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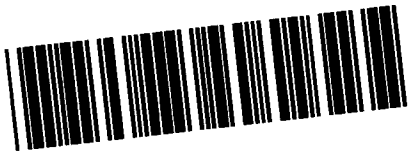

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Vinson&Elkins

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April 21, 2005

Via Facsimile & First Class Mail

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F, Room 1101
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:

Enclosed for filing in the above-referenced docket, please find Guadalupe-Blanco River Authority's ("***GBRA's***") Reply to the Response of Bexar Metropolitan Water District to GBRA's Motion to Dismiss. Thank you.

Respectfully submitted,

Molly Cagle

Molly Cagle

cc: Hon. Mike Rogan (*via facsimilie*)
Brenda Bishop, SOAH Docket Clerk (*via facsimilie*)
Service List (*via facsimilie and electronic mail*)

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ORIGINAL

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 REPLY TO THE RESPONSE OF BEXAR METROPOLITAN WATER DISTRICT TO GUADALUPE-BLANCO RIVER AUTHORITY'S MOTION TO DISMISS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW Guadalupe-Blanco River Authority ("***GBRA***") and, pursuant to the Administrative Law Judge's ("***ALJ's***") April 7, 2005 order, files this Reply to the Response of Bexar Metropolitan Water District ("***BexarMet***" or the "***District***") to GBRA's Motion to Dismiss this proceeding.

INTRODUCTION

BexarMet's Response fails to overcome the fundamental defects in its petition that warrant dismissal. Fundamentally, BexarMet's Response unequivocally demonstrates that the District cannot satisfy the minimum statutory standing requirements of § 11.041 of the Texas Water Code. As a matter of law, BexarMet cannot demonstrate that it is "entitled to receive or use water from any reservoir . . . or lake" owned or controlled by GBRA.[1]

Additionally, BexarMet's Response is yet another demonstration of the District's steadfast refusal to identify the portion of the 3,000 acre-feet it demands from GBRA that is necessary to provide an adequate and continuous supply of water to the four small areas in Comal County that BexarMet is authorized to serve under its enabling act. In the

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1 TEX. WATER CODE § 11.041(a).

correspondence attached to its petition, BexarMet states that it wants the 3,000 acre-feet to supply areas both within and without its statutorily-defined boundaries.[2] In it's petition, BexarMet neither defines the specific portion of the 3,000 acre-feet that it claims is needed within its boundaries, nor does it ask the Commission to define that amount. Therefore, should the ALJ determine that BexarMet somehow is entitled to water from GBRA, to determine the amount of water to which BexarMet is entitled, the ALJ necessarily must either construe BexarMet's authority under its enabling act (a matter now squarely before the Comal County District Court),[3] or defer ruling on that issue and determine only the amount necessary to supply BexarMet's four statutorily-authorized service areas, notwithstanding BexarMet's failure to define the specific amount it claims or to request that the Commission define that amount.

Accordingly, in light of the fact that construction of BexarMet's enabling act remains a legal issue pending in the courts, GBRA respectfully renews its request that the ALJ either (i) grant GBRA's Motion to Dismiss now, by ruling on the dispositive legal issues raised by GBRA in its 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

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2 *See* BexarMet Pet., Ex. C at 3 (stating that its 3,000-acre feet demand is based "on projections of population and water demand for presently certificated areas, ***and*** projections for areas including, ***but not limited to***, the Bulverde CCN area now subject to appeal") (emphasis added); *see also* BexarMet Resp. at 3 (noting that "the present ***and future extent*** of BexarMet's Comal County retail service area may affect the amount of water the TCEQ may order GBRA to provide BexarMet") (emphasis added).

3 *See City of Bulverde v. Bexar Metro. Water Dist.*, No. C2003-1201A (22nd Dist. Ct., Comal County, Tex. Dec. 18, 2003).

BexarMet's enabling act. In either case, GBRA sees no reason for the ALJ, at this time, to direct the parties to propose a new procedural schedule for this case.

ARGUMENT

BEXARMET LACKS STANDING BECAUSE ITS CLAIM OF ENTITLEMENT TO WATER FROM CANYON RESERVOIR FAILS AS A MATTER OF LAW

The pertinent statute and regulations required BexarMet to explain, ***in its petition***, the grounds for its claim of entitlement to the water that it demands from GBRA.[4] Now on notice that its petition fails to plead the requisite statutory standing requirements, BexarMet attempts, for the first time in its Response, to explain its entitlement claim. BexarMet now claims that it is a "person entitled to receive or use water" from Canyon Reservoir under § 11.041 of the Texas Water Code because (1) "it seeks water for use in its retail water supply operations in Comal County," and (2) it is "a municipal corporation." BexarMet's explanation fails as a matter of law. Neither of these two claims entitles BexarMet to any water from Canyon Lake.

A. BexarMet's Retail Water Supply Operations in Comal County Do Not Entitle BexarMet to Compel Water from GBRA

As demonstrated in GBRA's Motion to Dismiss, BexarMet's attempts to expand its water supply operations in Comal County beyond the scope of its statutory authority are unlawful and void.[5] BexarMet cannot claim entitlement to water for such illegal business ventures. Furthermore, while BexarMet's Certificate of Convenience and Necessity ("***CCN***") No. 10675 authorizes BexarMet to provide water service to four discrete areas within Comal County, the mere fact that BexarMet has acquired such limited authorization does not entitle BexarMet to

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4 *See* TEX. WATER CODE § 11.041(a)(1) (requiring BexarMet's "written petition" to include a "showing . . . that [BexarMet] is entitled to receive or use the water" at issue in the petition); 30 TEX. ADMIN. CODE § 291.44(a)(3) (requiring "an explanation of why [BexarMet] is entitled to receive or use the water" at issue in the petition).

