

Control Number: 43943



Item Number: 64

Addendum StartPage: 0

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

INTEROFFICE MEMORANDUM

TO: LaDonna Castanuela, Chief Clerk

DATE: September 14, 2004

THRU: ^{YMA} Earl Lott, Manager
Utilities and Districts Section
Water Supply Division

FROM: ^{YMA} Michelle Abrams, Team Leader
Utilities Financial Review Team
Water Supply Division

SUBJECT: Docket No. 2004-1384-UCR; Petition of Bexar Metropolitan Water District (BexarMet), Certificate of Convenience and Necessity (CCN) No. 10675, to Compel Raw Water Commitment from Guadalupe-Blanco River Authority (GBRA), CCN No. 12977 in Comal County under Texas Water Code Section 13.043(f); Application No. 34494-A

CHIEF CLERK'S OFFICE
SEP 15 11:02 AM
2004

We hereby transfer the official file for the above application to the Chief Clerk's Office. Please refer this application to the State Office of Administrative Hearings (SOAH) and request that a hearing be scheduled.

We received the Petition of Bexar Metropolitan Water District on January 16, 2004. BexarMet began its efforts to secure raw water from GBRA in March of 2003. Despite repeated requests from BexarMet, GBRA refused to commit to the 2000 acre-feet per year. On August 6, 2003, GBRA announced its intention to increase its basin-wide Firm Water Rate from \$80.00 to \$84.00 per acre-foot per year. On August 8, 2003, BexarMet again requested 2000 acre-feet of water. One month later, BexarMet increased its request for a commitment of Canyon Lake water to 3000 acre-feet per year. GBRA has continued to refuse BexarMet's request. Per TWC 11.041 (a), any person entitled to receive or use water from any conserved or stored supply may present to the commission a written petition showing that the party owning or controlling the water supply fails or refuses to supply the available water to the petitioner, or that the price or rental demanded for the available water is not reasonable or just or is discriminatory.


The staff assigned to this case are:

Technical - Brian Dickey

Financial - Elsie Pascua

Legal -

If we may be of further service regarding this matter, please call.


Michelle Abrams, Team Leader

EL/MA/ac

cc: TCEQ Public Interest Counsel; ATTN: Blas Coy
TCEQ Agency Communications; ATTN: Andy Saenz, Director
TCEQ Chief Clerk's Office; ATTN: Melanie Mohair
TCEQ Legal Office; ATTN: Robert Martinez

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 14, 2004

Mr. Howard Slobodin
Hazen & Terrill
810 W. 10th Street
Austin, Texas 78701

Re: Docket No. 2004-1384-UCR; Petition of Bexar Metropolitan Water District Certificate of Convenience and Necessity No. 10675 to Compel Raw Water Commitment from Guadalupe-Blanco River Authority, CCN No. 12977 in Comal County; Application No. 34494-A

CN: 601180565; RN: 103908547

Dear Mr. Slobodin:

On January 16, 2004, we received your petition to Compel Raw Water Commitment from Guadalupe-Blanco River Authority. The Commission has requested that a hearing be scheduled. Your application has been assigned Docket No. 2004-1384-UCR. Any further communications should refer to this docket number.

This matter has been referred to the State Office of Administrative Hearings to schedule a hearing. When a hearing has been scheduled, you will receive a notice of hearing which explains when and where the hearing will be held.

In order to review the petition of an Appeal, the staff of the TCEQ may need additional information regarding your petition. You may be receiving Staff Requests for Information (RFT's) within a few weeks. We would appreciate your cooperation in providing the information requested.

If you have questions about this process or what material you should bring with you to the hearing, please contact Ms. Elsie Pascua at 512/239-5367 or Mr. Brian Dickey at 512/239-0963.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Abrams".

