

AGENDA ITEM MEMO

BOARD MEETING DATE: November 9, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel
Jessica Peña, Deputy Executive Administrator, Water Supply and Infrastructure

FROM: T. Clay Schultz, Ph.D., Director, Regional Water Project Development
Mireya Loewe, Assistant Director, Regional Water Project Development

SUBJECT: Amendment to the Presidio County Commitment Expiration Date

ACTION REQUESTED

Consider amending by resolution previously adopted Texas Water Development Board Resolution No. 23-044 to extend Presidio County's Economically Distressed Areas Program funding commitment to February 29, 2024.

BACKGROUND

In June 2023, the Texas Water Development Board (TWDB) approved a \$4,600,000 commitment to Presidio County (County) from the Economically Distressed Areas Program for planning, acquisition, design, and construction of a water and wastewater system project. The commitment included \$1,380,000 in financing and \$3,220,000 in grant. The commitment is set to expire on December 31, 2023.

KEY ISSUES

The County is requesting an extension to the expiration date of its commitment to February 29, 2024, to have sufficient time to complete the closing process. The County intends to issue certificates of obligation to the TWDB to fulfill the financing portion of the commitment. Per state law, the County must publish in a newspaper a notice of its intent to issue the certificates of obligation at least 46 days prior to a regular meeting at which the County Commissioners Court considers authorizing the issuance. Due to circumstances beyond the County's control, the required notice was not timely published in the newspaper. Although the notice has now been published, due to the publication delay the

earliest the County Commissioners Court can consider authorizing the issuance of the certificates of obligation is December 13, 2023. Given the tight schedule to complete the transaction prior to the December 31 expiration date, the County requests a 60-day extension to its commitment expiration date in order to complete the closing process.

RECOMMENDATION

The requested amendment does not change the total amount of financing to the City. In order to have sufficient time to close on the commitment, the Executive Administrator recommends that TWDB Resolution 23-044 be amended to extend the commitment expiration to February 29, 2024.

Attachments:

1. Proposed Resolution (23-)
2. Resolution (23-044)
3. County's request for extension of the commitment's expiration date

A RESOLUTION OF THE TEXAS WATER DEVELOPMENT BOARD
AMENDING TWDB RESOLUTION NO. 23-044
PROVIDING FINANCIAL ASSISTANCE TO THE COUNTY OF PRESIDIO

(23-)

At its meeting on June 6, 2023, the Texas Water Development Board (TWDB), by TWDB Resolution No. 23-044, made a commitment to provide financial assistance in the amount of \$4,600,000 to the County of Presidio (County) from the Economically Distressed Areas Program Account of the Texas Water Development Fund II to finance certain water and wastewater systems through the TWDB's proposed purchase of \$975,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Series 2023 and a grant of \$2,275,000, and through the proposed purchase of \$405,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Taxable Series 2023 and a grant of \$945,000, for Project No. 10457; and

Under TWDB Resolution No. 23-044, the commitment period is set to expire December 31, 2023; and

The County has submitted a request to extend the TWDB's commitment period for an additional 60 days to close on the commitment, as the County was unable to meet the schedule to close on the commitment before the expiration date due to circumstances beyond its control, all as is more specifically set forth in the recommendations of the TWDB's staff, to which documents express reference is made; and

The TWDB hereby finds that the proposed amendment to TWDB Resolution No. 23-044, granting an extension of 60 days is reasonable, within the public interest, and will serve a public purpose; and

WHEREAS, in accordance with the Texas Water Code, the TWDB has carefully considered all matters as required by law.

NOW THEREFORE, based on these considerations and findings, the TWDB resolves as follows:

1. The commitment made through TWDB Resolution No. 23-044 is amended to extend the commitment 60 days. The commitment will expire on February 29, 2024.
2. All other terms and conditions of TWDB Resolution No. 23-044 shall remain in full force and effect.

APPROVED and ordered of record this, the 9th day of November 2023.