5 *See* GBRA Mot. to Dismiss at 4-10.

water from Canyon Reservoir, nor obligate GBRA to supply water to BexarMet. BexarMet has not cited, and cannot cite, any provision in the body of laws and regulations governing the issuance and operation of CCNs that entitles BexarMet to water under GBRA's control, nor obligates GBRA to supply it.[6]

Moreover, to obtain its CCN authorizing it to provide service to limited areas of Comal County, BexarMet was required to demonstrate to the Texas Commission on Environmental Quality ("***TCEQ***" or the "***Commission***") that it had "access to an adequate supply of water" and would be able to "provide continuous and adequate service" to those areas.[7] In its application for CCN No. 10675, BexarMet could not have legitimately represented that it had a contract with GBRA for a supply of water from Canyon Reservoir. As the case law demonstrates, in addition to actual, physical water rights, such a contract is one of only three forms of entitlement to receive or use water that have historically been recognized under Texas water law.[8]

BexarMet maintains that such forms of entitlement are not necessary to bring a claim under § 11.041 of the Texas Water Code. The District claims that if it had a contract with GBRA, or a physical or riparian water right, "it would never have a need for recourse to Section 11.041."[9] However, BexarMet's argument finds no support in Texas water law and

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6 *See* TEX. WATER CODE CH. 13, Subch. G; 30 TEX. ADMIN. CODE CH. 291.

7 TEX. WATER CODE § 13.241(a), (b)(2); *see also id.* § 13.246(c).

8 *See id.* § 11.036(a) (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"); *see also* GBRA's Mot. to Dismiss at 15-18 (discussing the three forms of entitlement to receive or use water that have historically been recognized under Texas water law).

9 BexarMet Resp. at 16.

jurisprudence.[10] Indeed, the two cases relied upon by BexarMet for this proposition – *Boyt Realty Co.* and *LaCour* – confirm that, in the absence of a contract for water supply, a person's entitlement to water service under § 11.041 has historically been derived from the person's rights as a riparian landowner.

In *Texas Water Comm'n v. Boyt Realty Co.*, the Court of Appeals addressed claims under § 11.041 brought by landowners neighboring a canal system.[11] Relying upon TEX. WATER CODE § 11.038(b), the appellate court found that the landowners had "a statutory right under the Water Code to use water" from the canals adjoining their properties.[12] Pursuant to § 11.038(b), a water supplier is obligated to furnish available water to a person owning or holding a possessory interest in land adjoining the water supply.[13] Thus, in *Boyt Realty Co.*, the petitioners' entitlement to a supply of water at reasonable rates under § 11.041 was derived from the petitioners' riparian water rights as holders of possessory interests in lands adjoining irrigation canals.[14] Accordingly, *Boyt Realty Co.* provides no support for BexarMet's sweeping assertion

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10 For instance, TEX. WATER CODE § 11.036(a) provides that any person conserving or storing water "may contract to supply the water to any person . . . having the right to acquire use of the water." The appellate court in *Brushy Creek Mun. Util. Dist. v. Texas Water Comm'n* found that the water supply contracts contemplated by § 11.036 "are subject to Commission revision and control" under § 11.041. 887 S.W.2d 68, 72 (Tex. App.—Austin 1994), *rev'd on other grounds*, 917 S.W.2d 19 (Tex. 1996).

11 10 S.W.3d 334, 337-339 (Tex. App.—Austin 1993, no writ).

12 *Id.* at 339.

13 *See also* TEX. WATER CODE § 11.038(a) (providing that "[a] person who owns or holds a possessory interest in land adjoining or contiguous to a canal, ditch, flume, lateral, dam, reservoir, or lake . . . and who has secured a right to the use of water in the canal, ditch, flume, lateral, dam, reservoir, or lake is entitled to be supplied" such water).

that all "persons within GBRA's statutory district" are entitled to whatever available water exists in Canyon Reservoir.

BexarMet's reliance upon *LaCour v. Devers Canal Co.* is similarly misplaced.[15] BexarMet quotes extensively from the appellate court's opinion to support the District's claim that it does not need a water supply contract with GBRA to maintain a claim under § 11.041. BexarMet, however, omits from its reply a key statement in the *LaCour* opinion, one immediately following the passage quoted by BexarMet. In that statement, the court explained that the reason that a person having no water supply contract may petition for water service under Article 7560, the predecessor provision to § 11.041, is because the purpose of such a petition is "to establish [the petitioners'] rights as ***riparian owners*** to a certain water service."[16] As discussed above, the entitlement of an owner of land adjoining a canal to receive and use water derives not from contract but from his or her possessory interests in lands adjoining the canal.[17]

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14 *See Boyt Realty Co.*, 10 S.W.3d at 339 ("'[T]hose owning or holding a possessory right or title to the land adjoining the canal or any of its parts, are entitled to water at just and reasonable rates.'" (quoting *Trinity Water Reserve, Inc. v. Evans*, 829 S.W.2d 851, 861-62 (Tex. App.—Beaumont 1992, no writ)).

