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Texas Court of Appeals
Ninth Judicial District
1085 Pearl Street, Suite 330
Beaumont, Texas 77701

Re: Cause No. 09-20-00180-CV; *San Jacinto River Authority v. City of Conroe and City of Magnolia*

To the Honorable Justices of the Ninth Court of Appeals:

The Guadalupe-Blanco River Authority (GBRA) respectfully submits this *amicus curiae* letter in support of Appellant, San Jacinto River Authority (SJRA).¹

Summary of GBRA's Position

GBRA supports the positions taken by SJRA as expressed in SJRA's initial brief and the legal arguments SJRA makes in support of its positions.

In regard to the waiver of immunity under Tex. Local Govt. Code § 271.152 in particular, the District Court's ruling in favor of the Cities of Conroe and Magnolia (hereinafter, "Conroe," "Magnolia," and collectively, "the Cities."), represents an erroneous view of the law with potentially far-reaching consequences. It could destabilize a very common method of financing and operating many public water and sewer projects in the State of Texas.

Identity and Interest of *Amicus Curiae* GBRA

GBRA, like SJRA, is a Texas conservation and reclamation district. GBRA was also created by an act of the Texas Legislature² under authority of Article XVI, Section 59

¹ Per the requirement of Tex. R. App. Proc. 11(c), GBRA confirms that no person or entity other than GBRA made a monetary contribution to the preparation or filing of this brief.

² Act of October 12, 1933, 43rd Leg., 1st C.S. ch.75, 1933 General & Special Laws of Texas 198-201, as amended (often cited as V.C.S. art.8280-106). The text, current through 2018 may be found at the following url: <https://www.gbra.org/documents/about/GBRAEnablingAct.pdf>

GBRA's Enabling Legislation was amended in 2019 by Senate Bill 626:
<https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00626F.pdf#navpanes=0>

of the Texas Constitution.³ GBRA has many of the same missions as SJRA and essentially the same authority and limits.

GBRA, like SJRA, covers and serves a multi-county area within a major Texas river basin. Kendall, Comal, Hays, Caldwell, Guadalupe, Gonzales, DeWitt, Victoria, Calhoun, and Refugio Counties are all within GBRA's district boundaries and GBRA serves customers in and adjacent to its district boundaries. GBRA serves many water districts and municipal water and municipal sewer utilities from Bexar County, into the Hill Country north of San Antonio, up the Interstate 35 corridor to the outskirts of Austin, and down the Guadalupe Valley as it reaches the Texas coast.

GBRA has developed, and continues work on, regional projects that enable local entities, both large and small, to participate together. This cooperative effort allows smaller public entities and many private entities to have the use of infrastructure that they could not build or operate as easily or as economically alone.

GBRA has no authority to levy taxes. GBRA receives no appropriations from the Texas Legislature. Revenues to fulfill GBRA's statutory missions to develop and conserve water resources in the Guadalupe River Basin come almost exclusively from GBRA's selling raw and treated water and providing sewage treatment and disposal services.

The infrastructure to provide those water or sewer services is financed, constructed, and operated under long-term agreements, often with local governmental entities.

I. Why the Decisions in the Trial Court Poses a Serious Problem

The arguments relating to incontestability and other issues are fully briefed by SJRA and discussed at length by both parties. GBRA has little to add to those discussions, but it does support SJRA's positions and urges this Court to rule in SJRA's favor.

The decision by the District Court that the GRP Contracts fail to state "essential terms" as required by Tex. Local Govt. Code § 271.152 does merit additional attention.

A. The District Court's Ruling Seriously Impacts a Widely-Used Paradigm for Water and Sewer Project Contracts.

In GBRA's own experience, and in its observation of critical water and sewer projects by others in the State, the contracting paradigm for many large and small water and sewer projects in Texas is similar to the one employed in the case at bar. The paradigm consists of a long-term agreement between a regional entity such as a river authority and one or more water districts, municipal utilities, or similar local governmental entities. The agreement typically contemplates project design, project construction, project operation,

³ *Id.*, Sec. 1.

and project financing. If a water supply project is contemplated, the regional entity is most often the entity that brings the water supply to the table.

The primary term for these agreements typically coincides with the payment terms on the financing for the project, *e.g.*, 30 to 40 years. The agreements can involve small projects such as the construction and operation of a small sewage treatment plant and collection system serving a few adjoining neighborhoods. They can involve large projects, such as regional water treatment and supply projects.

In many instances, the regional entity will be responsible for design and construction with input from the local partners. In others, the local partners may take a larger role. Typically, though, the regional entity will issue bonds or secure loans to finance the contemplated project. Often, the regional entity is in a position to obtain interest rates that are more favorable. The debt will then be secured by the local entity's pledge of revenues from the project or from taxes, and a promise to pay as the debt comes due.