TEXAS WATER DEVELOPMENT BOARD

Brooke T. Paup, Chairwoman

DATE SIGNED: _____

ATTEST:

Jeff Walker, Executive Administrator

A RESOLUTION OF THE TEXAS WATER DEVELOPMENT BOARD
APPROVING AN APPLICATION FOR FINANCIAL ASSISTANCE IN THE AMOUNT OF
\$4,600,000 TO
PRESIDIO COUNTY
FROM THE ECONOMICALLY DISTRESSED AREAS PROGRAM ACCOUNT OF
THE TEXAS WATER DEVELOPMENT FUND II
THROUGH THE PROPOSED PURCHASE OF
\$975,000 PRESIDIO COUNTY, TEXAS, COMBINATION TAX AND SUBORDINATE LIEN
REVENUE CERTIFICATES OF OBLIGATION, PROPOSED SERIES 2023 AND
THE EXECUTION OF A GRANT AGREEMENT IN THE AMOUNT OF \$2,275,000
AND
THROUGH THE PROPOSED PURCHASE OF
\$405,000 PRESIDIO COUNTY, TEXAS, COMBINATION TAX AND SUBORDINATE LIEN
REVENUE CERTIFICATES OF OBLIGATION, PROPOSED TAXABLE SERIES 2023 AND
THE EXECUTION OF A GRANT AGREEMENT IN THE AMOUNT OF \$945,000

(23-044)

WHEREAS, Presidio County (County), has filed an application seeking financial assistance in the amount of \$4,600,000 from the Economically Distressed Areas Program Account of the Texas Water Development Fund II, to finance certain water and wastewater system improvements, identified as Project No. 10457; and

WHEREAS, the County seeks financial assistance from the Texas Water Development Board (the TWDB) through the TWDB's proposed purchase of \$975,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Series 2023 (together with all authorizing documents (Obligations)) and a grant of \$2,275,000, and through the proposed purchase of \$405,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Taxable Series 2023 (together with all authorizing documents (Obligations)) and a grant of \$945,000 from the Economically Distressed Areas Program Account of the Texas Water Development Fund II, all as is more specifically set forth in the application and in recommendations of TWDB's staff; and

WHEREAS, the County has offered a pledge of ad valorem taxes and a subordinate lien on the net revenues of the County's jail system as sufficient security for the repayment of the Obligations;

WHEREAS, the commitment is approved for funding under the TWDB's pre-design funding option, and initial and future releases of funds are subject to 31 TAC § 363.16 and § 363.43; and

WHEREAS, the TWDB has carefully considered all matters required by law and in particular the following:

1. the feasibility of creating a conservation and reclamation district to provide and finance the water supply or sewer services, in accordance with Texas Water Code § 16.346;
2. the need of the economically distressed area to be served by the water supply and sewer services in relation to the need of other political subdivisions requiring economically distressed areas financing, and the relative costs and benefits of all applications, in accordance with Texas Water Code § 17.929(a)(1);
3. the availability to the political subdivision of revenue from alternative sources for the payment of the cost of the proposed project, in accordance with Texas Water Code § 17.929 (a)(2);
4. financing of the proposed water supply or sewer project, in accordance with Texas Water Code § 17.929(a)(3);
5. the feasibility of achieving cost savings by providing a regional facility for water supply and wastewater service and the feasibility of financing the facilities by using funds from the economically distressed areas account or any other financial assistance, in accordance with Texas Water Code § 17.929(a)(5);
6. the rates, fees, and charges that the average customer to be served by the project will be able to pay, sources of funding available to the County, and any local funds of the County, in accordance with Texas Water Code § 17.933(d)(1);
7. sources of funding available to the County from federal and private funds and from other state funds, in accordance with Texas Water Code § 17.933(d)(2);
8. any local funds of the County to be served by the project if the economically distressed area to be served is within the boundary of the County, in accordance with Texas Water Code § 17.933(d)(3);
9. the just, fair, and reasonable charges for water and wastewater service as provided in the Texas Water Code, in accordance with Texas Water Code § 17.933(d)(4);

WHEREAS, the TWDB hereby finds:

1. that the County is exempt from requirements to adopt a water conservation program because the implementation of a water conservation program is not reasonably necessary to facilitate water conservation as the County does not currently provide water or wastewater services;

