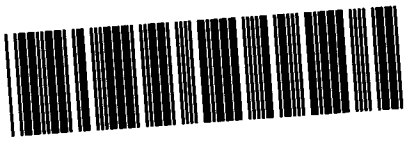

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CHIEF CLERKS OFFICE

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

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

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

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ATTORNEYS FOR PETITIONER
BEXAR METROPOLITAN WATER DISTRICT

April 1, 2005

ABBREVIATIONS

"ALJ" is the abbreviation for Administrative Law Judge.

"BexarMet" means Bexar Metropolitan Water District.

"CCN" means Certificate of Convenience and Necessity.

"ED" means the Executive Director of Texas Commission on Environmental Quality.

"GBRA" means Guadalupe-Blanco River Authority.

"PFD" means Proposal for Decision.

"SOAH" is the abbreviation for the State Office of Administrative Hearings.

"TCEQ" is the abbreviation for the Texas Commission on Environmental Quality.

"TNRCC" is the abbreviation for the Texas Natural Resource Conservation Commission.

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

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

IN RE PETITION OF BEXAR METROPOLITAN WATER DISTRICT TO COMPEL RAW WATER COMMITMENT FROM GUADALUPE-BLANCO RIVER AUTHORITY

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

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES the Bexar Metropolitan Water District ("BexarMet" or "Petitioner"), and files this Response to Guadalupe-Blanco River Authority's ("GBRA") Motion to Dismiss ("GBRA's Motion"). This Court has jurisdiction over BexarMet's Original Petition to Compel Raw Water Commitment from Guadalupe-Blanco River Authority ("BexarMet's Petition") pursuant to TEX. WATER CODE § 11.041 and 30 TEX. ADMIN CODE § 291.44. For that reason, and because every purported jurisdictional defect alleged in GBRA's Motion is either non-jurisdictional or without merit, this Court should deny GBRA's Motion.

INTRODUCTION

GBRA is a heavy-handed monopolist. Nowhere is GBRA's monopolistic behavior more evident than in the context of water rights. GBRA controls a dominant share of water rights in the Guadalupe River basin. Under a TCEQ permit, GBRA controls 90,000 acre-feet per year of raw water in Canyon Lake. That water is not GBRA's — it is a ***public resource***, owned by the State in trust for the benefit of the people of Texas.[1] Despite having almost 30,000 acre-feet per year of raw

[1] TEX. WATER CODE § 11.021(a); *Lower Colorado River Authority v. Texas Dept. of Water Resources*, 689 S.W.2d 873, 875 (Tex. 1984).

water available for commitment,[2] GBRA has refused BexarMet's repeated requests for a mere 3000 acre-feet of water per year to serve BexarMet's present and future customers in Comal County.

GBRA's refusal to provide BexarMet with additional water is attributable to GBRA's entry into the retail water service market in Comal County. Traditionally, GBRA has served as a wholesale water provider, providing raw water to retail water service provides like BexarMet. Now, in areas including Comal County, GBRA has decided to leverage its monopoly on raw water into a monopoly on retail drinking water service. Among GBRA's competitors in the Comal County retail market is BexarMet. Rather than compete fairly, GBRA has abused its position as the dominant holder of state-owned water in Comal County to deny its competitor — BexarMet — the water useful to BexarMet's Comal County retail operations. By denying BexarMet's requests for water, GBRA has improperly exercised monopolistic control over a public resource. GBRA's anti-competitive conduct forced BexarMet to bring this action. Because GBRA has impermissibly refused to supply BexarMet state-owned water under GBRA's control for BexarMet's use in Comal County, TCEQ and SOAH have jurisdiction over BexarMet's Petition, and GBRA's Motion to Dismiss should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Rather than raising jurisdictional issues, roughly half of GBRA's Motion to Dismiss addresses BexarMet's authority to serve in Comal County outside those areas presently certificated to BexarMet under TCEQ CCN Nos. 10675, 12759, 12760.[3] TCEQ and SOAH jurisdiction over BexarMet's Petition does not turn on ***how much*** of Comal County BexarMet is authorized to serve. Jurisdiction over BexarMet's Petition is established because BexarMet is a "person entitled to receive or use" state-owned water under GBRA's control for use in Comal County; and, 2)

[2] *See*, Exhibit A to BexarMet's Petition, attached as Exhibit A to this Response. BexarMet's exhibits to this Response are included in an appendix hereto.

[3] GBRA's Motion at 2-13.

BexarMet has complied with all pleading requirements contained in the Water Code and TCEQ's rules.

Whether BexarMet may provide retail water service to additional areas of Comal County is not a matter affecting TCEQ or SOAH jurisdiction. GBRA admits that BexarMet is presently authorized to serve in portions of Comal County.[4] GBRA merely disputes the extent to which BexarMet may expand those operations. GBRA's entire argument concerning BexarMet's authority to expand its service area in Comal County turns on GBRA's strained reading of 2003 amendments to BexarMet's enabling act, enacted as Senate Bill 1494 ("SB 1494").[5] While 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 — a merits issue — BexarMet's authority to expand its Comal County retail service has no bearing on SOAH or TCEQ's ***jurisdiction*** over BexarMet's Petition. Nevertheless, GBRA's serious misstatements of fact and law regarding BexarMet's authority to serve additional areas of Comal County requires a response.

A. General law authorizes BexarMet to serve additional portions of Comal County outside its boundaries.

GBRA's claim that BexarMet may not expand its retail water service area in Comal County as a result of SB 1494 is easily dismissed on review of BexarMet's powers and history of expansion. From its creation as a governmental agency in 1945, BexarMet has been vested with ***both*** general and special law powers. Since its establishment, Section 2 of BexarMet's enabling act has provided that BexarMet "shall have and be empowered to exercise all the rights, privileges, functions, and powers of such governmental agency . . . as have been or may be ***conferred by General Law*** upon conservation districts..."[6] That general law power has been carried forward to the present

[4] GBRA's Motion at 10, n.29.

[5] SB 1494 was enacted as Act of May 28, 2003, 78th Leg., R.S., ch. 375, 2003 Tex. Gen. Laws 1593.

