

No. 03-14-00501-CV

In the
Third Court of Appeals
at Austin

COUNTY OF LA SALLE,

Appellant,

v.

JOE WEBER, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR
OF THE TEXAS DEPARTMENT OF TRANSPORTATION;
THE TEXAS DEPARTMENT OF TRANSPORTATION;
TED HOUGHTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF
THE TEXAS TRANSPORTATION COMMISSION; AND
JEFF AUSTIN III, JEFF MOSELEY, FRED UNDERWOOD, AND
VICTOR VANDERGRUFF, IN THEIR OFFICIAL CAPACITIES AS
COMMISSIONERS OF THE TEXAS TRANSPORTATION COMMISSION,

Appellees.

On Appeal from the 353rd District Court
of Travis County, Texas

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This case involves an *ultra vires* claim and a parallel rules challenge. At a hearing held July 17, 2014, the defendants began by introducing evidence on their plea to the jurisdiction, 2RR10, and the trial court then received live testimony and exhibits from the plaintiff, accepting that evidence as related to sovereign immunity and to a pending request for temporary injunction. 2RR19. At the conclusion of the hearing, the trial court granted the plea to the jurisdiction, signing that final judgment on July 17, 2014. [CR335](#). A notice of appeal was filed on August 12, 2014. CR337-38.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may help the Court better understand the nature of the Transportation Infrastructure Fund grant program, which is of significance to county and state transportation planning.

ISSUES PRESENTED

This appeal concerns the Transportation Infrastructure Fund (TIF) grant program, under which \$225 million was dedicated by the Legislature for “projects located in areas of the state affected by increased oil and gas production.” TEX. TRANSP. CODE [§256.103\(a\)](#).

1. Does the County of La Salle have a valid *ultra vires* claim challenging whether actions under the TIF grant program are contrary to state law? That includes:
 - whether the law requires that these scarce funds be focused on areas of the state affected by increased oil and gas production;
 - whether the law requires that funds be conditioned on counties having made a new type of road-condition report for the previous year; and
 - whether the law requires that funds be conditioned on counties creating a valid tax zone under the statute.
2. The County of La Salle believes that TxDOT’s formal rules support its interpretation. If those rules instead are held to contradict the statute, should the rules challenge be revived?
3. Should the trial court have temporarily enjoined, or should this Court now enjoin, dissipation of the limited fund at the heart of this case to preserve subject-matter jurisdiction and protect the judiciary’s ultimate ability to order meaningful relief?

