



Guadalupe Basin
Natural
Resources Center

125 Lehmann Drive
Ste. 100

Kerrville, Texas
78028-5908

(830) 896-5445

Fax (830) 257-2621

E-mail: ugraadm@ugra.org

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Opinion Committee

August 17, 1999

FILE # ML-40970-99

I.D. # 40970

The Honorable John Cornyn
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Certified Mail
Return Receipt Requested

RE: Request for Reconsideration of Attorney General's Opinion
JM-961 (1988) Issued to the Upper Guadalupe River Authority

Dear General Cornyn:

As Chairman of the Upper Guadalupe River Authority, I am writing to you pursuant to Section 402.042 (b)(9), Texas Government Code, to request your reconsideration and possible withdrawal, or clarification of the 1988 Attorney General opinion issued by former Attorney General Jim Mattox, JM-961 (1988). A copy of Opinion No. JM-961 setting forth the earlier analysis at issue is attached for your reference.

UGRA, was created by the Legislature pursuant to Article 8280-124 (as amended) in furtherance of Article XVI, Section 59 of the Texas Constitution. UGRA operates with the additional authority of applicable general laws of the State, including without limitation Chapters 30, 49, 50, 51 and 54 of the Texas Water code.

As part of its mission, UGRA is actively involved in efforts both to develop water supplies within the Kerr County and to protect and enhance the quality of surface and groundwater resources. As you may be aware, Kerr County is part of the "Hill Country Critical Groundwater Area," by designation of the former Texas Water Commission (now Texas Natural Resource Conservation Commission) (See 30 T.A.C. § 294.34). The limited availability of surface and groundwater resources in Kerr County make the accomplishment of UGRA's mission to protect and develop those limited resources critical to our citizens. Due to the present reliance upon septic systems throughout the entirety of Kerr County outside of the corporate boundaries of the City of Kerrville, UGRA desires to develop a regional wastewater system for the benefit and protection of both the citizens and water resources of Kerr County.

UGRA

General Maddox's Opinion No. JM-961 was issued in response to UGRA's 1988 inquiry about its authority to compel septic tank users within UGRA's boundaries to connect to an organized regional wastewater system owned by the Authority. UGRA had proposed to operate the system either by itself, or pursuant to an agreement with some other governmental entity permitted to contract with the Authority for the operation of such a sewage collection system. In summary, Opinion JM-961 concluded that the Authority had no power, either expressed or implied, to compel septic tank users to connect to such a system.

In response to Opinion No. JM-961, UGRA abandoned its then current plans to develop a regional wastewater system capable of serving the unincorporated areas of Kerr County relying upon On Site Sewage Facilities, *i.e.*, septic systems, that were creating a water quality problem within the County. Although UGRA abandoned the plan, it continued to monitor water quality within Kerr County in an effort to address issues created by the problem of continually failing or poorly operating septic systems.

Critical to Opinion No. JM-961 was the analysis that notwithstanding the broad and express powers of UGRA with regard to the development of water resources and protection of water quality (including the authority to own an operate, and/or contract for sewage treatment and disposal) UGRA lacked authority to compel septic tank users to connect to a sewage system because it was "not necessary" to the operation of the system. According to General Mattox's opinion, allowing UGRA to compel connection to the system as part of the exercise and implementation of its powers could only be considered to be "convenient." See A.G. Opinion No. JM-961 at p. 4 (citing Tri-City Fresh Water Supply District No. 2 of Harris County v. Mann, 142 S.W.2d 945, 948 (Tex. 1940)).

UGRA believes that the authority to compel septic tank users to participate in an organized regional wastewater system owned and/or operated by UGRA is both essential and necessary, not merely "convenient", to carrying out UGRA's express powers. If UGRA, and similarly situated political subdivisions of the State charged with protecting water quality within their jurisdiction, lack the authority to compel connection to such a system in the unincorporated areas of its jurisdiction and, with the consent, approval and participation of a municipality authorized to compel such connections within the incorporated areas, the express power to carry out such water quality protection efforts and operate wastewater systems is meaningless.

It is clear from both the Legislature's actions during the past two sessions, including the passage of Senate Bill 1 in 1997 and Senate Bill 821 in 1999, and the Supreme Court's opinions in the Barshop v. Medina County Underground Water Conservation District, 925 S.W.2d 618 (Tex. 1996) and Sipriano v. Great springs Waters of America Company, 42 Tex. Sup. Ct. J. 629, ___ S.W.2d ___ (Tex. May 6, 1999), that (i) the Legislature has the authority to enact laws for the protection and enhancement of the natural resources of the State pursuant to the "Conservation Amendment, *i.e.*, Article XVI, § 59, Tex. Const., and (ii) the Legislature views the development

and protection of the State's water resources as a top priority. Accordingly, upon your review and reconsideration of Opinion No. JM-961, UGRA respectfully requests that you withdraw the Opinion and publish a proper opinion supporting the authority of UGRA and other governmental entities to establish viable wastewater systems for the benefit and protection of human health and welfare, as well as our State's precious but limited surface and groundwater resources.

Assuming, however, that you concur with the conclusion in Opinion JM-961, *i.e.*, that UGRA does not have either the implied or express power to compel the connection to a wastewater system, please clarify and confirm UGRA's ability to contract with entities, such as municipalities, authorized to own and/or contract for the operation of such a system and compel connection to the system. In Opinion No. JM-961, the conclusion was reached that such an entity would have the authority to compel connection, however, that authority could not be delegated to UGRA. See Opinion No. JM-961 at p. 5. UGRA does not, and would not, seek "delegation" of that authority. Instead, pursuant to an "Interlocal" contract between the two governmental bodies, UGRA would have the authorized entity compel connection to the system owned and operated by UGRA.

Similar to confirming UGRA's ability to enter into such a contractual relationship with a municipality, UGRA also seeks your opinion with regard to the authority of a County, pursuant to Senate Bill 821 effective May 25, 1999, to compel connection to a sewage system in the unincorporated portions of the County. Senate Bill 821 gives Counties the authority to own, or contract for, the operation of a water or sewage utility system, as well as granting the power of eminent domain and the authority to issue bonds for establishing the same.

That statute amends Chapter 412 of the Local Government Code by adding Section 412.016, which provides that a County may acquire, own, operate, or contract for the operation of, a water or sewer utility system to serve an unincorporated area of the county in the same manner and under the same regulations as a municipality under Chapter 402. A copy of Senate Bill 821 is attached for your reference. The specific question presented by UGRA is whether UGRA can contract with Kerr County, as authorized by Senate Bill 821, whereby the County would compel connection to the system to achieve the desired goal of protecting water quality in the unincorporated areas of Kerr County.

UGRA is anxious to issue bonds to finance the construction and operation of regional waste water systems within Kerr County. Accordingly, your prompt and favorable consideration of this request would be greatly appreciated.

Should you have any questions regarding UGRA, its authority and/or plans, please contact UGRA's General Manager, Mr. J.T. (Jim) Brown at UGRA's offices during normal business hours. Mr. Brown can be reached at (830) 896-5445.

General Cornyn

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August 17, 1999

Thank you again for your assistance.



UPPER GUADALUPE RIVER AUTHORITY

G. Granger MacDonald, President
Board of Directors

Enclosures

cc: **Honorable Jeff Wentworth, Texas Senate**
Honorable Harvey Hilderbran, Texas House of Representatives
Honorable Fred Henneke, County Judge, Kerr County
Texas Water Development Board, Attn: Mr. Craig Peterson, Executive Director
Suzanne Schwartz, General Counsel