2. that the area to be served by the proposed project has a median household income that is not greater than 75 percent of the median state household income for the most recent year for which statistics are available, in accordance with Texas Water Code § 17.929(b);
3. that the County and the City of Marfa (City) have adopted model subdivision rules as promulgated by the TWDB pursuant to Texas Water Code § 16.343 and the manner of enforcement, in accordance with Texas Water Code § 17.929(a) (4);
4. that the TWDB has approved a regional water plan for the region of the state that includes the area benefiting from the project and that the needs to be addressed by the project will be addressed in a manner that is consistent with the approved regional and state water plans, in accordance with Texas Water Code § 16.053(j);
5. that the County has considered cost-effective innovative, nonconventional methods of treatment and will evaluate alternatives in greater detail through the planning phase of the project, in accordance with Texas Water Code § 17.189(b);
6. that the public interest will benefit from state assistance in the financing of the treatment works, in accordance with Texas Water Code § 17.277;
7. that a nuisance dangerous to the public health and safety exists resulting from water supply and sanitation problems in the area to be served by the proposed project, in accordance with Texas Water Code § 17.933(b);

NOW, THEREFORE, based on these considerations and findings, the TWDB resolves as follows:

1. based on the finding stated above, the TWDB determines that a nuisance dangerous to the public health and safety exists in the area to be served by the proposed project, pursuant to Texas Water Code § 17.933; and
2. a commitment is made by the TWDB to the Presidio County for financial assistance in the amount of \$4,600,000 from the Economically Distressed Areas Account of the Texas Water Development Funds through the TWDB's proposed purchase of \$975,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Series 2023 and a grant of \$2,275,000, and through the proposed purchase of \$405,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Taxable Series 2023 and a grant of \$945,000. This commitment will expire on December 31, 2023.

This commitment is conditioned as follows:

Standard Conditions:

1. this commitment is contingent on a future sale of bonds by the TWDB or on the availability of funds on hand;
2. this commitment is contingent upon the County's compliance with all applicable requirements contained in 31 TAC Chapter 363;
3. the Obligation and Grant Agreements must contain a provision that the TWDB may exercise all remedies available to it in law or equity, and any provision of the Obligations or Grant Agreements that restricts or limits the TWDB's full exercise of these remedies shall be of no force and effect;
4. loan proceeds and grant funds are public funds and, as such, the Grant Agreements and Obligations must include a provision requiring that these proceeds shall be held at a designated state depository institution or other properly chartered and authorized institution in accordance with the Public Funds Investment Act, Government Code, Chapter 2256, and the Public Funds Collateral Act, Government Code, Chapter 2257;
5. loan proceeds and grant funds shall not be used by the County when sampling, testing, removing or disposing of contaminated soils and/or media at the project site. The Obligations and Grant Agreements shall include an environmental indemnification provision wherein the County agrees to indemnify, hold harmless and protect the TWDB from any and all claims, causes of action or damages to the person or property of third parties arising from the sampling, analysis, transport, storage, treatment and disposition of any contaminated sewage sludge, contaminated sediments and/or contaminated media that may be generated by the County, its contractors, consultants, agents, officials and employees as a result of activities relating to the project to the extent permitted by law;
6. prior to closing, and if not previously provided with the application, the County shall submit executed contracts for engineering, and, if applicable, financial advisor, and bond counsel contracts for the project that are satisfactory to the Executive Administrator. Fees to be reimbursed under the contracts must be reasonable in relation to the services performed, under the contract, and acceptable to the Executive Administrator;
7. prior to closing, when any portion of the financial assistance is to be held in escrow or in trust, the County shall execute an escrow agreement or trust agreement, approved as to form and substance by the Executive Administrator, and shall submit that executed agreement to the TWDB;