Michelle Abrams, Team Leader
Utilities and Districts Section
Water Supply Division

EL/MA/SP/ac

cc: TCEQ Region No. 13 Office

RECEIVED

JAN 16 2004

Water Quality Applications Team

2003 NOV - 7 11 41 AM '04
CHIEF CLERK'S OFFICE
BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

No. _____

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

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL QUALITY

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

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

NOW COMES the Bexar Metropolitan Water District ("BexarMet" or "Petitioner") and files this Petition to Compel a Raw Water Commitment from the Guadalupe-Blanco River Authority ("GBRA"), pursuant to TEX. WATER CODE § 11.041. In support of its to Petition to Compel a Raw Water Commitment from the Guadalupe-Blanco River Authority ("Petition"), BexarMet respectfully shows as follows:

I. Introduction

GBRA controls a dominant share of water rights in the Guadalupe River basin. Pursuant to a Commission permit, GBRA controls water rights for 90,000 acre-feet per year of raw water from Canyon Lake. That water is not owned by GBRA — it is a public resource, owned by the State in trust for the benefit of the people of Texas. TEX. WATER CODE § 11.021(a); *Lower Colorado River Authority v. Texas Dept. of Water Resources*, 689 S.W.2d 873, 875 (Tex. 1984). Despite having almost 30,000 acre-feet per year of raw water available for commitment, GBRA has refused repeated requests by BexarMet to provide it with a mere 3000 acre-feet of water per year to serve its customers in Comal County.

which contain about 50 million gallons of water. BexarMet has provided retail water service in Comal County since 1998.

5. BexarMet began its efforts to secure raw water from GBRA in March of 2003, following BexarMet's termination of a 1998 contract with GBRA that was supposed to provide BexarMet with 2000 acre-feet per year of treated water as part of GBRA's Western Canyon Project. BexarMet opted out of the Western Canyon Project because, despite paying for water for several years, BexarMet had yet to receive any water and, due to numerous delays, would not receive any water until at least 2005. Additionally, the cost projections for the water had increased substantially — with no end to the rate increases in sight.

6. At the termination of its Western Canyon Project contract, BexarMet requested that its 2000 acre-feet treated water entitlement be converted to a raw water commitment for immediate use in Comal County. BexarMet's reiterated its request by letters to GBRA in May and June of 2003. Despite repeated requests from BexarMet and an abundance of available water, GBRA refused to commit the 2000 acre-feet per year.

7. On August 6, 2003, GBRA announced its intention to increase its basin-wide Firm Water Rate from \$80.00 to \$84.00 per acre-foot per year. The primary reason GBRA identified for the rate increase was the loss of 2,950 acre-feet in commitments for water from Canyon Lake. By letter dated August 8, 2003, Bexar Met again requested 2000 acre-feet of water, noting that BexarMet's request would immediately offset two-thirds of GBRA's lost commitments and the consequent rate hike. A true and correct copy of the August 8, 2003 letter is attached as Exhibit B and incorporated by reference. GBRA again failed to honor BexarMet's request.

8. About one month later, BexarMet increased its request for a commitment of Canyon Lake water to 3000 acre-feet per year. BexarMet's request reflects its prudent water planning efforts

GBRA refuse to sell water to a ready, willing and able buyer? GBRA's recent efforts to expand out of its traditional role as wholesale water purveyor into retail water service cast some light on that question. BexarMet and GBRA, acting through the City of Bulverde, are presently in a Certificate of Convenience and Necessity ("CCN") dispute regarding retail water service to a substantial portion of Comal County. On November 3, 2000, BexarMet filed an application to amend its existing CCN No. 10675 to provide water service to additional portions of western Comal County. Bulverde also filed an application for a new CCN to provide water utility service to much of the same area sought by BexarMet's application.

13. Unlike BexarMet, Bulverde has never operated a retail water system and thus lacks the financial, managerial, and technical capability to provide continuous and adequate service required to meet the CCN holder's obligations under TEX. WATER CODE § 13.241. In order to satisfy the requirements of Chapter 13 of the Water Code and the Commission's rules, Bulverde's CCN application anticipated that GBRA would render all required service on Bulverde's behalf. Under this arrangement, GBRA is responsible for all aspects of serving Bulverde's customers. After a lengthy contested case hearing, Administrative Law Judge James Norman issued a Proposal for Decision granting a CCN for the disputed area to BexarMet. The Commission then reversed, granting GBRA, through Bulverde, the right to serve the disputed area. The Commission's Final Order is presently the subject of an administrative appeal pending in Travis County District Court in *Bexar Metropolitan Water District v. Texas Commission on Environmental Quality*, Cause No. GV-302775. Bulverde and GBRA have jointly intervened in that suit for judicial review of the Commission's Final Order.