15 319 S.W.2d 951 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.)

16 *Id.* at 953 (emphasis added).

17 *See Boyt Realty Co.*, 10 S.W.3d at 339 (quoting *Trinity Water Reserve, Inc.*, 829 S.W.2d at 861-62); *Trinity Water Reserve, Inc.*, 829 S.W.2d at 865 ("[B]y decisional precedent, under the common law as well as the statutory law . . ., the persons or entities owning or holding a possessory right or title to land that adjoins any canal or ditch and who shall have secured a right to the use of the said irrigation water shall be furnished with the irrigation water also."); *Lower Colo. River Auth. v. Tex. Dep't of Water Res.*, 638 S.W.2d 557, 574 (Tex. App.—Austin 1982) (citing § 11.041 as support for the statement that water suppliers are "under a statutory duty to furnish water to adjoining landowners under reasonable demand"), *rev'd on other grounds*, 689 S.W.2d 873 (Tex. 1984).

BexarMet does not and cannot claim entitlement to water in Canyon Reservoir based on any riparian-landowner theory. Nor does it claim any of the other forms of entitlement historically recognized under Texas law.[18] Rather, BexarMet would have the Administrative Law Judge ignore the requisites for entitlement to water under the statutory and common law and open the gates of Canyon Reservoir to anyone in GBRA's district that demands water. Reducing the burden of proof under § 11.041 to a mere showing of the petitioner's presence in the water supplier's district would eviscerate the statutory requirement of entitlement to receive or use the water. The terms of § 11.041 – limiting claims to only those persons "entitled to receive or use water" – must be given effect; they must not be interpreted in way that renders them meaningless.[19]

The requirement in § 11.041 that petitioners demonstrate their entitlement to the water at issue indicates that the class of persons entitled to a given supply of water is not unlimited. Certain persons are entitled, all others are not. A person's entitlement to water under § 11.041 should be determined by reference to other statutory provisions governing a person's right to water in Texas.[20] In Chapter 11 of the Texas Water Code – in the provisions governing water

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18 *See* GBRA's Mot. to Dismiss at 15-18.

19 *See Williams v. Adams*, 74 S.W.3d 437, 439 (Tex. App.—Corpus Christi 2002, pet. denied) (holding that proper statutory construction should "look to the plain and common meaning of the statute's words, viewing its terms in context and giving them full effect . . . mindful that 'every word in a statute is presumed to have been used for a purpose'" (quoting *Perkins v. State,* 367 S.W.2d 140, 146 (Tex.1963)); *State v. Vasquez*, 34 S.W.3d 332, 334 (Tex. App.—San Antonio 2000, no pet. h.) (citing "the guiding standard of statutory interpretation that we must presume the legislature intended every word and phrase of a statute to have meaning and effect" and rejecting an argument that would render a "distinct term" in the statute a "nullity").

20 *See, e.g.*, *Williams v. Adams*, 74 S.W.3d at 439 (providing that, when interpreting a statute, courts may look to "laws on the same or similar subjects").

rights – the term "entitled" is used sparingly. Most notably, it appears in § 11.038, the provision discussed above which codifies the rights of riparian landowners, and in § 11.040 concerning permanent water rights. Immediately following these provisions is § 11.041, which, much like § 11.038, speaks in terms of persons "***entitled to receive or use water*** from any canal, ditch, flume, lateral, dam, reservoir, or lake."[21] Nothing in the legislative history of § 11.041 suggests that when the Legislature required a showing of entitlement in § 11.041, it intended to extend the class of persons entitled to water beyond the riparian landowners and permanent water right holders in §§ 11.038 and 11.040. BexarMet certainly cannot provide any support for its assertion that the class of persons entitled to demand water from GBRA includes each and every person present in GBRA's statutory district.

B. BexarMet Is Not A Municipality Entitled to Receive Water from GBRA

Section 2 of BexarMet's enabling act states that the District was created as, among other things, a "municipal corporation." From this statement, BexarMet reasons that it is a "municipality," no different than the City of San Antonio, and therefore entitled to water from GBRA pursuant to it's reading of the Texas Supreme Court's holding in *City of San Antonio v. Texas Water Comm'n.*[22] BexarMet's reasoning is fatally flawed in every respect.

Even assuming that BexarMet can claim status as a municipal corporation, which it cannot,[23] it is self-evident that BexarMet is *not* a municipality. In an effort to avail itself of the

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21 TEX. WATER CODE § 11.041(a) (emphasis added).

22 407 S.W. 2d 752 (Tex. 1966).

23 BexarMet's purported status as a "municipal corporation" is irrelevant to this proceeding, in that it neither entitles BexarMet to water from Canyon Reservoir, nor obligates GBRA to supply that water to BexarMet. Nevertheless, BexarMet's disingenuous claim of special entitlement in this proceeding because of its purported "municipal corporation" status warrants a response here, primarily because BexarMet made similarly disingenuous claims in

City of San Antonio opinion, BexarMet uses the terms "municipal corporation" and "municipality" interchangeably throughout its Response. The two terms, however, are *not* interchangeable.