[6] Act of May 9, 1945, 49th Leg., R.S., Ch. 306 § 2 (emphasis added).

unchanged.[7] Section 3 of BexarMet's enabling act sets forth BexarMet's additional powers, providing that those special law powers are "***in addition to*** the powers vested by the Constitution and general laws" and that general law powers can be exercised "for the ***greatest practicable measure*** of the conservation, preservation, and beneficial utilization of the public waters. . . ."[8]

GBRA's analysis of BexarMet's authority to serve in Comal County completely ignores BexarMet's general law authority. Chapter 49 of the Water Code ("Chapter 49") is the general law applicable to all water districts in Texas, including BexarMet. Water Code Section 49.002, entitled "Applicability," states that Chapter 49 "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."[9] Thus, BexarMet may exercise any power in Chapter 49 to the "greatest practicable measure" unless there is a "direct[] conflict."[10]

Chapter 49 authorizes water districts including BexarMet to extend their services outside their boundaries. Section 49.211 — entitled "Powers" — provides that: "A district is authorized to purchase, construct, acquire, own, operate, maintain, repair, improve, or extend ***inside and outside its boundaries*** any and all land, works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation or the purposes authorized by this code or any other law."[11] Water Code Section 49.215 — entitled "Service to Areas Outside the District" — specifically provides that a district such as BexarMet may extend its services outside its boundaries "***to areas contiguous to or in the vicinity of the district.***"[12]

In its extensive ***non-jurisdictional*** argument concerning BexarMet's authority to serve additional areas of Comal County, GBRA never mentions Section 49.215 or BexarMet's general law

[7] *See,* Act of June 18, 2003, 78th Leg., R.S., Ch. 375 § 2.
[8] *See,* Act of June 18, 2003, 78th Leg., R.S., Ch. 375 § 3 (emphasis added).
[9] TEX. WATER CODE § 49.002(a) (emphasis added).
[10] Act of June 18, 2003, 78th Leg., R.S., Ch. 375 § 3; TEX. WATER CODE § 49.002(a).
[11] TEX. WATER CODE § 49.211(a) (emphasis added).
[12] TEX. WATER CODE § 49.215(a) (emphasis added) ("Section 49.215").

authority. General law empowers BexarMet to serve "areas contiguous to or in the vicinity of the district," and that power does not directly conflict with any provision of BexarMet's enabling act. As a result, GBRA's argument that BexarMet cannot serve additional areas of Comal County, in addition to being irrelevant to jurisdiction, is simply incorrect.

B. BexarMet's general law authority to serve areas in the vicinty of its district does not directly conflict with its enabling act.

The Legislature is well aware of the means by which it can state a ***direct conflict*** with BexarMet's enabling act, thereby withdrawing general law powers under Chapter 49. In 1997, the Legislature amended BexarMet's enabling act to address BexarMet's bonding authority and did just that. Section 1 of HB 376 amended Sections 15A and 15B of BexarMet's enabling act to read as follows: "Sec. 15A. Sections 49.181 and 49.183, Water Code, do not apply to the issuance or sale of District bonds."[13] Sec. 15B then established BexarMet's special law power relating to bond issuance. HB 376 plainly shows how general law authority is withdrawn — with clear and unambiguous statutory language.

If the Legislature wanted to withdraw BexarMet's authority to expand its service area when it enacted SB 1494, it clearly could have stated a direct conflict just as it did with HB 376. In plain terms, it could have said: "Section 49.215, Water Code, does not apply to BexarMet's service outside the District." But the Legislature did not do so. Nothing in the plain language of SB 1494 establishes the "direct conflict" with Section 49.215 that is required by Section 49.002(a).

The lack of the requisite direct conflict is illustrated in several ways. First, it bears noting that the "direct conflict" requirement in Section 49.002 sets a very high standard. The Attorney General has interpreted this provision to mean that statutes are "in irreconcilable conflict, so that it is impossible to comply with both provisions at the same time." Op. Tex. Att'y Gen. LO-98-124 at 2 (1998). In fact, only one other statute in Texas uses "directly conflict" language rather than the

[13] Act of May 15, 1997, 75th Leg., R.S., Ch. 91, § 1. A copy of HB 376 is attached as Exhibit B.

lower and more common "conflict" standard that allows implied conflicts.[14]

Second, the elevated "direct conflict" standard has important implications for statutory construction. Because Section 49.002 requires a "direct conflict" — instead of a mere indirect or implied conflict — it is axiomatic that a direct conflict can *only* be established by statutory language — not by resort to legislative history. Thus, GBRA's almost exclusive reliance on language that was deleted during drafting of SB 1494 is misplaced because it cannot demonstrate a direct conflict in the enacted statutory language.[15]

Third, BexarMet's long history of expansion — with the express approval of the TCEQ combined with the Legislature's acceptance of the TCEQ's interpretation — reinforces the lack of *any* conflict, much less a direct one, between BexarMet's enabling act and Chapter 49. The construction of a statute by an administrative agency charged with its enforcement is entitled to great weight.[16] Administrative construction is given even greater deference if the construction has been continued for a long time by the agency and has been sanctioned by long acquiescence by the Legislature.[17] For more than half a century, BexarMet has repeatedly expanded its water service areas outside its boundaries to meet the water needs of customers in the several counties, including Comal County, with the express approval of the TCEQ and the acquiescence of the Legislature.

Fourth, when the Legislature enacted SB 1494, it did so to address the Voting Rights Act problems raised in the *Rios v BexarMet* federal lawsuit and to remove BexarMet's groundwater

[14] *Compare* TEX. AGRIC. CODE § 149.007("A municipal ordinance that directly conflicts with this chapter has no effect") *with* TEX. AGRIC. CODE § 41.155 ("To the extent that the provisions of this subchapter conflict with other provisions of this chapter, the provisions of this subchapter prevail"); TEX. WATER CODE § 54.234 ("In the event of any conflict between the provisions of the Water Code and the general laws of this state applicable to the district and the provisions of Chapter 441, Transportation Code, the provisions of the Water Code and the general laws of this state applicable to the district shall prevail.")

[15] Reliance on the deletion of language from a draft bill is problematic to show legislative intent, and courts have repeatedly held that the rejection of proposed language "is not a statement about legislative purpose or the meaning of the statute." *See, e.g., Robinson v. Budget Rent-A-Car*, 51 S.W.3d 425, 429 (Tex. App.–Houston [1st Dist.] 2001, no pet.).

[16] *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 196 (Tex. 1994).