These long-term agreements typically provide for operation, maintenance and repair of the project. Associated fees are provided for. Often the regional entity will operate the project, but not always. In any case, operation, repair and maintenance is critical to the life and continued viability of the project, and that requires revenue over the long term. As the cost of anything over the past several decades clearly illustrates, those fees cannot be fixed or unchanging over the long term.

B. Affirming the District Court's Ruling Will Have Negative Impacts.

By its ruling on jurisdiction, the District Court has denied SJRA a means to enforce existing agreements. GBRA submits that the decision: (1) undercuts the continued strength of existing obligations that support the payment of debt used to build projects; (2) undercuts the strength of obligations to fund maintenance, operation, and repair costs for existing projects, which is critical to their long-term viability; and (3) will likely have a chilling effect on future use of a method of financing and maintaining projects, that has been widely used in Texas. The reason is simple enough. The denial by the Courts of a remedy for refusal to meet contractual payment obligations will undoubtedly provide opportunities – and incentives – to disregard those obligations.

Having legal recourse for non-payment is critically important when millions of dollars go into the financing of a water and sewer project that is financed by bonds sold to the public or to the State of Texas backed by an unconditional promise to pay. It is also critical when considering the cost of operation and maintenance of a project over the long term. It is also critically important for regional entities contemplating how – and whether – to finance and operate future projects in their area.

II. The Essential Terms Required Under Local Govt. Code § 271.152 Are Included in the GRP Contracts.

One thing that the Cities appear to ignore in their reply brief is that in many of the cases they cite, the contracts in question either did not have specific obligations to pay or accept certain services,⁴ or they involved a promise to use good faith to obtain an increase in compensation to a contractor – in other words, an “agreement to agree,” which is generally unenforceable.⁵ Another was executed by a governmental body’s staff without appropriate approval by the governing body, and the case may have turned more on the failure to comply with the requirement in § 271.152 that a contract be “properly executed.”⁶

In the GRP Contracts as described by SJRA, there is a definite obligation to pay which identifies what the payment is for.⁷ SJRA notes that the GRP Contracts specifically provide that the rates will be set and reset from time to time.⁸ There is a specific formula, however simple, which the signatories agreed to use to calculate the fees for groundwater pumping and for surface water.⁹ There is a specific procedure (which includes comments from a multi-party GRP Review Committee) for the rate setting for comments and recommendations on proposed fees.¹⁰

III. The Court’s Decision Will Have an Impact Beyond this Case.

The question regarding the waiver of immunity before the Court of Appeals in this case is fundamental and of great importance because of the implications it carries for current and future water and sewer projects, as discussed above. This case will be watched. It will be considered in the framing of future arguments in other cases. It will figure in decisions on future projects.

⁴ *ICI Constr., Inc. v. Orangefield Indep. Sch. Dist.*, 339 S.W. 3d. 235, 239-40 (Tex. App. – Beaumont 2011, no pet.). See Cities’ Brief at 30-31.

⁵ *Dallas/Fort Worth Int’l. Airport Bd. V. Vizant Techs., LLC*, 576 S.W.3d. 362, 368-71, (Tex. 2019). See Cities’ Brief at 28-30.

⁶ *El Paso Educ. Initiative. Inc. v. Amex Props., LLC*, 602 S.W.3d. 521, 531-32 (Tex. 2020). See Cities’ Brief at 25-26.

⁷ SJRA’s Brief at 26-27.

⁸ SJRA’s Brief at 26-29.

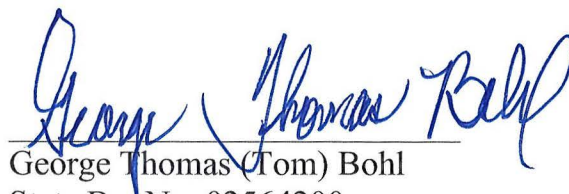
⁹ *Id.*

¹⁰ *Id.*

IV. Conclusion.

For the reasons stated above and for the reasons stated in SRJA's Brief, GBRA supports the request of SJRA that Court of Appeals to reverse the decision of the District Court and remand this case for trial.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of this document was served on all counsel of record, identified below by on November 6, 2020, electronically through the electronic filing manager in compliance with the Texas Rules of Appellate Procedure:

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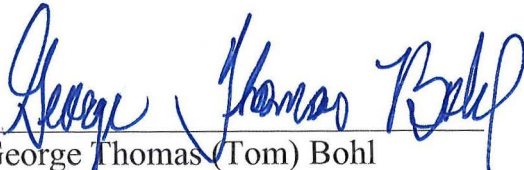
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