Texas law and TCEQ regulations define the term "municipality" to mean a city, which BexarMet unequivocally is not.[24] Moreover, various provisions of the Water Code and TCEQ's regulations distinguish between a municipality and a special law district, such as BexarMet, created pursuant to Article XVI, § 59, of the Texas Constitution.[25] This distinction is recognized in case law as well. For instance, the Austin Court of Appeals, in *Lower Colo. River Auth.*,

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another TCEQ proceeding – the CCN dispute between BexarMet and the City of Bulverde. *See* SOAH Docket Nos. 582-01-3633 and 582-02-0432; TCEQ Docket Nos. 2001-0697-UCR and 2001-0951- UCR; *see also* BexarMet Resp. at 7-9, Ex. C.

Moreover, notwithstanding the fact that the Commission entered a final order in the Bulverde CCN proceeding granting Bulverde's application for a CCN and denying BexarMet's competing application, and notwithstanding the fact that the Commission's order has been affirmed by a Travis County District Court, BexarMet relies heavily on the ALJ's Proposal for Decision in that proceeding for the proposition that it can serve areas in Comal County that are not expressly authorized in BexarMet's enabling act and included within BexarMet's boundaries for that limited purpose. *See* BexarMet Resp. at 7-9. BexarMet fails to mention, however, that the ALJ in that proceeding ***rejected*** BexarMet's claim of special entitlement in that case because of its purported "municipal corporation" status. *See* Letter from Hon. James W. Norman, State Office of Administrative Hearings, to Duncan Norton, General Counsel, TCEQ 3-4 (Jan. 21, 2003) (attached as Exhibit A). The ALJ in this case should similarly reject BexarMet's claim of special entitlement here because of its purported "municipal corporation" status. Bexar Met is not a city, and it likewise is not a municipal corporation under Art. XI, § 4 of the Texas Constitution.

24 *See, e.g.*, TEX. WATER CODE § 13.002(12) ("'Municipality' means cities existing, created, or organized under the general, home-rule, or special laws of this state."); 30 TEX. ADMIN. CODE § 291.3(25) ("Municipality--A city, existing, created, or organized under the general, home rule, or special laws of this state.").

25 *See, e.g.*, TEX. WATER CODE § 13.044 (concerning "rates charged by a municipality for water or sewer service to a district created pursuant to Article XVI, Section 59, of the Texas Constitution"); 30 TEX. ADMIN. CODE § 291.45 (same).

opined that a special law district created under Article XVI, § 59, "***is not a city or town***."[26] Additionally, as discussed below, this distinction is also reflected in the provisions of BexarMet's own enabling act. Furthermore, BexarMet's website proclaims that the District "is independent of municipal and county governments," providing further proof that BexarMet is not a municipality and does not consider itself to be one.[27]

BexarMet cannot avail itself of municipality status and, therefore, can find no support for its petition in the *City of San Antonio* opinion or GBRA's briefing in that matter. In its opinion, the Supreme Court reasoned that "GBRA cannot legally refuse to sell municipal water to any particular ***municipality***."[28] The Court's statement does not extend to water or special law districts, nor to entities, such as BexarMet, that purport to be municipal corporations, but cannot reasonably be considered municipalities. The Court's opinion addressed the argument of the party before the Court, the City of San Antonio, a municipality in every sense of the word. The Court's opinion does not extend to non-parties, such as BexarMet, that are not similarly situated.

Similarly, GBRA's briefings to the Court in the *City of San Antonio* case repeatedly referenced GBRA's obligations to provide water to "***municipalities***" and "***constituent cities***,"

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26 638 S.W.2d at 573-74 (emphasis added).

27 *The History of BexarMet*, *available at* http://www.bexarmet.org/history1.htm.

28 407 S.W.2d at 768 (emphasis added). Contrary to BexarMet's assertions, GBRA's statement in its Motion to Dismiss was true – "the Court was not addressing any claim under § 11.041 of the Texas Water Code or its precursor provisions." GBRA's Mot. to Dismiss at 16. It is undisputed that the Court in *City of San Antonio* did not have before it a petition to compel water under § 11.041 of the Texas Water Code or its precursor provisions. Rather, the Court was addressing competing applications for permits to appropriate water. *See* 407 S.W.2d at 7754-56.

neither of which describes BexarMet.[29] To refute San Antonio's assertion that the Canyon permit impermissibly granted GBRA the unfettered right to decide, at its sole discretion, whether to supply water to ***municipalities***, GBRA explained to the Court that "broad and ample remedies" are available should GBRA fail to supply water to a ***municipality***.[30]

It was in this context that GBRA cited the holding in *Allen v. Park Place Water, Light & Power Co.*[31] Despite the repeated references to municipalities in GBRA's brief, BexarMet blatantly attempts to misconstrue GBRA's citation of the *Allen* opinion. GBRA did not cite *Allen* for the proposition that GBRA was obligated to supply water to anyone that demanded it. Indeed, the limited holding in *Allen* does not support such a broad proposition. The *Allen* opinion addressed the refusal of a local water supply corporation – not a river authority – to supply groundwater, for domestic purposes, to landowners within the corporate limits of the municipality where the water supply corporation's charter specifically declared that the corporation was formed to supply water to members of "the public residing [in] and in the vicinity of" the municipality.[32] Accordingly, BexarMet can find no support in the *Allen* holding, or GBRA's position before the Court in *City of San Antonio*, for its contention that GBRA must supply water to BexarMet and anyone else who may demand it, regardless of entitlement.