[17] *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.–Austin 1990, no writ).

authority. When it did so, it greatly ***expanded*** — not ***contracted*** — BexarMet's boundaries to include the many water service areas in Bexar, Medina, Atascosa and Comal Counties not described in BexarMet's original enabling act. Yet GBRA/Bulverde would have this Court believe than SB 1494's dramatic ***expansion*** and ***ratification*** of BexarMet's expansion over a half-century somehow deprived BexarMet of the authority to expand further. Nowhere does the plain language of SB 1494 even remotely suggest that BexarMet cannot continue to expand to serve new customers.

Fifth, after the enactment of SB 1494, the TCEQ has continued its consistent interpretation of BexarMet's authority to allow expansion of its service area outside its boundaries, as described below. Since SB 1494 became effective, and over the protests of GBRA, the TCEQ has granted an application by BexarMet for the transfer of several additional CCNs in Comal and other counties. As described below, the TCEQ has also approved an amendment to one of BexarMet's CCNs to allow its expansion into a new service area in Bexar County.

C. BexarMet's authority to serve additional areas of Comal County has been established in proceedings before SOAH.

This is not the first time GBRA has challenged BexarMet's authority to expand in Comal County. In 2000, BexarMet and the City of Bulverde filed competing applications at the TNRCC, each seeking a CCN to provide water service to an area in southwest Comal County. Unlike BexarMet, Bulverde lacks a water supply, pipeline infrastructure, and the experience and capability to provide retail water service in Comal County. Thus, in its CCN application, Bulverde chose to rely on GBRA (which has a raw water supply, but not an existing pipeline infrastructure or much experience providing retail water service) to fulfill its obligations under the CCN, if granted by TCEQ.

BexarMet and Bulverde's competing CCN applications were consolidated and referred to SOAH for a contested case hearing (the "CCN Contested Case").[18] At SOAH, Bulverde and GBRA

[18] SOAH Docket Nos. 582-01-3633 & 582-02-0432; TCEQ Docket Nos. 2001-0697-UCR & 2001-

raised the same issue that GBRA has raised numerous times since — that BexarMet cannot provide retail water service outside the boundaries set forth in its enabling act.[19] GBRA and Bulverde argued that BexarMet would be exceeding its boundaries by serving additional parts of Comal County, and, therefore, the TNRCC should not issue the CCN to BexarMet. The parties briefed the issue extensively and, after a contested case hearing, ALJ James Norman thoroughly examined the issue and rendered a 118 page Proposal For Decision ("PFD"), attached as Exhibit C. In the PFD, ALJ Norman recommended that BexarMet's CCN application be granted and Bulverde/GBRA's be denied.[20] The ALJ specifically rejected GBRA and Bulverde's challenge to BexarMet's boundaries, finding GBRA and Bulverde's focus on BexarMet's enabling act was "not persuasive" because it ignored BexarMet's general law authority under Chapter 49 of the Water Code. [21]According to the ALJ, "BexarMet may act in ways not expressed in the BexarMet Act to accomplish the purposes of laws other than the BexarMet Act." *Id.*, p.83.

The ALJ explained that Chapter 49 provides BexarMet (and all other general law water districts) the authority to extend water services to "areas contiguous to or in the vicinity of the district" and that "BexarMet has applied to serve areas contiguous to or in the vicinity of its district that are not being served by other public entities."[22] Furthermore, according to the ALJ, other provisions of Chapter 49 provide BexarMet with authority to expand its service area through TCEQ approved CCNs. *Id.* (citing TEX. WATER CODE § 49.215(d)).

Bulverde and GBRA appealed to the TCEQ Commissioners from the ALJ's decision, making the same arguments about BexarMet's boundaries that the ALJ rejected. The Commissioners reversed the ALJ and granted the CCN to Bulverde, but not on the ground that BexarMet was

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0951-UCR. *See*, Exhibit C.

[19] Exhibit C, pp. 75-80.

[20] *Id.*, pp. 75-76, 118.

[21] *Id.*, pp. 83-85.

[22] *Id.*, pp. 83-84 (citing TEX. WATER CODE § 49.215(a)).

exceeding its boundaries.

D. The TCEQ has recognized BexarMet's authority to expand in Comal County since SB 1494.

In addition to the CCN Contested Case, GBRA has raised the same challenge to BexarMet's boundaries in other TCEQ matters. On those occasions, the TCEQ has rejected GBRA's arguments. For instance, on December 8, 2003 — after the effective date of SB 1494 — BexarMet filed an application with TCEQ to transfer CCNs owned by several water companies operating in Comal and other counties to BexarMet ("CCN Transfer Application"). GBRA, again joined by Bulverde, protested BexarMet's CCN Transfer Application, asserting: "BexarMet does not possess the legal authority to provide water service anywhere in Comal County, except in those four (4) small isolated service areas certificated under water CCN No. 10675," precisely as it has alleged in its Motion to Dismiss.[23] According to GBRA and Bulverde, "[a]pproving the sale and transfer of WSI's and Diamond's water systems and CCN's [sic] in Comal County to Bexar Met, a utility without the legal authority to provide water services to such service areas in Comal County would be against public policy and in violation of state statutes and Commission's own rules." *Id.*

After considering GBRA's and Bulverde's protests, the TCEQ Executive Director reached the same conclusion as the ALJ in the CCN Contested Case — BexarMet has the authority to expand its service area boundaries through TCEQ-granted CCNs.[24] The TCEQ Executive Director rejected GBRA's and Bulverde's protest, stating: "[w]e have reviewed the criteria in Texas Water Code (TWC) 13.301(e) and determined that a public hearing will not be requested. You may complete your proposed transaction as scheduled, or at any time after you receive this notification." Bulverde and GBRA sought reconsideration of the TCEQ Executive Director's decision not to request a public hearing on GBRA/Bulverde's protests. That request was denied, and GBRA failed to appeal to

[23] *See*, Exhibit D.

[24] *See*, Exhibit E.

Travis County District Court within the allowed time for review of TCEQ's decision. *See* TEX. GOV'T CODE § 2001.171, § 2001.176(b); TEX. WATER CODE §§ 5.351, 5.354. That decision is now final and unappealable. *Id.*

In yet another TCEQ matter, the same issue of BexarMet's boundaries mysteriously arose, and it was again rejected by the TCEQ. In that case, BexarMet sought a CCN for uncertificated area in Bexar County. GBRA could have no interest in retail water service in Bexar County because GBRA's ten-county district does not include Bexar County. Nevertheless, in an otherwise uncontested matter, SB 1494 and BexarMet's ability to expand its boundaries ***in Bexar County*** were raised by persons unknown.