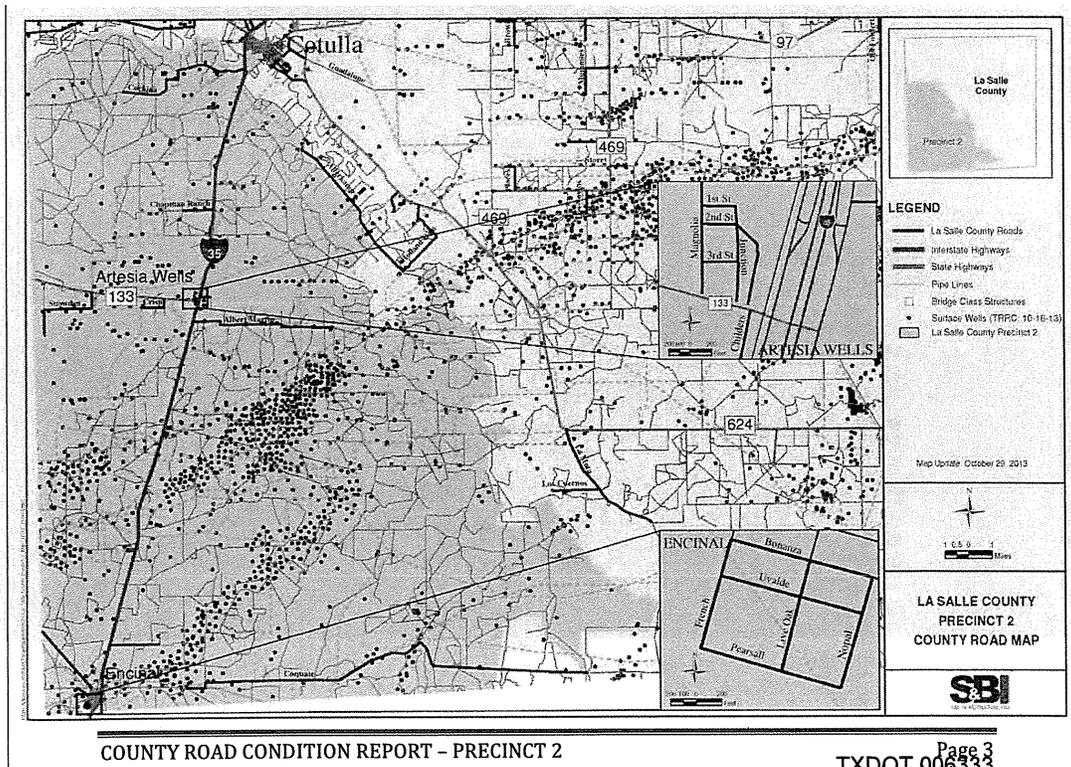
STATEMENT OF FACTS

A. Shale drilling comes to the Eagle Ford

Among Texas's 254 counties, the Top 10 list for oil and gas production is dominated by two regions. Six of the ten counties are in the Eagle Ford shale, with Karnes County ranked first and La Salle County ranked second. (2RR53). The other four are in the Permian Basin region. (2RR53)

The history of energy development in the Permian Basin region is long and well-documented. The Eagle Ford's starring role is much newer. In 2008, a new horizontal drilling technique was quietly introduced at one drilling site within the Eagle Ford area. (2RR54). This early drilling activity was "fairly stealth for a good year and half" before "the major development exploded in 2010." (2RR54-55). Within a couple of years, as it became clear how profitably these techniques could unlock the rich deposits in the Eagle Ford shale, the boom brought an incredible density of wells to these sparsely populated counties.

By the time of this grant application, La Salle County — with a census population hovering around 7000 — had seen the development of 2031 wells. (5RR4). As the maps included in the County's road-condition report illustrate, these well sites spread deep into the county road network:



(5RR166) (a map for one of La Salle County’s four precincts, showing well locations relative to the road network through part of the county).

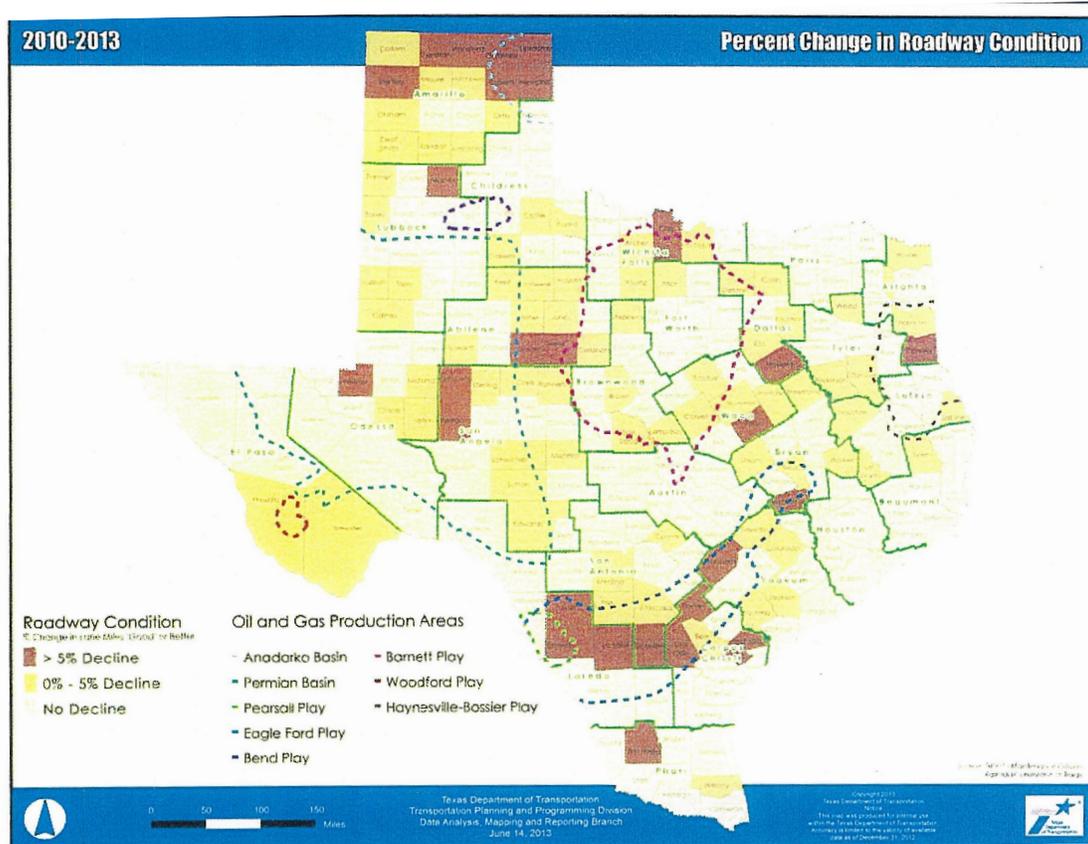
B. This concentration of horizontal drilling has done extraordinary damage to local infrastructure.