Because BexarMet is not a city, under BexarMet's argument, ***any*** person who wants raw water from Canyon Reservoir for use on ***any*** land within GBRA's ten-county statutory district is

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29 *See, e.g.*, BexarMet Resp., Ex. J at 48-50; *see also, e.g.*, BexarMet Resp., Ex. I at 19-20 (noting that GBRA is required by its enabling act "to serve all ***cities*** within its boundaries without discrimination") (emphasis added).

30 BexarMet Resp., Ex. J at 50.

31 266 S.W. 219 (Tex. Civ. App.—Galveston 1924, writ ref'd).

32 *Id.* at 220-23.

"entitled" to it. This argument is not only completely without support in the law, it is illogical and contrary to state policy related to water planning. BexarMet is arguing that GBRA effectively holds a CCN that ***requires*** GBRA to provide raw water from Canyon Reservoir to anyone within a ten-county area who demands it for any use authorized under the Canyon Reservoir water right. Narrowing the class of people who are "entitled" to the water to only those who want to use the water for "municipal use," or to only those who hold CCNs from the Commission requiring them to supply treated water to those within defined areas, does not make BexarMet's argument any less absurd. In that case, BexarMet's argument would mean, for example, that a person owning five acres of land in Refugio County could subdivide that property into, say, twenty lots, obtain a CCN from the Commission by representing that it will supply treated groundwater to those lots, and then demand that GBRA supply him or her water from Canyon Reservoir for "municipal use." BexarMet's argument would mean that if GBRA refuses, that person would have standing to maintain an action before the Commission under § 11.041 to force GBRA to supply water from Canyon Reservoir to that person.

BEXARMET'S AUTHORITY TO SERVE AREAS OUTSIDE ITS STATUTORILY-DEFINED BOUNDARIES IS A QUESTION FOR THE COURTS TO DECIDE

BexarMet defends its steadfast refusal to justify any specific amount of water on grounds that the amount of water that TCEQ may order GBRA to provide BexarMet is a fact question. That fact question, however, turns upon a determination of the areas that BexarMet is authorized to serve – a decidedly legal question.[33] In the correspondence attached to its petition, BexarMet states that it wants the 3,000 acre-feet to supply undefined areas in Comal County both within

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33 *See Bexar Metro. Water Dist. v. City of Bulverde*, 156 S.W.3d 79, 89-90 (Tex. App. – Austin 2004, pet. filed) (holding that the issue of "whether BexarMet may provide water-utility service outside its boundaries" is "a question of law").

and without its statutorily-defined boundaries.[34] In it's petition, BexarMet neither defines the specific portion of the 3,000 acre-feet that it claims is needed within its boundaries, nor does it ask the Commission to define that amount. Therefore, should the ALJ determine that BexarMet somehow met the statutory threshold for entitlement to water from GBRA, to determine the amount of water to which BexarMet is entitled, the ALJ necessarily must either construe BexarMet's authority under its enabling act, or it must defer ruling on that issue and determine only the amount necessary to supply BexarMet's four statutorily-defined areas, notwithstanding BexarMet's failure to define the specific amount it claims or its failure to request that the Commission define that amount.

By virtue of its petition demanding water to supply to undefined areas in Comal County both within and without its statutorily-defined boundaries, BexarMet asserts authority to provide retail water utility service outside of its boundaries. As detailed in GBRA's Motion to Dismiss, BexarMet's authority to provide service outside its statutory boundaries is an issue currently pending in the Texas courts.[35] In those proceedings, the Austin Court of Appeals has held that construction of BexarMet's enabling act is "for the court to decide."[36] Accordingly, GBRA respectfully submits that the courts in the pending litigation – not the ALJ in this administrative proceeding – should rule on this dispositive issue. Indeed, this issue need not be addressed at all

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34 *See* BexarMet Pet., Ex. C at 3 (stating that its 3,000-acre feet demand is based "on projections of population and water demand for presently certificated areas, ***and*** projections for areas including, ***but not limited to***, the Bulverde CCN area now subject to appeal") (emphasis added); *see also* BexarMet Resp. at 3 (noting that "the present ***and future extent*** of BexarMet's Comal County retail service area may affect the amount of water the TCEQ may order GBRA to provide BexarMet") (emphasis added).

35 GBRA Mot. to Dismiss at 11-13.

36 *Bexar Metro. Water Dist*, 156 S.W.3d at 90; *see also Williams v. Adams*, 74 S.W.3d at 439 ("Matters of statutory construction are questions of law for the courts to decide.").

in this case if the ALJ decides to rule now on other dispositive issues raised by GBRA and grants GBRA's Motion to Dismiss for any one or more of those reasons – in particular, if the ALJ finds, as demonstrated above, that BexarMet has failed to show that it is "entitled" to any water from Canyon Reservoir.

CONCLUSION AND PRAYER

For the foregoing reasons, GBRA respectfully requests that the ALJ either (i) grant GBRA's Motion to Dismiss now, by ruling on the dispositive legal issues raised by GBRA in its 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. In either case, GBRA sees no reason for the ALJ, at this time, to direct the parties to propose a new procedural schedule for this case.

Respectfully submitted,

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ATTORNEYS FOR GUADALUPE-BLANCO RIVER AUTHORITY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Guadalupe-Blanco River Authority's Reply to the Response of Bexar Metropolitan Water District to Guadalupe-Blanco River Authority's Motion to Dismiss was served on the following person(s) via electronic mail and/or facsimile on April 21, 2005.