When those questions arose, Frank Madla, the Senate sponsor of SB 1494, wrote to the TCEQ Executive Director to explain the bill's intent and effect. *See*, Exhibit F. Senator Madla explained that SB 1494 "repealed antiquated provisions in BexarMet's enabling act that were inconsistent with the Federal Court's decision in a 1996 court case, *Rios v. BexarMet*, and [removed] BexarMet's ability to regulate groundwater." *Id.* Addressing the "confusion" that had arisen on the uncontested CCN application, Senator Madla stated that SB 1494 was not intended to "restrict or abridge certain powers of BexarMet existing in BexarMet's enabling statute or general law, especially the power to expand or acquire additional certificates of convenience and necessity." *Id.*

On April 1, 2004, Senator Madla again wrote to the TCEQ Executive Director to "further emphasize that my sponsorship of SB 1494 was directed, as stated above, to removing antiquated provisions of BexarMet's 1945 act and to conform it to the *Rios v. BexarMet* decision." *See*, Exhibit G. Senator Madla further stated that SB 1494, "was in no way intended to diminish the TCEQ's jurisdiction to grant BexarMet CCNs in connection with any such application duly processed by the Commission, *whether the certificated area is within or outside Bexar County*. In other words, if the Commission finds BexarMet's application is qualified, SB 1494 should not be an obstacle to its

approval." *Id.*

Following Senator Madla's letters, the TCEQ Executive Director approved BexarMet's CCN Amendment Application #34354-C, again clearly showing that the TCEQ has not been persuaded by the boundary argument that GBRA has raised time and time again, this time as a false jurisdictional bar to this action. *See*, Exhibit H.

E. The authorities GBRA provides in support of its claim lend no support.

The 1947 A.G. opinion relied upon by GBRA is its discussion of BexarMet's authority to provide service outside of its boundaries is wholly inapposite. *See*, GBRA's Motion at 5 (discussing Op. Tex. Att'y Gen. No. V-139 (1947)). Here again, GBRA misleads with its characterization of that opinion. GBRA refers to the subject of the opinion as a *water district*. GBRA's motion at 5. It is not. The opinion dealt with a *river authority* — the Lower Colorado River Authority — not a *water district* like BexarMet. Op. Tex. Att'y Gen. No. V-139 (1947). As a river authority, GBRA surely knows the difference. River authorities and water districts draw their authority from fundamentally different sources. Importantly, river authorities were not included in the 1995 comprehensive re-codification of water districts which resulted in Water Code Chapter 49.[25] Thus, Section 49.215 does not apply to river authorities. GBRA's citation to the A.G.'s opinion conflates two very different political subdivisions, with different powers and duties.[26]

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[25] General law districts under the Water Code include: Water Control and Improvement Districts (Chapter 51); Underground Water Conservation Districts (Chapter 52); Fresh Water Supply Districts (Chapter 53); Municipal Utility Districts (Chapter 54); Water Improvement Districts (Chapter 55); Drainage Districts (Chapter 56); Levee Improvement Districts (Chapter 57); Irrigation Districts (Chapter 58); certain types of Navigation Districts (Chapters 60 to 64); Water Import Authorities (Chapter 64); Special Utility Districts (Chapter 65); and Stormwater Control Districts (Chapter 66).

[26] *See* Act of June 18, 2003, 78th Leg., R.S., Ch. 375 §2 ("for the purpose of controlling . . . the storm and flood waters of the rives and streams situated in said District"); §3(c) ("for cities and towns situated within the District"); 3(d) ("dispose of all storm and flood waters of the District"); 3(e) ("to provide . . . all facilities . . . essential for preserving the purity of all the surface and underground waters of the District"); 3(e) ("to formulate plans . . . for the effective disposal of any and all sewage . . . of the District"); 3(i) ("to make contracts with any person . . . operating water distribution facilities for the benefit of a city or town within the District."); 3(r) ("to operate and maintain . . . in the District any works, plants or facilities"); 3(s) ("to enter into planning agreement with the Texas Water Development Board . . . for the purpose of conducting studies . . . within the boundaries of the District"); and 3(t) ("to cooperate with and support local

Like the 1947 A.G. opinion, the 1960's cases cited by the GBRA are misleading as well. Both *Tri-City* and *Harris County WCID* predate TEX. WATER CODE § 49.215's earliest predecessor — TEX. WATER CODE § 54.519. Thus, the holdings of *Tri-City* and *Harris County WCID* have been ***superceded*** by statute and have no application to this case.

One final point BexarMet is obligated to make is that it is, by no means, claiming authority "to roam at large throughout the State and distribute water wherever it wishes without regard to limitations placed on it by statute" as was the district in *Harris County WCID No. 58*, 357 S.W.2d at 795. BexarMet is only serving those areas *contiguous to or in the vicinity of* its existing boundaries. And, as described above, BexarMet has sought and *obtained* the approval of the TCEQ before it expanded its service area in each instance.

F. GBRA's pending declaratory judgment action has no bearing on TCVEQ or SOAH's jurisdiction over BexarMet's Petition

Disappointed by the repeated rejections of its claims concerning SB 1494, GBRA improperly bypassed the TCEQ's jurisdiction and filed a declaratory judgment action in Comal County District Court. In that action, GBRA and a handful of its loyal confederates including Bulverde seek declarations that would foreclose BexarMet from expanding its retail water service operations in Comal County. BexarMet challenged the Comal County District Court's jurisdiction over GBRA's suit by a Plea to the Jurisdiction. In that Plea, BexarMet identified multiple jurisdictional defects including that GBRA's suit was within the exclusive jurisdiction of the Travis County District Court, or the exclusive and/or primary administrative jurisdiction of the TCEQ, and was barred by TEX. WATER CODE § 49.066. The Comal County District Court denied BexarMet's Plea, from which BexarMet took an interlocutory appeal to the Third Court of Appeals. The Third Court of Appeals sustained the District Court's denial of BexarMet's Plea, and BexarMet has filed a Petition for Review in the Supreme Court for review of the Court of Appeals' decision. Since BexarMet has

fire departments and economic development activities . . . within the District")

challenged the Comal County District Court's jurisdiction, the merits of GBRA's SB 1494 claims were not before the court. To date, the only decisions on the merits of this matter have come from the TCEQ and SOAH, which ahve both rejected GBRA's claim that AbexarMet maynot serve in areas not identified in its enabling act.

