



Control Number: 43943



Item Number: 50

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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

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

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

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

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

GUADALUPE-BLANCO RIVER AUTHORITY'S 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

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 its 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

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

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

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.

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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

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

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

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 its 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

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.*,

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. BexarMet 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,*"

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 775-76.

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

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

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

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.").

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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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ENVIRONMENTAL QUALITY

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BEXAR METROPOLITAN WATER
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BEXAR METROPOLITAN WATER
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Molly Cagle

From:
4/21/2005 15:32 FAX

APR 21 2005

019/026

EXHIBIT A

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 Certificate of Convenience and Necessity (Application No. 33194-C) & The Application of Bexar Metropolitan 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

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

²BexarMet 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 231).

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.²

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.

²As 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 legislation⁴ 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 Conservation 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.

⁴Bexar 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 § 412.001(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.

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

⁷TEX. 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 District¹

BexarMet contended the *Rios* court ruled that BexarMet's political boundaries automatically expand to match its CCN boundaries.² 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

¹In *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.

²BexarMet 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; TCEO 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; TCEO 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 Certify BexarMet

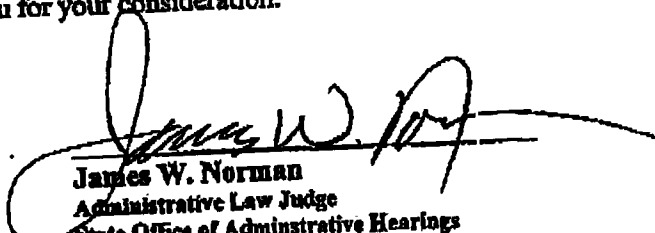
BexarMet contended it is impossible to know where it will be certificated because the Bulverde corporate limits are not clear from the record. It argued that because city limits change from time to time, it will be necessary to reopen the evidentiary record to determine the exact corporate limits of 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 Administrative Hearings

JWN/ll
cc: Mailing list

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

¹¹Areas with existing CCNs are outlined in green.

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

Vinson&Elkins

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From:	Date:
Molly Cagle	April 21, 2005
Regarding:	Number of Pages:
GUA160.23007	Hard Copy Follows:
	YES
To:	Fax:
LaDonna Castanuela	239.3311
Texas Commission on Environmental Quality	
Message:	

Attached for FILING is Guadalupe-Blanco River Authority's Reply to Bexar Metropolitan Water District's Response to Guadalupe-Blanco River Authority's Motion to Dismiss. A copy is being provided via U.S. First Class Mail, too.

Thank you.

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2005 APR 12 AM 9:11

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

ORDER NO. 4
VACATING PROCEDURAL DEADLINES

On April 7, 2005, Petitioner submitted a request that the existing procedural schedule in the captioned matter be abated or that a new procedural schedule be adopted, in order to accommodate additional time sought by Guadalupe-Blanco River Authority ("GBRA") to submit additional pleadings on its pending Motion to Dismiss.

On April 11, 2005, GBRA submitted a letter concurring with Petitioner's proposal that the existing schedule be vacated, pending action on GBRA's Motion to Dismiss.

Based upon the parties' representations, the ALJ hereby vacates the existing schedule. The parties will be directed to propose a new schedule, if necessary, after the ALJ's ruling on the Motion to Dismiss.

PROCEDURAL QUESTIONS

Routine procedural and logistical questions may be directed to Brenda Bishop at (512) 463-5766; however, please note that SOAH support personnel are not authorized to provide general advice or the interpretation of regulations or policy.

SIGNED April 12, 2005.

Mike Rogan
MIKE ROGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

WILLIAM P. CLEMENTS BUILDING, Jr.

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April 12, 2005

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ORDER NO. 4 VACATING PROCEURAL DEADLINES

582-05-1005

JUDGE MIKE ROGAN

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David P. Blanke dblank@velaw.com
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CHIEF CLERKS OFFICE

April 11, 2005

Via Facsimile (512.475.4994)

The Honorable Mike Rogan
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502B
Austin, Texas 78701

Re: SOAH Docket No. 582-05-1005, TCEQ Docket No. 2004-1384-UCF.
Petition of Bexar Metropolitan Water District to Compel Raw Water Commitment
from Guadalupe-Blanco River Authority

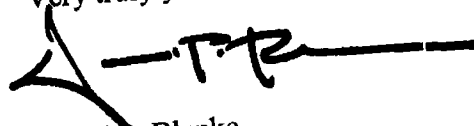
Dear Judge Rogan:

We are writing on behalf of Guadalupe-Blanco River Authority ("**GBRA**") to address two subjects in Paul Terrill's April 7 letter.