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State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

January 21, 2003

Duncan Norton
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: SOAH Docket Nos. 582-01-3633 & 582-02-0432; TCEQ Docket Nos. 2001-0697-UCR & 2001-0951-UCR, In Re: The Application of the City of Bulverde to Obtain a Water Certficate of Convenience and Necessity (Application No. 33194-C) & The Application of Bexar Metroplolitan Water District to Amend its Water Certificate and Convenience and Necessity No. 10675 (Application No. 33309-C).

Dear Mr. Norton:

The proposal for decision (PFD) in this case was issued on November 20, 2002. Exceptions were filed on December 18, 2002, and responses to exceptions were filed on January 9 and 10, 2003. After reviewing the exceptions and responses to exceptions, I recommend several changes to the proposed Order. I have attached a revised Order.

Changes to the Proposed Order

Several changes to the Order result from a problem in determining the exact location of specific requests for service contained in the Bexar Metropolitan Water District (BexarMet) application. My PFD recommended that BexarMet's application be granted north of Highway 46 in places where it has a specific request for service and in its two existing service areas.[1] In its exceptions to the PFD, BexarMet complained that the PFD was not clear as to where I recommended that it be certificated. Of the four requests for service included in BexarMet's application, three are south of Highway 46 and it is not clear whether the other one is north or south of Highway 46.[2] BexarMet witness Charles Ahrens testified there have been other requests for service since BexarMet

[1]The PFD recommended approval of the application in the requested service area south of Highway 46.

[2]BexarMet Exhibit C, Attachment 7.

filed its application, but the evidence did not show who made the requests or where they are (except it appears that some of them are north of Highway 46 near its intersection with Highway 281).

Because the burden of proving the location of its request for services is on BexarMet and it did not present proof of the locations north of Highway 46, the Order is changed to remove the recommendation that BexarMet be certified north of Highway 46 in places where it has a specific request for service. This leaves the recommendation north of Highway 46 applicable to BexarMet's existing service areas only. That recommendation appears to be superfluous because BexarMet is already certified in those areas. As a result, the recommendation to certify certain areas north of Highway 46 is removed altogether.

This results in several changes to the proposed Order. Finding of Fact No. 55 is amended to delete any reference to BexarMet's requested service area north of Highway 46. A new Finding of Fact No. 59 is added, stating that the specific locations of BexarMet's requests for service north of Highway 46 were not shown in the evidentiary record. A new Finding of Fact No. 60 is added, stating BexarMet's CCN has previously been amended to add two service areas north of Highway 46. Finding of Fact No. 58 (renumbered No. 61) is changed to read the evidence failed to show a need for service in specific locations in BexarMet's requested service area north of Highway 46, except in BexarMet's previously certified areas. Finding of Fact No. 93 (renumbered No. 96) is amended to delete any reference to BexarMet's requested service area north of Highway 46. A new Conclusion of Law No. 10 is added, stating the specific location of BexarMet's requests for service north of Highway 46 was not proved. Renumbered Conclusion of Law No. 11 is amended to delete language stating that BexarMet's application to amend its CCN in its requested service area north of Highway 46 meets applicable statutory standards. Renumbered Conclusion of Law No. 12 is changed to state that BexarMet's application to amend its CCN north of Highway 46 should be denied. Paragraph one of the ordering provisions is changed to delete any reference to approving BexarMet's application in areas north of Highway 46. Paragraph two of the ordering provisions is changed to say BexarMet's application to amend its CCN to include areas north of Highway 46 is denied.[3]

There are other changes to the proposed Order. The last words of Finding of Fact No. 42 are changed to read "Highway 281" rather than "Highway 46."

A new Finding of Fact No. 58 is added, stating that the service area requested by BexarMet north of Highway 46 covers several miles from east to west and from north to south. This finding relates to the PFD's recommendation that BexarMet's requested service area north of Highway 46 should not be approved.

Other findings and conclusions are renumbered.

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[3]As an alternative to denying BexarMet's application north of Highway 46 for its service requests in that area on the ground that the location of the requests was not proved, the Commission could order the record reopened for the sole purpose of determining the location of the requests. It seems that could be easily and accurately accomplished.

Other Comments

I have several additional comments on the exceptions and replies to exceptions. These are directed primarily to matters raised in exceptions and responses that were not addressed in post-hearing briefs or the PFD.

WATER CODE § 49.002

A matter that was not addressed in the PFD or by any party prior to the issuance of the PFD was the effect of WATER CODE § 49.002(a) on whether certain Water Code provisions apply to BexarMet or whether BexarMet's enabling legislation[4] is controlling. Section 49.002(a) provides:

> **§ 49.002. Applicability**
>
> (a) Except as provided by Subsection(b), this chapter applies to all general and special law districts to the extent that the provisions of this chapter do not **directly conflict with** a provision in any other chapter of this code **or any Act creating or affecting a special law district.** In the event of such conflict, the specific provisions in such other chapter or Act shall control. (Emphasis added).

As can be seen, this section provides, in the case of a direct conflict between the Water Code and legislation creating a special law district, the creating legislation controls. The issue to be discussed below is whether WATER CODE § 49.211 or § 49.215 **directly conflicts** with the BexarMet Act .