GBRA incorrectly proclaims that if the courts ultimately grant the declarations it seeks in its Comal County suit, "such ruling would entitle GBRA to dismissal of this proceeding, in which case it would be unnecessary for the ALJ or Commission to rule on any issue." GBRA's Motion at 1. This statement reflects GBRA's fundamental confusion of merits issues with jurisdiction matters. GBRA admits that BexarMet is presently authorized to serve in specified areas of Comal County pursuant to TCEQ-issued CCNs. GBRA's Motion at 9-10 & n.29. Given that admission, and that BexarMet's Petition seeks water for use in Comal County, the issue of whether BexarMet may serve additional areas of Comal County in the future goes to ***the amount of water*** BexarMet may compel GBRA to provide it, not to ***TCEQ or SOAH's jurisdiction over BexarMet's Petition.***

II. RESPONSE TO MOTION TO DISMISS

GBRA's Motion to Dismiss should be denied because no complaint raised by GBRA defeats the jurisdiction of the TCEQ or SOAH over BexarMet's Petition. BexarMet's Petition meets the applicable pleadings requirements of the Water Code, Rules of Civil Procedure, and rules of the TCEQ. BexarMet has standing as a "person entitled to receive or use" state-owned water under GBRA's control, because it seeks water for use in its retail water supply operations in Comal County. Moreover, BexarMet, as a municipal corporation, is a "person entitled to receive or use" state-owned water from GBRA under controlling Texas Supreme Court Authority. *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752 (Tex. 1966). GBRA's representations to the Supreme Court in that case furthermore constitute a judicial admission that BexarMet is a "person entitled to receive or use" state-owned water under GBRA's control. GBRA is judicially estopped

from from advocating a contrary position in this proceeding. Finally, the issues of whether GBRA's partial offer of 428 acre-feet of water in response to BexarMet's request for 3000 acre-feet, and BexarMet's entitlement to the amount of water requested, present fact questions that do not undermine SOAH or TCEQ's jurisdiction.

A. BexarMet's Petition satisfies the applicable pleading requirements.

BexarMet's Petition satisfies the applicable statutory and regulatory pleading requirements for actions under TEX. WATER CODE § 11.041 ("Section 11.041"), and states a claim for which it should be granted relief. Ignoring the notice pleading standard of TEX. R. CIV. P. 47, GBRA declares that Section 11.041 "requires BexarMet ***to demonstrate***, in its petition" that it is a person "entitled to receive or use" state-owned water under GBRA's control.[27] Under the governing Texas Rules of Civil Procedure, BexarMet need only include in its Petition "a short statement of the cause of action sufficient to give fair notice of the claim involved," and " a demand for judgment for all the other relief to which [BexarMet] deems [itself] entitled."[28] BexarMet's Petition clearly satisfies this standard.

In its Petition, BexarMet states that its Petition is brought to compel GBRA to provide it state-owned water under GBRA's control, pursuant to Section 11.041.[29] BexarMet unambiguously requests that the TCEQ "order GBRA to provide BexarMet with 3,000 acre-feet per year of raw water for use in Comal County at a just and reasonable rate."[30] BexarMet's Petition provides a ***concise*** statement of the facts BexarMet relies upon, and identifies the grounds supporting its requested relief.[31] BexarMet has also satisfied the judicially applied test for fair notice, which is

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[27] GBRA's Motion at 14 (emphasis added).

[28] TEX. R. CIV. P. 47. Consistent with TEX. R. CIV. P. 47, SOAH's rules merely require BexarMet's Petition to contain a "concise statement of facts relied upon" and a "clear statement of the type of relief, action, or order desired . . . and [an] identification of the specific grounds supporting the relief requested."

[29] BexarMet's Petition at 1.

[30] *Id.* at 2.

[31] BexarMet's Petition at 3-5, 6-7.

"whether an opposing attorney of reasonable competence, with the pleadings before him, can ascertain the nature and the basic issues of the controversy and the testimony probably relevant."[32] Given the specificity of GBRA's Motion to Dismiss, GBRA's counsel cannot contend that they failed to "ascertain the nature and the basic issues" raised by BexarMet's Petition.

BexarMet's Petition also satisfies the pleading requirements of 30 TEX. ADMIN. CODE § 155.56, by explaining its entitlement to receive or use the state-owned water that BexarMet demands from GBRA.[33] In its Petition, BexarMet states that it is a "district created under TEX. CONST. art. XVI, § 59," and a "***municipal corporation*** and political subdivision of the State of Texas," which provides retail water service in Comal County, where BexarMet intends to use the water its Petition demands.[34] As discussed further below, BexarMet's Petition also identifies controlling Texas Supreme Court authority that provides that "GBRA ***cannot legally refuse*** to sell municipal water to any particular municipality, and that "GBRA is under a duty to serve the public without discrimination."[35] BexarMet, a municipal corporation providing retail water service in GBRA's ten-county statutory district, is a "person entitled to receive or use" state-owned water under GBRA's control pursuant to *City of San Antonio v. Texas Water Commission* ("*City of San Antonio*"), and GBRA "cannot legally refuse" to provide BexarMet that water.[36] BexarMet's Petition thus satisfies the regulatory requirement that it contain "an explanation of why petitioner

[32] *Broom v. Brookshire Bros., Inc.*, 923 S.W.2d 57, 60 (Tex.App.–Tyler 1995, writ denied) (citing *State Fidelity Mortgage Company v. Varner*, 740 S.W.2d 477, 479 (Tex. App.–Houston [1st Dist.] 1987, writ denied); *see also, Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000) (noting that Texas's "fair notice" standard for pleading "looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.).

[33] GBRA has only alleged that BexarMet's Petition is deficient with respect to 30 TEX. ADMIN. CODE § 291.44(a)(3), although it incorrectly cites to 30 TEX. ADMIN. CODE § 291.44(a)(1) as requiring that BexarMet's Petition contain "an explanation of why [BexarMet] is **entitled** to receive or use the water" it demands. GBRA's Motion at 14 (emphasis in original). BexarMet's Petition complies not only with the requirements of both 30 TEX. ADMIN. CODE § 291.44(a)(1) and (3), but with all of the additional pleading requirements of 30 TEX. ADMIN. CODE § 291.44(a).