14. GBRA's attempted entry into the Comal County retail water market creates a conflict between its duties as a person controlling state-owned water and its ambitions to serve retail

App.—Austin 1979, writ ref'd n.r.e). BexarMet is ready, willing and able to pay a just and reasonable price for the 3000 acre-feet of raw water it requests.

18. The current and projected commitments of Canyon Lake water leave more than enough water available under GBRA's Certificate of Adjudication No. 18-2074E to satisfy BexarMet's request. GBRA controls a substantial amount of state-owned water — nearly 30,000 acre-feet per year — not contracted to others, which is available for BexarMet's use within GBRA's statutory district. Despite this abundance of water, GBRA has refused to supply available water under its control to BexarMet. *See, Exhibit D and Exhibit F; TEX. WATER CODE § 11.041(a)(4).* Additionally, the basin-wide price demanded by GBRA for Canyon Lake water is unreasonable, unjust, and discriminatory. *Id.*

19. A \$25.00 deposit accompanies this Petition. BexarMet requests that the Executive Director make a preliminary investigation of BexarMet's Petition and determine that there are probable grounds for it. BexarMet further requests that the Executive Director enter an order setting time and place for hearing of BexarMet's Petition.

Exhibit A

Exhibit B

Exhibit C

Mr. Bill West, General Manager
Guadalupe-Blanco River Authority
September 19, 2003
Page 2

BexarMet seeks a 3000 acre-feet per year commitment on the above conditions.

BexarMet's request is both clear and supported by its present and future needs in Comal County. At its meeting on August 25, 2003, the BexarMet Board of Directors instructed me to increase BexarMet's request from 2000 acre-feet per year to 3000 acre-feet per year. That increase was made on the basis of need and also on the basis of availability. In your letter to me dated August 6, 2003, you identified as the "primary reason for [GBRA's most recent] increase in the stored water rate," a 2,950 acre-feet decrease in the amount of water committed from Canyon Lake. As I have told you previously, BexarMet stands ready to make GBRA's latest rate increase unnecessary, by accepting 3000 acre-feet of water for diversion at Canyon Lake.

2. Current Need versus Beneficial Use

Where it appears we disagree is on the need for BexarMet to justify a raw water commitment. Under the present need standard incorporated in your letter, BexarMet could not obtain a commitment accommodating the inevitable growth of its Comal County operations. You attribute this current need requirement to both "the law and the regional water plan." That description leaves the actual authority for that standard unclear. In any case, current need is only part of the equation.

Permits to use state water, such as GBRA's Canyon Permit, are not issued on a current need basis, but instead where water "is intended for a beneficial use," and where an application "addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan."¹ Similar standards should govern BexarMet's request to appropriate state-owned water under GBRA's control. Because you have described BexarMet's request as a speculative reservation, I gather that GBRA questions whether BexarMet will make beneficial use of the water in question. If beneficial use is the governing standard, GBRA does not need additional data regarding BexarMet's "current needs in Comal County."²

BexarMet has present and future needs for water in Comal County to the extent of its

¹ TEX. WATER CODE § 11.134(b)(3)(a), (e).

² See, *Texas Rivers Protection Association v. Texas Nat. Res. Conserv. Comm'n*, 910 S.W.2d 147, 155-56 (Tex. App.—Austin 1995, writ denied).

Mr. Bill West, General Manager
Guadalupe-Blanco River Authority
September 19, 2003
Page 4

of, its district.⁸ All of GBRA's powers are "public rights and duties."⁹ There is no room in the exercise of those public rights and duties to deny delivery of a state owned resource in the name of competition.

3. Request for Service

BexarMet is a "person entitled to receive or use water" from Canyon Lake,¹⁰ for use within Comal County, and BexarMet is willing to pay a just and reasonable price for the 3000 acre-feet of raw water it requests.¹¹ GBRA obtained its Canyon Permit Amendments with the support of BexarMet in the FOCL process, including the appeal. GBRA controls a substantial amount of water not contracted to others, which is available for BexarMet's use in GBRA's statutory district. I believe that we can find common ground if we can discuss the appropriate standards to be applied to BexarMet's continuing requests.