WATER CODE § 49.215(a)

BexarMet contended that provisions of WATER CODE § 49.215(a), stating a water district may not provide water service outside its district boundaries within the corporate limits of a city without the city's consent, do not apply to it because § 49.215(a) is contrary to BexarMet Act § 2, which creates BexarMet as a "municipal corporation" as well as a water district. BexarMet contended its municipal corporation status gives it special authority not available to other water districts, including the authority to serve within another municipality's corporate limits without the municipality's consent. It cited the Texas Natural Resource Conversation Commission (now Texas Commission on Environmental Quality (Commission) decision in *City of Hudson Oaks*, Docket No. 6507-S (May 8, 1990), to support its contention.[5] BexarMet also maintained it was created as a municipal corporation under Article XI § 4 of the Texas Constitution.

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[4]Bexar Metropolitan District Act, 49th Leg., R.S., ch. 306, 1945 Tex. Gen. Laws 491 (BexarMet Act).

[5]*City of Hudson Oaks* was based in material part on an interpretation of Local Government Code § 402.001(b) and (c), that a municipality is authorized to provide water service inside the corporate limits of another municipality without obtaining consent. *City of Hudson Oaks* was decided in 1990 before the enactment of WATER CODE § 49.215 in 1995.

I did not find BexarMet's arguments persuasive for two reasons.

First, as argued by the Executive Director, the very enabling legislation that BexarMet relies on to say it is a municipal corporation also says at § 3(r) that BexarMet shall have the power to operate and maintain works and facilities with the "consent" of cities, towns, or political subdivisions located in the district. Moreover, § 6 of the BexarMet Act authorizes BexarMet to annex territory that is "not included within the limits of any incorporated village, town or city." Section 25 of the Act authorizes cities and towns to grant BexarMet the right to operate and maintain works located within their corporate limits. Thus, BexarMet relies on the BexarMet Act to say it has municipal corporation status, but ignores other specific provisions of the same legislation indicating it must receive the consent of a city or town to serve within the city's or town's corporate limits. The specific BexarMet Act provisions indicating a requirement of consent are controlling over a general statement giving BexarMet the powers of a municipal corporation.[6] As argued by the Executive Director, the BexarMet Act and WATER CODE § 49.215(a) appear to be consistent rather than contradictory.

Second, I found Bulverde/GBRA's argument against BexarMet's position convincing. Nowhere does the BexarMet Act say BexarMet is an entity created under Article XI § 4 of the Texas Constitution. To the contrary, the BexarMet Act says BexarMet was created "in obedience to the provisions of Article 16, Section 59 of the Constitution of Texas." Moreover, as argued by Bulverde/GBRA, an action by the legislature creating BexarMet as a municipal corporation would violate Texas Constitutional provisions prohibiting the passage of a local law regulating the affairs of a city or incorporating a city.[7]

WATER CODE §§ 49.211 and 49.215(d)

Based on WATER CODE § 49.002(a), Bulverde/GBRA contended the BexarMet Act, rather than WATER CODE § 49.211(a) and (b), determines whether BexarMet is authorized to have a CCN in Comal County. BexarMet Act §§5 is contrary to the Water Code. Section 5 says, "The District is hereby created and established, **situated wholly in Bexar County, Texas**, having the following metes and bounds:. . . ." (Emphasis added.) In the PFD, I cited WATER CODE § 49.211(a) as providing that a district is authorized to accomplish the **purposes** for which it was created or the **purposes** authorized by the Texas Constitution, the Water Code, or any other law. WATER CODE § 49.211(b) says a district is authorized to construct, maintain, or extend inside and outside its boundaries all works and facilities necessary to accomplish the purposes of its creation or the purposes authorized by the Water Code or any other law. I concluded that a Water Code **purpose** not stated in the BexarMet Act is stated in WATER CODE § 49.215(d), providing that a district may serve in **any** area where it has a CCN.

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[6] *Holmes v. Morales*, 924 S.W. 2d 920, 923 (Tex. 1996).

[7] TEX. CONST. ANN. art. 3, § 56(a)(3) and (11) (Vernon Supp. 2002).

I did not find Bulverde/GBRA's argument persuasive. As argued by BexarMet, WATER CODE § 49.215(d) does not conflict with § 5 of the BexarMet Act. The best understanding of the quoted § 5 language is from the words themselves–BexarMet was created and established and situated wholly within Bexar County. The language is in the nature of a **grant of authority rather than a prohibition**. As such, it is consistent with § 49.211(a) language providing that a district is authorized to accomplish the purposes of the Water Code as well as the purposes for which it was created. Moreover, there is nothing in BexarMet Act § 5 **directly** prohibiting BexarMet from providing service outside Bexar County. Thus, Water Code provisions authorizing BexarMet to provide service in any area where it receives a CCN do not **directly conflict** with the BexarMet Act and WATER CODE § 49.002 does not apply.

Effect of *Rios v. Bexar Metropolitan Water District*[8]

BexarMet contended the *Rios* court ruled that BexarMet's political boundaries automatically expand to match its CCN boundaries.[9] The issue is significant because WATER CODE § 49.215(a) says a water district may not serve outside its district boundaries within the corporate limits of a city without the city's consent. BexarMet argued if its application to expand its CCN is approved and its political boundaries automatically expand to include new CCN areas, it will not need Bulverde's consent to serve within its corporate limits because the § 49.215(a) limitation applies only to service by a district outside its boundaries.