[34] BexarMet's Petition at 2-3 (¶ 2, 4) (emphasis added); 3-4 (¶ 8); 6 (¶ 16 - 17).

[35] *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752, 768 (Tex. 1966) (emphasis added) (citation omitted) (BexarMet's Petition at 6-7 (¶ 17)).

[36] *City of San Antonio*, 407 S.W.2d at 768.

is entitled to receive or use the water" requested.

B. BexarMet is a "person entitled to receive or use" state-owned water under GBRA's control.

BexarMet has standing as a "person entitled to receive or use" to maintain its Petition to Compel. BexarMet's entitlement to "receive or use" state-owned water under GBRA's control derives foremost from GBRA's statutory duty to "distribute and sell," state-owned water under its control, without discrimination, for all useful purposes within GBRA's statutory district.[37] BexarMet's use of the water requested in furtherance of its Comal County retail water supply operations is plainly a "useful purpose."[38] Notwithstanding, GBRA has denied BexarMet water useful to BexarMet's Comal County operations, to frustrate BexarMet's competition with GBRA in the Comal County retail service market.

Ignoring the duties imposed upon it by its own enabling legislation, the Water Code and case authorities, GBRA claims that "person[s] entitled to receive or use water" under Section 11.041 are only those with existing permit, contractual or riparian water rights.[39] GBRA's argument here is circular. If a party has such rights, it would never have a need for recourse to Section 11.041. That provision exists to protect the public's interest in a public resource — state-owned water — under the control of usufructory permitees like GBRA.

Section 11.041 provides a remedy for parties to whom a holder of state-owned water refuses to sell that resource at all, or refuses to sell state-owned water at a just and reasonable price. In other words, it exists for the benefit of parties in the position of BexarMet, to whom GBRA has refused to provide available state-owned water under GBRA's control for anti-competitive reasons. The state's water is too previous to place in the hands of those who might abuse that usufructory right. GBRA's claim that persons "entitled to receive or use" state-owned water, are limited to those with

[37] Act of May 21, 1975, 64th Leg., R.S., Ch. 433, § 1, sec. 2(a), 1975 Tex. Gen. Laws 1149.

[38] *Id.*

[39] GBRA's Motion at 15-16.

a permit, riparian or contract rights ignores the purpose of Section 11.041. Section 11.041 "provides an avenue for a party who ***has no contract*** for the use of raw water." *Texas Water Comm'n v. Boyt Realty Co.*, 10 S.W.3d 334, 338 (Tex. App.–Austin 1993, no writ). Instead, it allows persons within GBRA's statutory district, like BexarMet, to compel GBRA to fulfil its mandate to "distribute and sell" within its District "the waters of any rivers and streams, including the waters of the Guadalupe and Blanco Rivers and their tributaries" for "all useful purposes."[40] Cases construing TEX. REV. CV. STAT. ANN. art. 7560 ("Article 7560"), Section 11.041's predecessor provision, confirm that Section 11.041 applies where a party has no established rights. In *LaCour v. Devers Canal Co.*, 319 S.W.2d 951, 953 (Tex. Civ. App.–Beaumont 1959, writ ref'd n.r.e.), the court described Article 7560 as "allowing ***any person*** to petition . . . who ***does not have a contract*** for water and is entitled to receive or use water from some public source, if such source 'has a supply of water . . . available for his use,' and . . . fails or refuses to supply him or demands unjust rates. In other words, if a person ***cannot obtain a share of water*** available from the one having control of it, he may petition the Board ***to have his right therein established***, including reasonable water rates."[41] This is precisely the purpose of BexarMet's Petition, to establish its right to state-owned water under GBRA's control, including that BexarMet's right to that water at a just and reasonable rate.

C. As a municipal corporation, BexarMet is entitled to receive and use state-owned water under controlling Texas Supreme Court Authority.

Controlling Supreme Court authority, *City of San Antonio*,[42] also establishes that BexarMet is a "person entitled to receive or use" state-owned water under GBRA's control. In *City of San Antonio*, San Antonio challenged the original issuance of GBRA's permit granting it authority over state-owned water impounded in Canyon Lake. Among San Antonio's challenges to the grant of GBRA's permit, over its own competing application, was that GBRA's permit would allow GBRA

[40] Act of May 21, 1975, 64th Leg., R.S., Ch. 433, § 1, sec. 2(a), 1975 Tex. Gen. Laws 1149.

[41] *Id.*

[42] *City of San Antonio*, 407 S.W.2d 752.

to discriminate among potential purchasers of water under GBRA's control.[43] The Supreme Court, with GBRA's assistance, concluded that GBRA could not discriminate amongst purchasers generally, and specifically amongst municipal purchasers. The Court found that GBRA "***cannot legally refuse*** to sell municipal water to any particular municipality."[44] BexarMet is a municipal corporation which furnishes retail water service to customers in Comal County, within GBRA's ten-county statutory district. As recognized by the Supreme Court at the urging of GBRA, municipal corporations such as BexarMet are "person[s] entitled to receive or use" state-owned water under GBRA's control. BexarMet may therefore maintain this action.

In its Motion, GBRA "disputes that the terms of its enabling act and [TCEQ] Permit support such a broad conclusion" as was reached by the Supreme Court in *City of San Antonio*, *i.e.*, that GBRA cannot legally refuse to sell water to municipal providers. GBRA, however, did not dispute that "broad conclusion," in its briefing to the Supreme Court in *City of San Antonio*. In fact, in that briefing, GBRA ***argued*** that it was "required by its Act of creation . . . to serve all cities within its boundaries without discrimination."[45] GBRA went even further, when it argued that the case of *Allen v. Park Place Water, Light & Power Co.*, 266 S.W. 219 (Tex. Civ. App.–Galveston 1924, writ ref'd) controlled its conduct.[46] Citing *Allen*, GBRA advised the Supreme Court that it was under the obligation to serve the public generally without discrimination.[47] And, as quoted by GBRA to the Supreme Court, *Allen* held that "[a] water corporation . . . is a quasi public corporation, and assumes the obligation to supply water to ***all who may apply therefor*** who reside within the territory in which the corporation undertakes to operate, provided the demand for such water is reasonable and within

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[43] *City of San Antonio*, 407 S.W.2d at 768.