On the basis of this response to your letter of August 29, 2003, I am requesting a draft contract on the above-stated terms that I may present to BexarMet's Board on Monday September 29, 2003, in lieu of filing a petition to compel service.

Thank you for your consideration and continued efforts to resolve this matter expeditiously.

⁸ See, *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752, 768-69 (Tex. 1966); *Texas Water Rights Comm'n v. City of Dallas*, 591 S.W.2d at 613-14.

⁹ Act of May 21, 1975, 64th Leg., R.S. Ch. 433, § 1, sec. 1, 1975 Tex. Gen. Laws 1149, 1150.

¹⁰ See, *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d at 768-69; *Texas Water Rights Comm'n v. City of Dallas*, 591 S.W.2d at 613-14.

¹¹ TEX. WATER CODE § 11.041.



Exhibit D

Mr. Thomas C. Moreno
September 29, 2003
Page 2

Second, in numbered paragraph 2 of your letter, you refer to "BexarMet's request to appropriate state-owned water under GBRA's control." I understand your request to be one seeking a wholesale contract to purchase raw water from GBRA, and not a "request to appropriate state-owned water."

Third, I have repeatedly asked you to provide information needed to properly define the current and projected future demands for treated water within BexarMet's currently-defined service area in Comal County which, as discussed above, consists of the four disconnected small service areas in Comal County covered by CCN No. 10675 identified in BexarMet's enabling act. Although you initially promised several times in July to provide this information in response to my requests, you have thus far provided nothing. To move your request along, we have undertaken our own estimate of the projected future demand within that area. Based on information otherwise available to us and assuming that development occurs to the maximum permissible extent within BexarMet's current statutory service area in Comal County (the four disconnected small service areas in Comal County covered by CCN No. 10675 identified in BexarMet's enabling act), we have calculated that the future demand for treated water within that area will not exceed 428.5 acre-feet per year.

Please let me know if you want to pursue the development of a contract for an amount of raw water based on the projected future demand for treated water within BexarMet's current statutory service area in Comal County (the four disconnected small service areas in Comal County covered by CCN No. 10675 identified in BexarMet's enabling act). If you do want to pursue such a contract, I will have a draft contract prepared promptly after I hear back from you. Before we finalize the contract, however, we will need from you the information requested so that our calculation of the projected future demand for treated water within BexarMet's current statutory service area in Comal County can be confirmed.¹ Contrary to the implication in numbered paragraph 2 of your letter, GBRA is only seeking information on current and projected future demands for treated water within BexarMet's current statutory service area in Comal County (the four disconnected

¹ With regard to our need for this information, GBRA wants to be sure that the amount of water committed for supply within BexarMet's current statutory service area in Comal County (the four disconnected small service areas in Comal County covered by CCN No. 10675 identified in BexarMet's enabling act) is not excessive, so that as much water as possible remains available for others. In fact, the legal authorities you cite in your letter point out that a wholesale contract may be improper where it is found that it attempts to furnish too much water." See, e.g., *City of San Antonio v. Texas Water Commission*, 407 S.W.2d 752, 768 (Tex 1966).

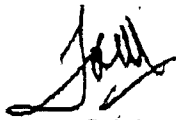
Exhibit E

Mr. Bill West, General Manager
Guadalupe-Blanco River Authority
October 23, 2003
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Thank you for your consideration.

