexarMet is authorized to service.

In its petition, BexarMet states that it wants a supply of 3,000 acre-feet of stored water from Canyon Reservoir per year, for an unspecified term, so that BexarMet can provide treated water utility service to undefined persons, in undefined areas within Comal County.<sup>56</sup> This amount of water is *substantially* in excess of the amount needed to supply current and future demands for treated water within those four service areas in Comal County that are defined in BexarMet's current Enabling Act. GBRA estimates that the amount of water needed to supply

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<sup>56</sup> See BexarMet Pet. at ¶ 8.

current and future demands for treated water within those four service areas is only approximately 428 acre-feet per year. Before BexarMet filed its petition, GBRA advised BexarMet that GBRA is willing to enter into a contract with BexarMet for the amount needed to supply current and future demands for treated water within those four service areas, and it repeatedly asked BexarMet provide to GBRA a statement of how much water that is, and its supporting calculations. BexarMet repeatedly failed to provide that fundamental information to GBRA.<sup>57</sup> Thus, GBRA has not "failed or refused" to supply water to BexarMet for use within its four statutorily-defined Comal County service areas. For this reason, BexarMet's petition should be dismissed with respect to BexarMet's four statutorily-defined Comal County service areas.

**E. BexarMet Has Provided No Justification For Any Specified Amount of Water**

Even assuming that BexarMet is somehow entitled to some supply of water from Canyon Reservoir, which as demonstrated above it is not, BexarMet may not demand an unlimited supply nor an unjustified amount of water. Indeed, even the long-recognized rights of riparian landowners to be supplied water are not without limitations. Absent a contract for a specified amount, such persons are entitled only to "the water necessary for" the purposes for which the water is to be used.<sup>58</sup>

In its petition, BexarMet seeks a supply of 3000 acre-feet of water per year for an unspecified term.<sup>59</sup> Despite repeated requests by GBRA, BexarMet has failed or refused to

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<sup>57</sup> See BexarMet Pet., Exs. C-F.

<sup>58</sup> TEX. WATER CODE § 11.038(b); see also *Trinity Water Reserve, Inc.*, 829 S.W.2d 851, 862 (Tex. app. – Beaumont 1992) (holding that, "regardless of contract," irrigation company was obligated "to furnish those in possession of the land with water that is necessary for the proper irrigation of the crops").

<sup>59</sup> See BexarMet Pet. at ¶ 8.



provide any justification for this or any other amount of water.<sup>60</sup> If BexarMet is entitled to any water from Canyon Reservoir, which GBRA maintains it is not, its purported entitlement must be limited to only that amount of water "necessary" to provide an "adequate" and "continuous" supply of water to the areas in Comal County that it is authorized to serve under its CCN.<sup>61</sup> BexarMet does not have statutory authority to supply any water for use in any area outside its statutorily defined boundaries and, therefore, any action taken by BexarMet for the purpose of supplying water to any such area, including an action seeking to secure a supply of water for that purpose is unlawful.

As discussed below, to properly state a claim for such water, it was incumbent upon BexarMet to demonstrate, in its petition, how much water is needed annually to supply current and projected water needs within the four, discrete and disconnected areas of Comal County that BexarMet is authorized to serve under CCN No. 10675. BexarMet failed, and has repeatedly refused, to provide any such demonstration. BexarMet characterizes GBRA's request for current and projected future demands of water within the four service areas.<sup>62</sup> BexarMet apparently believes that the careful efforts resulting from SB 1 planning should be cast aside when an entity who wants some water simply demands whatever it wants from another entity who holds a water right. Why bother with planning, projections, conservation, etc.? BexarMet wants 3000 acre-feet. Period. BexarMet has not demonstrated its entitlement to any amount of water and,

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<sup>60</sup> See BexarMet Pet., Exs. C-F.

<sup>61</sup> TEX. WATER CODE §§ 11.038(b), 13.241(a), (b)(2).

<sup>62</sup> GBRA's letter August 29, 2003 of September 29, 2003 and October 30, 2003, set forth this simple, straightforward request. See BexarMet Pet. Exhibit D and F.

therefore, has failed to satisfy the minimum statutory standing requirements necessary to maintain petition under § 11.041.

Furthermore, as a steward of the Canyon Reservoir water supply, GBRA should not be compelled to set aside an unjustified amount of water for an indefinite term. Proper stewardship of this water supply demands that GBRA not knowingly supply water in an amount "in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in plying the water to that purpose."<sup>63</sup> Such "waste of water" is prohibited in Texas and may not be compelled.<sup>64</sup>

By GBRA's calculations, the 3000 acre-feet of water requested by BexarMet is far in excess of the amount necessary to supply the current and projected water needs of the four areas within Comal County that BexarMet is authorized to serve.<sup>65</sup> Moreover, BexarMet has repeatedly proven itself to be a grossly mismanaged water utility, which has engaged in a pattern of conduct involving highly questionable expenditures and other activities alleged to be illegal or corrupt. Under no circumstances should GBRA be compelled to provide such an entity with an unjustified amount of water for an unlimited time.

#### IV.

#### CONCLUSION AND PRAYER

For the foregoing reasons, GBRA respectfully requests that the ALJ either (i) grant this motion now, by ruling on the dispositive legal issues raised by GBRA in this Motion other than the dispositive issue relating to construction of BexarMet's enabling act that properly will be

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<sup>63</sup> 30 TEX. ADMIN. CODE § 297.48(b).

<sup>64</sup> *See id.* at § 297.48(a); *see also* TEX. WATER CODE § 11.093.

<sup>65</sup> *See* BexarMet Pet., Exs. D, F.

decided by the courts in pending litigation; or (ii) defer ruling on those other dispositive legal issues at this time, and instead monitor the pending litigation in anticipation of rulings by the courts on the dispositive legal issue relating to construction of BexarMet's enabling act. If the courts rule as requested by GBRA, such ruling would entitle GBRA to dismissal of this proceeding, in which case it would be unnecessary for the ALJ and the Commission to rule on any issue.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Guadalupe-Blanco River Authority's Response to Bexar Metropolitan Water District's Request for Disclosure was served on the following person(s) via electronic mail and/or facsimile on March 9, 2005.

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