[44] *Id.* (emphasis added).

[45] *See*, Exhibit I, GBRA's Reply to the Application for Writ of Error at 19-20.

[46] *See*, Exhibit J, Reply of GBRA to Reply of City of San Antonio on GBRA's Motion to Dismiss at 48-49.

[47] *Id.* at 49.

the capacity of the corporation."[48] BexarMet seeks water for use in GBRA's statutory "territory," and GBRA has ample uncommitted water to satisfy BexarMet's request. Nonetheless, GBRA has repeatedly refused to provide that water to BexarMet with discriminatory intent.

GBRA would have this Court believe the Supreme Court arrived at its "broad conclusions" in *City of San Antonio* on its own, without GBRA's assistance. GBRA's pleadings in the Supreme Court in *City of San Antonio* belie that claim, and its attempts to distinguish that controlling authority of *City of San Antonio* ring hollow. That *City of San Antonio* is nearly forty years old has no effect on the Supreme Court's binding pronouncement that "***GBRA cannot legally refuse*** to sell municipal water" to customers in its district and cannot discriminate among such purchasers, as it has done in this case.[49]

The only colorable ground for distinguishing *City of San Antonio* that GBRA presents is that the Supreme Court was not addressing a "claim under § 11.041 or its predecessor provisions" in that case. Of course, GBRA is correct that the Supreme Court was not addressing a claim under present day Section 11.041 in *City of San Antonio* because the codification of the Water Code did not take place until several years later. It was, however, discussing claims under Section 11.041's predecessor provision, Article 7560. Section 11.041 is the codified successor statute to Article 7560, and Section 11.041 is substantively indistinguishable from it.[50] Attached as Exhibit K is a copy of

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[48] *See*, Exhibit J, Reply of GBRA to Reply of City of San Antonio on GBRA's Motion to Dismiss at49 (citing *Allen*, 266 S.W. at 222) (emphasis added).

[49] *City of San Antonio*, 407 S.W.2d at 768.

[50] Former Article 7560 provided that "If any person entitled to receive or use water from any canal, ditch, flume, lateral, dam, reservoir . . . shall present to the board his petition in writing, showing that the person, association of persons, corporation, water improvement or irrigation district, owning or controlling such water, has a supply of water not contracted to others and available for his use, and fails or refuses to supply such water to him, or that the price or rental demanded therefor is not reasonable and just, or is discriminatory; or that the complainant is entitled to receive or use such water, and is willing and able to pay a just and reasonable price therefor, and shall accompany such petition with a deposit of twenty-five dollars, it shall be the duty of the Board to make a preliminary investigation of such complaint and determine whether there is probable ground therefor." *See, LaCour v. Devers Canal Co.*, 319 S.W.2d 951, 952-53 (Tex. Civ. App.–Beaumont 1959, writ ref'd n.r.e.).

Section 11.041, detailing its direct derivation from Article 7560.[51] The Supreme Court recited the elements and remedy afforded by Article 7560 in response to San Antonio's complaint that GBRA's permit would allow it to discriminate between water purchasers:

> GBRA cannot legally refuse to sell municipal water to any particular municipality. The GBRA is under a duty to serve the public without discrimination. The Texas Statutes, herein discussed, specifically entitle the Water Rights Commission to compel GBRA to furnish municipal water without discrimination. ***Article 7560*** [now Section 11.041] provides that ***any person entitled to use water*** from any reservoir can present a petition to the Commission showing that GBRA ***has a supply of water not contracted to others*** and available for his use. Upon such showing and upon the further showing that GBRA ***has failed and refused to supply such water*** to him, GBRA can be compelled to deliver such water in accordance with the Commission's order.[52]

As reflected by the Supreme Court's discussion of Article 7560, it is plain that it had that "predecessor provision" of Section 11.041 in mind when it declared that "GBRA cannot legally refuse to sell municipal water to any particular municipality."[53] GBRA's claim that the Supreme Court "was not addressing any claim under [Section 11.041's] . . . predecessor provisions" is clearly false.[54]

The Texas Supreme Court did not strike upon the relevance of Article 7560 to the dispute in *City of San Antonio* without assistance. It was advocated by GBRA. In its briefing to the Supreme Court, GBRA cited the predecessor provision to Section 11.041 as a check on the threat that it might discriminate amongst water purchasers. When the City of San Antonio challenged GBRA's Canyon Lake permit on that ground, GBRA responded that:

> [T]he statutes of Texas specifically entitle the Water Rights Commission to compel GBRA to furnish water. Article 7560 [now TEX. WATER CODE § 11.041] provides that ***any person*** entitled to use water from ***any reservoir*** can present a petition to the Commission showing that GBRA has 'a supply of water not contracted to others and

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[51] *See also, Brushy Creek Mun. Utility Dist. v. Texas Water Comm'n*, 887 S.W.2d 68, 75-76 (Tex. App.–Austin 1994), *rev'd on other grounds*, 917 S.W.2d 19 (Tex. 1996).

[52] *City of San Antonio*, 407 S.W.2d at 768 (citation omitted) (emphasis added).

[53] *Id.*

[54] GBRA's Motion at 16.

available for his use, and fails or refuses to supply such water to him . . . .[55]

BexarMet, a victim of GBRA's discrimination in the supply of state-owned water, has sought the same relief that GBRA advised the Supreme Court was available in such situations. In response to BexarMet's Petition, GBRA claims that the BexarMet is powerless to do ***the very thing*** it told the Supreme Court aggrieved parties in BexarMet's position could do: file a petition to compel GBRA to disgorge of state-owned water under its control.