8. the Executive Administrator may require that the County execute a separate financing agreement in form and substance acceptable to the Executive Administrator;
9. this commitment is contingent upon the issuance of a written approving opinion of the Attorney General of the State of Texas stating that all of the requirements of the laws under which said Obligations were issued have been complied with; that said Obligations were issued in conformity with the Constitution and laws of the State of Texas; and that said Obligations are valid and binding obligations of the County;
10. the Obligations must provide that the Obligations can be called for early redemption only in inverse order of maturity, and on any date beginning on or after the first interest payment date which is 10 years from the dated date of the Obligations, at a redemption price of par, together with accrued interest to the date fixed for redemption;
11. the County, or an obligated person for whom financial or operating data is presented to the TWDB in the application for financial assistance either individually or in combination with other issuers of the County's Obligations or obligated persons, will, at a minimum, regardless of the amount of the Obligations, covenant to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) in 17 CFR § 240.15c2-12 (Rule 15c2-12) and determined as if the TWDB were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the TWDB and the beneficial owners of the County's Obligations, if the TWDB sells or otherwise transfers such Obligations, and the beneficial owners of the TWDB's bonds if the County is an obligated person with respect to such bonds under SEC Rule 15c2-12;
12. the Obligations must contain a provision requiring the County to levy a tax or maintain and collect sufficient rates and charges to produce system revenues in an amount necessary to meet the debt service requirements of all outstanding obligations and to maintain the funds established and required by the Obligations;
13. the Obligations must include a provision requiring the County to use any loan proceeds from the Obligations that are determined to be surplus proceeds remaining after completion of the project and after completion of a final accounting in a manner approved by the Executive Administrator;
14. prior to closing, the County shall submit documentation evidencing the adoption and implementation of sufficient system rates and charges or, if applicable, the levy of an interest and sinking tax rate sufficient for the repayment of all system debt service requirements;

15. the County must immediately notify TWDB, in writing, of any suit against it by the Attorney General of Texas under Texas Penal Code § 1.10(f) (related to federal laws regulating firearms, firearm accessories, and firearm ammunition);
16. the Obligations must provide that the County will comply with all applicable TWDB laws and rules related to the use of the financial assistance;
17. the Obligations must provide that the County must comply with all conditions as specified in the final environmental finding of the Executive Administrator when issued, including the standard emergency discovery conditions for threatened and endangered species and cultural resources;
18. the Obligations must contain a provision requiring the County to maintain insurance coverage sufficient to protect the TWDB's interest in the project;
19. the Obligations must provide that the County will submit annually, an audit prepared by a certified public accountant in accordance with generally accepted auditing standards;
20. the Obligations must contain a covenant that the County will abide by all applicable construction contract requirements related to the use of iron and steel products and manufactured goods produced in the United States, as required by Texas Water Code § 17.183;

Conditions Related to Tax-Exempt Status of the \$975,000 Presidio County, Texas, Combination Tax and Subordinate Lien Revenue Certificates of Obligation, Proposed Series 2023:

21. the County's bond counsel must prepare a written opinion that states that the interest on the Obligations is excludable from gross income or is exempt from federal income taxation. Bond counsel may rely on covenants and representations of the County when rendering this opinion;
22. the County's bond counsel opinion must also state that the Obligations are not "private activity bonds." Bond counsel may rely on covenants and representations of the County when rendering this opinion;
23. the Obligations must include a provision prohibiting the County from using the proceeds of this loan in a manner that would cause the Obligations to become "private activity bonds" within the meaning of § 141 of the Internal Revenue Code of 1986, as amended (Code), and the Treasury Regulations promulgated thereunder (Regulations);
24. the Obligations must provide that no portion of the proceeds of the loan will be used, directly or indirectly, in a manner that would cause the Obligations to be "arbitrage bonds" within the meaning of § 148(a) of the Code and Regulations,

including to acquire or to replace funds which were used, directly or indirectly, to acquire Nonpurpose Investments (as defined in the Code and Regulations) which produce a yield materially higher than the yield on the TWDB's bonds that are issued to provide financing for the loan (Source Series Bonds), other than Nonpurpose Investments acquired with:

- a. proceeds of the TWDB's Source Series Bonds invested for a reasonable temporary period of up to three (3) years after the issue date of the Source Series Bonds until such proceeds are needed for the facilities to be financed;
- b. amounts invested in a bona fide debt service fund, within the meaning of § 1.148-1(b) of the Regulations; and
- c. amounts deposited in any reasonably required reserve or replacement fund to the extent such amounts do not exceed the least of maximum annual debt service on the Obligations, 125% of average annual debt service on the Obligations, or 10 percent of the stated principal amount (or, in the case of a discount, the issue price) of the Obligations;

25. the Obligations must include a provision requiring the County take all necessary steps to comply with the requirement that certain amounts earned on the investment of gross proceeds of the Obligations be rebated to the federal government in order to satisfy the requirements of § 148 of the Code. The Obligations must provide that the County will:

- a. account for all Gross Proceeds as defined in the Code and Regulations, (including all receipts, expenditures, and investments thereof) on its books of account separately and apart from all other funds (and receipts, expenditures, and investments thereof) and retain all records of such accounting for at least six years after the final Computation Date. The County may, however, to the extent permitted by law, commingle Gross Proceeds of its loan with other money of the County, provided that the County separately accounts for each receipt and expenditure of such Gross Proceeds and the obligations acquired therewith;
- b. calculate the Rebate Amount, as defined in the Code and Regulations, with respect to its loan, not less frequently than each Computation Date, in accordance with rules set forth in § 148(f) of the Code, § 1.148-3 of the Regulations, and the rulings thereunder. The County shall maintain a copy of such calculations for at least six years after the final Computation Date;
- c. as additional consideration for the making of the loan, and in order to induce the making of the loan by measures designed to ensure the excludability of the interest on the TWDB's Source Series Bonds from the gross income of the owners thereof for federal income tax purposes, pay to the United States the

amount described in paragraph (b) above within 30 days after each Computation Date;

- d. exercise reasonable diligence to assure that no errors are made in the calculations required by paragraph (b) and, if such error is made, to discover and promptly to correct such error within a reasonable amount of time thereafter, including payment to the United States of any interest and any penalty required by the Regulations;
26. the Obligations must include a provision prohibiting the County from taking any action that would cause the interest on the Obligations to be includable in gross income for federal income tax purposes;
27. the Obligations must provide that the County will not cause or permit the Obligations to be treated as “federally guaranteed” obligations within the meaning of § 149(b) of the Code;
28. the transcript must include a No Arbitrage Certificate or similar Federal Tax Certificate setting forth the County’s reasonable expectations regarding the use, expenditure and investment of the proceeds of the Obligations;
29. the transcript must include evidence that the information reporting requirements of § 149(e) of the Code will be satisfied. This requirement may be satisfied by filing an IRS Form 8038 with the Internal Revenue Service. In addition, the applicable completed IRS Form 8038 or other evidence that the information reporting requirements of § 149(e) have been satisfied must be provided to the Executive Administrator within fourteen (14) days of closing. The Executive Administrator may withhold the release of funds for failure to comply;
30. the Obligations must provide that neither the County nor a related party thereto will acquire any of the TWDB’s Source Series Bonds in an amount related to the amount of the Obligations to be acquired from the County by the TWDB;
31. the County’s federal tax certificate shall provide that the weighted average maturity of the Obligations purchased by the TWDB does not exceed 120% of the weighted average reasonably expected economic life of the Project;

EDAP Conditions:

32. the Grant Agreements and Obligations must include a provision that requires compliance with Texas Water Code § 16.356 that no revenues received from rates or fees collected from the water supply or wastewater system constructed in whole or in part from this commitment shall be used for any purposes other than utility purposes and that the annual financial statement prepared by the County under Local Government Code § 114.025 shall include a specific report on compliance with this condition;

33. prior to the release of funds provided for construction, the County must provide the TWDB with evidence satisfactory to the Executive Administrator that the County has received and will maintain a designation as an authorized agent of the Texas Commission on Environmental Quality, in compliance with Texas Health and Safety Code § 366.035;
34. the Grant Agreements and Obligations must include a provision that requires the County adequately enforce the authority granted to the County by Texas Water Code § 17.934(a)(2) to require and ensure that all property owners capable of receiving service from the system constructed with the funds provided by this resolution are actually connected to the sewer system constructed by these funds within a reasonable period of time not to exceed 90 days from the date the County notifies the property owner that service is available; provided, however, that the Executive Administrator may extend this time upon written request for good cause shown.

PROVIDED, however, the commitment is subject to the following special conditions:

Special Conditions:

35. prior to the release of funds for the costs of planning, engineering, architectural, legal, title, fiscal, or economic investigation, studies, surveys, or designs for that portion of a project that proposes surface water or groundwater development, the Executive Administrator must either issue a written finding that the County has the right to use the water that the project financed by the TWDB will provide or a written determination that a reasonable expectation exists that such a finding will be made before the release of funds for construction; and
36. prior to the release of construction funds for that portion of a project that proposes surface water or groundwater development, the Executive Administrator must have issued a written finding that the County has the right to use the water that the project financed by the TWDB will provide;
37. prior to closing, the County shall submit a 2022 audit, the form and substance of which is satisfactory to the Executive Administrator;
38. prior to closing, the County and the Executive Administrator shall execute Agreements that sets forth the terms and uses of the grant funds;
39. the Grant Agreements must include a provision stating that the County shall return any grant funds that are determined to be Surplus Funds in a manner determined by the Executive Administrator;
40. at the discretion of the Executive Administrator, the City shall complete an assessment by the TWDB of its financial, managerial, and technical capabilities prior to the release of funds for design;