Very truly yours,

BEXAR METROPOLITAN WATER DISTRICT



Thomas C. Moreno
General Manager/CEO

cc: Ronald C. Williamson, President
Bexar Metropolitan Water District

Board of Directors
Bexar Metropolitan Water District



GUADALUPE-BLANCO RIVER AUTHORITY

GENERAL OFFICE
33 East Court Street
Cognac, Texas 78155
Phone: 830-379-5822
Fax: 830-379-9718

COLETO CREEK PARK
AND RESERVOIR
P.O. Box 68
Cannan, Texas 77960
Phone: 361-575-6566
Fax: 361-575-2267

LAKE WOOD
RECREATION AREA
167 FM 2091 South
Donzales, Texas 78629-6051
Phone: 830-672-2779

LOCKHART WATER
TREATMENT PLANT
547 Old McMahan Road
Lockhart, Texas 78644
Phone: 512-398-5528

LOCKHART
WASTEWATER
RECLAMATION
SYSTEM
4435 FM 20 East
Lockhart, Texas 78644
Phone: 512-398-6391
Fax: 512-398-5526

LULING WATER
TREATMENT PLANT
350 Memorial Drive
Luling, Texas 78648
Phone: 830-875-2132
Fax: 830-875-3670

FORT LAVALA
OPERATIONS
P.O. Box 146
Fort Lavaca, Texas 77979
Phone: 361-552-9751
Fax: 361-552-6529

SAN MARCOS WATER
TREATMENT PLANT
91 Old Bustrop Road
San Marcos, Texas 78666
Phone: 512-553-9688
Fax: 512-553-5127

VICTORIA REGIONAL
WASTEWATER
RECLAMATION
SYSTEM
P.O. Box 2085
Victoria, Texas 77902-2085
Phone: 361-578-2878
Fax: 361-578-9039

GBRA WEBSITE
<http://www.gbra.org>

October 30, 2003

Mr. Tomas C. Moreno
General Manager/CEO
Bexar Metropolitan Water District
2047 West Malone
San Antonio, Texas 78225

Re: Request by Bexar Metropolitan Water District for Raw Water Contract

Dear Tom:

Thank you for your letter dated October 23, 2003 responding to my September 29, 2003 letter.

Pursuant to your request, GBRA will prepare a draft contract for the 428.5 acre-feet per year of stored raw water that you requested from Canyon Reservoir to supply the current and projected future demands for treated water within the four disconnected small service areas in Comal County covered by CCN No. 10675. As you know, I have been asking since early July for the information needed to properly define the current and projected future demands for treated water within these four service areas, but thus far you have provided no demand calculations. Nevertheless in an effort to move your request along, GBRA undertook its own estimate of the projected future demand for those four areas and included the estimate in my September 29, 2003 letter to you. GBRA arrived at that estimate of not more than 428.5 acre-feet per year based on information otherwise available to us and assuming that development within these four small areas occurs to the maximum permissible extent. As I also stated in my September 29 letter however, before we finalize the contract, we will need from you the information requested so that our calculation of the projected future demand for treated water within the four service areas can be confirmed. Please provide this information promptly, so that further delays in completing the raw water contract can be avoided.

I am disappointed that you continue to threaten to take legal action against GBRA to reserve additional stored water from Canyon Reservoir in order to supply the current and projected future demands for treated water within other areas in Comal County. There is no basis for such an action, particularly in light of BexarMet's lack of statutory authority to provide retail water service within any area

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 20, 2004

Mr. Howard Slobodin
Hazen & Terrill
810 West 10th Street
Austin, Texas 78701

RE: Declaration of Administrative Completeness
Name: Guadalupe-Blanco River Authority
CCN Number: 12977
CN: 601180565; RN: 103908547
Administrative Review Number: P-002-4
Type of Application: Bexar Metropolitan Water District vs Guadalupe-Blanco River Authority

Dear Mr. Slobodin:

The above referenced application was received by the Water Quality Applications Team on January 16, 2004. An administrative review of the application has been conducted and the application was declared administratively complete on January 20, 2004.

This application has been forwarded to Ms. Michelle Abrams, Utility Certification and Rate Analysis Team, Districts and Utilities Section (Mail Code 153), Water Supply Division for a technical review. If during the course of the technical review additional information is needed, you will be notified of the deficiency and be requested to supplement the application.

You may contact Ms. Abrams at (512) 239-6014 if you have questions regarding the technical evaluation of your application. If you have questions regarding the administrative review, please contact Peggy Hiscoe at (512) 239-6168.

Sincerely,

A handwritten signature in cursive script that reads "Peggy Hiscoe".

Peggy Hiscoe
Water Quality Applications Team (Mail Code 156)
Permits Administrative Review Section
Registration, Review & Reporting Division