GBRA's monopolistic hoarding of state-owned water is actionable under Section 11.041 in and of itself. But when considered in conjunction with its ***affirmative representations*** to the Texas Supreme Court in *City of San Antonio* – GBRA's position in this case is not merely reprehensible, it is barred by its judicial admissions in *City of San Antonio*. Those representations to the Supreme Court are plainly inconsistent with the position that it is now advocating in this case.[56] A judicial admissions is "conclusive on the party making it" and "bars the party party from disputing it." *Id.* Nor can GBRA hide behind the fact that the representations were made by its attorneys because "statements made by a party's attorney also qualify as judicial admissions."[57]

Similarly, the doctrine of judicial estoppel prevents GBRA from advocating the position it is taking here in light of its contrary advocacy before the Supreme Court in *City of San Antonio*. The doctrine of judicial estoppel is "intended to protect the integrity of the judicial system and to prevent a party from playing 'fast and loose' with the courts to suit the party's purposes."[58] The doctrine's purpose is to "prevent intentional self-contradiction as a method of gaining an unfair advantage."[59]

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[55] *See*, Exhibit J, Reply of GBRA to Reply of City of San Antonio on GBRA's Motion to Dismiss at 49 (citing *Allen*, 266 S.W. at 222) (emphasis added).

[56] *Brown, L.L.P. v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 900 (Tex. App.–Houston [14th Dist.], no pet.) (pleadings in other actions which contain statements inconsistent with the party's present position are judicial admissions).

[57] *Id.* (citing *DeWoody v. Rippley*, 951 S.W.2d 935 (Tex. App.–Ft. Worth 1997, pet. dism'd by agreement).

[58] *Brown*, 124 S.W.3d at 899 (citing *Stewart v Hardie*, 978 S.W.2d 203, 208 (Tex. App.–Ft. Worth 1998, pet. denied).

[59] *Brown*, 124 S.W.3d at 899.

When GBRA was advocating before the Supreme Court for water rights from Canyon Lake— the very water at issue here — it clearly and unequivocally stated that it would not and legally ***could not*** discriminate against providing water to the public and, if it did, "the statutes of Texas specifically entitle the Water Rights Commission to compel GBRA to furnish water."[60]

In affirming GBRA's water rights from Canyon Lake, the Supreme Court adopted the position GBRA advocated then, but which it pretends today it never said. This is only one small sample of the contradictory, self-serving conduct that characterizes GBRA's refusal to sell — ***not give away*** — water that does not even belong to GBRA, simply because the purchaser is a competitor of GBRA. It is the sort of conduct that BexarMet hopes the Court will bear in mind during the course of this contested case.

GBRA's final attempt to distinguish *City of San Antonio* turns on "relatively new provisions in the Water Code . . . that give significant importance to water planning.[61] GBRA principally looks to TEX. WATER CODE § 11.134(b)(3)(e) ("Section 11.134(b)(3)(e)"), which provides that ***before TCEQ grants a permitted water right***, like GBRA's Canyon Permit, it must determine that the application "addresses a water supply need in a manner . . . consistent with the state water plan and the relevant approved regional water plan . . . , unless the commission determines that conditions warrant waiver of this requirement." Section 11.134(b)(3)(e) has no application to Section 11.041 proceedings, because Section 11.041 addresses the obligations of persons ***already holding permits to appropriate state-owned water***, and the remedy for persons who seek water from such permittees.[62] BexarMet does not seek to a new permit to appropriate state-owned water. It seeks

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[60] *See*, Exhibit J, Reply of GBRA to Reply of City of San Antonio on GBRA's Motion to Dismiss at 49 (citing Article 7560 [now Section 11.041]).

[61] GBRA's Motion at 17 (citing TEX. WATER CODE §§ 11.0134(b)(3)(E), 16.051, 16.053).

[62] Similarly, GBRA's references to TEX. WATER CODE §§ 16.051, 16.053 are not well founded. Those provisions relate to the adoption of the comprehensive state water plan and regional water plans, respectively. Those statutes do not affect the availability of the remedy provided by Section 11.041 when a permittee in control of state-owned water refuses to supply that water to a subsequent purchaser.

only to compel GBRA to provide it available state-owned water under GBRA's control ***pursuant to GBRA's issued permit***. Because it is inapplicable, GBRA's claim that BexarMet is required to plead that its petition is consistent with Section 11.134(b)(3)(e), or otherwise entitled to waiver of its requirements, is also ill-founded.

D. Whether GBRA has "failed or refused" to provide BexarMet the water demanded and how much water GBRA must supply BexarMet are non-jurisdictional fact issues.

GBRA's Motion correctly notes that "a petition to compel the supply of water may be maintained under [Section 11.041] . . . only if 'the party owning or controlling the water supply'" refuses to provide available water to a purchaser. As pleaded and as proven by the correspondence from GBRA's General Manager to BexarMet, attached as exhibits to BexarMet's Petition,[63] GBRA has repeatedly refused BexarMet's requests for a commitment of 3000 acre-feet of water for BexarMet's use in Comal County. GBRA's response is that it has offered BexarMet a mere 428 acre-feet in satisfaction of BexarMet's requests.[64]

Whether GBRA's refusal to provide BexarMet ***all of the water*** BexarMet is entitled to constitutes a refusal under Section 11.041 presents a non-jurisdictional question. Relatedly, how much water the TCEQ may order GBRA to provide BexarMet for use in Comal County is also a fact question. Neither question affects TCEQ or SOAH's jurisdiction.[65] The jurisdiction of an administrative agency is "the power to hear and determine a matter committed to the agency's discretion by statute."[66] Section 11.041 grants the TCEQ jurisdiction to entertain BexarMet's Petition. GBRA's claims that it has not refused to supply BexarMet with the water demanded, and regarding the amount of water BexarMet is entitled to for use in Comal County, are fact questions to be addressed by a motion for summary disposition or at hearing.

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[63] *See*, Exhibits D – F to BexarMet's Petition.

[64] GBRA's Motion at 18-19.

[65] *See, Friends of Canyon Lake, Inc.*, 96 S.W.3d at 528.

[66] *Beaver Express Service, Inc.*, 727 S.W.2d at 773.

IV. Conclusion and Prayer

GBRA is not the arbiter of where BexarMet may legally serve, and may not use its control over state-owned water to exclude BexarMet from competing with it to provide retail water service in Comal County. The decisions of SOAH and TCEQ since the enactment of SB 1494 confirm that BexarMet may serve areas of Comal County in addition to those it presently serves pursuant to its general law authority under Water Code Chapter 49. GBRA's Motion fails to illustrate that TCEQ or SOAH lacks jurisdiction over BexarMet's Petition, and mistakes merits issues with questions of jurisdiction. BexarMet respectfully requests that the Court deny GBRA's Motion to Dismiss, and grant BexarMet such other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2005, a true and correct copy of the foregoing was delivered, as specified below, to the following parties of record:

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