- a. if the assessment identifies any deficiencies, the City, prior to the release of funds, must receive approval by the TWDB of a plan of action to address those deficiencies;
 - b. prior to the release of funds for construction, the City must demonstrate implementation of the plan of action in a manner satisfactory to the Executive Administrator;
41. prior to closing, the County shall submit an executed agreement between it and the City, the form and substance of which is satisfactory to the Executive Administrator;

APPROVED and ordered of record this 6th day of June, 2023.

TEXAS WATER DEVELOPMENT BOARD


Brooke T. Paup
Brooke T. Paup, Chairwoman

DATE SIGNED: 6/6/23

ATTEST:

Jeff Walker
Jeff Walker, Executive Administrator

**PRESIDIO
COUNTY
JUDGE
JOSE PORTILLO
JR.**



300 N. Highland Ave
P.O. Box 606
Marfa, TX 79843
432 729-4452 tel.
countyjudge@co.presidio.tx.us

October 4, 2023

VIA E-MAIL

Texas Water Development Board
Attn: Mireya Loewe
P.O. Box 13231
Austin, Texas 78711-3231
mireya.loewe@twdb.texas.gov

Re: Presidio County, Texas (the "County"); Project No. 10457; TWDB Resolution No. 23-044

Dear Ms. Loewe:

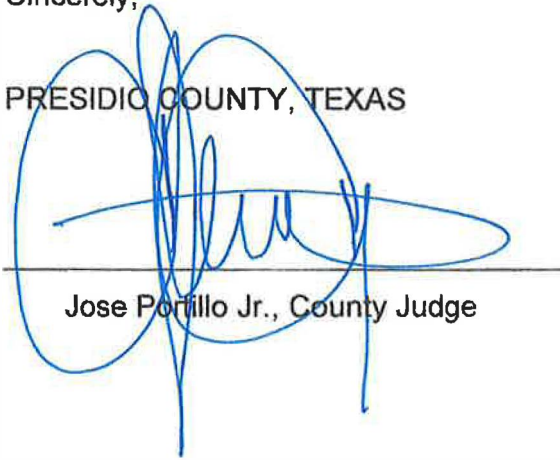
As discussed with members of the Texas Water Development Board staff, due to circumstances beyond the County's control, notice of the County's intention to issue the certificates of obligation that are being sold to the Texas Water Development Board ("TWDB") for the above referenced project was not timely published in a newspaper of general circulation in the County. State law requires such notice to be published at least forty-six days prior to a regular meeting at which the Commissioners Court considers the order authorizing the certificates of obligation. Although such notice has now been published, because of this unexpected delay, the Commissioners Court cannot consider the order authorizing the certificates of obligation until its December 13, 2023 meeting, which will not allow the County to meet TWDB deadlines and close the transaction by December 31, 2023. Therefore, on behalf of the County, I hereby respectfully request

an extension of the TWDB commitment until February 29, 2024, and further request that such extension be considered at the soonest practicable TWDB Board meeting. As we all know, these projects are of vital importance to the County and its residents and I am sure none of us would want this type of newspaper omission to prevent these projects from moving forward.

We appreciate all of TWDB's efforts to date to help better our community through this financial assistance package. If you need additional information, please do not hesitate to contact me or Paul Braden, the County's bond counsel, if you have any questions.

Sincerely,

PRESIDIO COUNTY, TEXAS



Jose Porfillo Jr., County Judge

cc: Michael Perez (michael.perez@twdb.texas.gov)
Arnoldo Rubio (arnoldo.rubio@twdb.texas.gov)
Trey Gerfers (tgerfers@pcuwcd.org)
Maria Urbina (maria.urbina@hilltopsecurities.com)
Paul Braden (paul.braden@nortonrosefulbright.com)