On April 6, when we requested leave for GBRA to file a reply brief in support of its Motion to Dismiss, Mr. Terrill had advised us that he was not inclined to object to the request for leave; however, he also informed us that he had to check with BexarMet about its position. We had heard nothing further at the time we wrote to request leave. Had vacating the existing schedule been raised, we would have agreed. A proposed order to that effect is enclosed.

Lastly, Mr. Terrill reports that "in light of the outstanding jurisdictional issues, the parties have not engaged in discovery" of any significance. We cannot speak to BexarMet's reasons for not engaging in discovery, but there has been no agreement to postpone discovery while the Motion to Dismiss remains pending. Of course, should the ALJ grant the Motion, further discovery would be unnecessary.

Very truly yours,


David P. Blanke

Enclosure

cc: LaDonna Castañuela, TCEQ Chief Clerk
All Parties and Counsel of Record

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From:
04/11/2005 14:39 FAX

Apr 11 2005 10:44

003/003

TEXAS
COMMISSION
ON
WATER
QUALITY

2005 APR 11 PM 3:42

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

CHIEF CLERKS OFFICE

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

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

ORDER NO. _____
VACATING PROCEDURAL DEADLINES

Before the ALJ is Guadalupe-Blanco River Authority's ("**GBRA**") Motion to Dismiss. Bexar Metropolitan Water District ("**BexarMet**") requests that the existing deadlines in this matter be vacated pending a ruling on that Motion. GBRA does not oppose that request.

The ALJ therefore vacates the scheduling deadlines previously established. If necessary, once a ruling is made on GBRA's Motion to Dismiss, a new scheduling order will be entered.

SIGNED April ____, 2005.

MIKE ROGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

From:
04/11/2005 14:39 FAX

Apr 11 2005 15:41

001/003

TEXAS
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ON ENVIRONMENTAL
QUALITY

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Vinson & Elkins

2005 APR 11 PM 3:41

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David P. Blanke	April 11, 2005	DB1112
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Texas Commission Environmental Quality		
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2005 APR -6 PM 4: 55

CHIEF CLERK'S OFFICE

April 6, 2005

Via Facsimile (512.475.4994)

The Honorable Mike Rogan
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502B
Austin, Texas 78701

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 Judge Rogan:

On Friday, April 1, 2005, Guadalupe-Blanco River Authority ("**GBRA**") received Bexar Metropolitan Water District's ("**BexarMet's**") response to GBRA's Motion to Dismiss in the above referenced matter. GBRA respectfully requests the opportunity to file a reply to BexarMet's response on or before April 21, 2005, which is twenty (20) calendar days from the date of GBRA's receipt of BexarMet's response. GBRA respectfully requests that you not rule on the Motion to Dismiss until GBRA has filed its reply.

Yesterday, April 5, 2005, counsel for GBRA contacted counsel for BexarMet seeking BexarMet's consent to the foregoing request. Counsel for BexarMet, Mr. Terrill, has not yet been able to reach his client's representative to discuss GBRA's request. Thus, while GBRA hopes that BexarMet's consent will be forthcoming, to date BexarMet has indicated neither its consent nor its opposition to GBRA's request.

Thank you for your time and attention to this matter.

Very truly yours,

Molly Cagle
Molly Cagle

cc: LaDonna Castañuela, TCEQ Chief Clerk
All Parties and Counsel of Record

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From:
04/06/2005 15:52 FAX

Apr 6 2005 16:55

001/002

Vinson & Elkins

2005 APR -6 PM 4:55

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Molly Cagle		April 6, 2005	
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From: 5124749888
01/FRI 04:59 PM

HAZEN & TERRILL

FAX NO 5124749888

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

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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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CHIEF CLERKS OFFICE

2005 APR -4 AM 8:05

ON EXAMINATION
OF FILE

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.

2005/APR/01/FRI 04:59 PM HAZEN RILL

FAX No 512474988

TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY

2005 APR -4 AM 8:05

TCEQ DOCKET NO. 2004-1384-UCR

SOAH DOCKET NO. 582-05-1005 CHIEF CLERKS OFFICE

IN RE PETITION OF
BEXAR METROPOLITAN
WATER DISTRICT TO
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AUTHORITY

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**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 providers 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 vicinity 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 that 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

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

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 have both rejected GBRA's claim that AbexarMet may not 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

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.