I recommend against acceptance of BexarMet's argument. As argued by Bulverde/GBRA, the *Rios* order deals with Voting Rights Act violations in Bexar, Medina, and Atascosa Counties. The court concluded there was a violation based on the existing fact situations in those counties in 1996. The case was not about the authority of a water district to serve within the corporate limits of a Comal County city in 2003. I was not able to find a statement in the order that **directly and expressly** said that BexarMet's political boundaries will automatically follow its **future** CCN amendments. Statements in the order expressly declaring that BexarMet's political boundaries expand to match its CCN area appear to apply to current (at the time of the 1996 order) rather than future boundaries. The *Rios* court itself said the remedial plan was "hardly a model of clarity." In fact, the order is often very unclear, as evidenced by the current difficulty in trying to determine whether it applies to newly created CCNs.

At pages 31 and 32 of the order, the court retained jurisdiction to clarify or implement the order upon motion by the defendants or plaintiff. BexarMet argued that the Commission may not order it to file a pleading in federal court. Nonetheless, BexarMet bears the burden of satisfying the

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[8]In *Rios*, the federal court approved a consent order containing a remedial plan for Voting Rights Act violations in Bexar, Medina, and Atascosa Counties by BexarMet related to a dilution of its Hispanic customers' voting.

[9]BexarMet did not cite any specific provision of the 52-page *Rios* decision to support its argument until January 9, 2003, when it filed a reply to Bulverde/GBRA's exceptions.

Commission that its assertions in this case are correct. It has an opportunity to satisfy that burden by requesting a clarification from the court to resolve any uncertainty before it urges the Commission to find that a Water Code provision generally applicable to other water districts does not apply to it.

Two Recent Commission Cases Cited in the Exceptions and Replies to Exceptions

Application of the Village of Wimberley for a CCN Application; SOAH Docket No. 582-01-3914; TCEQ Docket No. 2001-0845-UCR

In its exceptions, Bulverde/GBRA cited the recent Commission action in the Village of Wimberley application as an example of a Commission-approved Interlocal Agreement between a newly created governmental entity and GBRA in which GBRA has agreed to develop, design, finance, permit, construct, operate, and maintain a sewer system. (The PFD currently under consideration recommended denial of Bulverde's application because Bulverde itself does not possess the statutorily required financial, managerial, and technical capabilities.) Bulverde/GBRA argued that the Village of Wimberley/GBRA agreement is substantially the same as the Bulverde/GBRA agreements.

I concluded this argument was not persuasive. As argued by the Executive Director, information about this application is not in the record. The Executive Director also said that the case was the result of a negotiated settlement. BexarMet described in detail its version of the facts of the Village of Wimberley case, which it distinguished from this case, but again those facts are not a part of the record. I agree with the Executive Director that this matter should not be considered because the facts behind the Village of Wimberley application approval have not been presented and tested in a contested case hearing.

Application of Creedmoor-Maha Water Supply Corporation to Amend Water Certificate of Convenience and Necessity No. 12902 in Hays and Travis Counties; SOAH Docket No. 582-00-0546; TCEQ Docket No. 2000-0018-UCR

BexarMet maintained the Commission's approval of the Creedmoor-Maha application supports its argument that there is a need for its services north of Highway 46. The ALJ in that case said that specific requests for service are not the only way to establish need and community growth can be a good indicator that additional service will be needed in an area.

The PFD in the current case recommended denial of the application north of Highway 46. It cited the fact that the few requests for service north of Highway 46 were in the far southeast corner at the intersection of Highways 46 and 281.

I concluded that BexarMet's argument on the basis of the Creedmoor-Maha application was not persuasive. In that case, the ALJ recommended CCN approval of essentially "pockets" of uncertified land located between Creedmoor's current service area and other providers. Almost all of the land was contiguous to and within one-quarter mile of Creedmoor's current service

boundaries. It appears the ALJ recommended certification of less than a thousand total acres.[10] By contrast, BexarMet's requested area north of Highway 46 covers many miles from north to south and east to west. The maps attached to this letter attempt to show the size of BexarMet's requested service area north of Highway 46.[11]

Difficulty in Determining Where to Certificate BexarMet

BexarMet contended it is impossible to know where it will be certificated because the Bulverde corporate limits are not clear from the record. It argued that because city limits change from time to time, it will be necessary to reopen the evidentiary record to determine the exact corporate limits of Bulverde. BexarMet also complained that the PFD did not identify which of its requests for service should be included in the CCN. (The latter concern has been addressed at the first part of this letter.) Bulverde/GBRA expressed similar concerns.

The Executive Director disagreed, stating the CCN area could be mapped by use of an electronic Geographic Information Systems database. The Executive Director maintained that additional territory should not be granted for a CCN solely to ease the burdens of cartography.

With reference to the problem of determining Bulverde's city limits at the time the CCN is granted, the Commission can take administrative notice of those boundaries. Rule 201(f) of the Texas Rules of Evidence says judicial notice may be taken of a fact "at any stage of the proceeding."[12] Under section (b) of Rule 201, notice may be taken of any fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Bulverde's corporate limits at the time the Commission takes action can be determined with accuracy.

Conclusion

That concludes my remarks. Thank you for your consideration.

James W. Norman
Administrative Law Judge
State Office of Adminstrative Hearings

JWN/tll
cc: Mailing list

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[10] *See* Creedmoor-Maha PFD at 1, 4, 8, and 9.

[11] Areas with existing CCNs are outlined in green.

[12] Appellate courts have taken judicial notice of facts. *Flores v. Employees Retirement System*, 74 S.W.3rd 532, 538 (Tex. App.– Austin 2002, no writ history found)