The techniques that unlocked the Eagle Ford shale were horizontal drilling and fracture stimulation (2RR54). Those are capital intensive, demanding thousands of heavy truck trips — per well. (8RR45). It “requires lots and lots of equipment, which in turn provides a unique stress on the county infrastructure.” (2RR54)

A study done by TxDOT has converted those heavy-truck trips into an equivalent number of car trips, concluding that drilling a single, typical

well of this type causes road wear equivalent to 8 million car trips, and that upkeep each year requires the equivalent of 2 million more. (2RR30-31); (8RR45: “Loaded Trucks Per Gas Well”) With thousands of wells in the Eagle Ford, each requiring the equivalent of millions of car trips, the strain was felt across the region. (5RR4: estimating that La Salle County had felt the equivalent of 20 billion car trips to drill these wells).

For its network of state roads, TxDOT has published studies of road degradation that correlate areas of extreme degradation with areas of energy development, including the Eagle Ford shale:



(8RR43). This TxDOT map shows road degradation is concentrated in the areas of increased oil and gas production. (2RR29) (TxDOT witness agreeing that this map points to such a connection).¹

For smaller roads, degradation has if anything been more severe. La Salle County's road-condition report for 2013 details the extensive degradation of its own road network. (5RR159–6RR367). The cost has been human as well as economic. County Judge Joel Rodriguez testified that in 2012 (the year prior to the enactment of the TIF Grant Fund), La Salle County “had over 400 accidents, 52 percent commercial related, versus other cities like San Antonio, Houston, and Dallas that may have a five to seven percent commercial-related accident ratio.” (2RR107) (referring to DPS statistics). “[T]hroughout the whole Eagle Ford area ... the amount of accidents continues to rise and escalate, and [the] mortality rate is really high.” (2RR124).

The Legislature took action to bring state funds to bear on the problem of road degradation in these energy-producing areas while still preserving the traditional role of counties in local road policy.

¹ This slide depicting “road condition decline in the various oil and gas production areas” was provided in connection with the TIF Grant Program “[t]o try to assist the counties in making their application for this grant program.” (2RR28)

C. In 2013, the Texas Legislature responded by creating and funding the TIF Grant Program

In Senate Bill 1747, the Legislature created the Transportation Infrastructure Fund (TIF) Grant Program, to which it appropriated (in a separate bill) an initial allocation of \$225 million.²

TxDOT's role is to administer the grant program. The statute commands it to “develop policies and procedures to administer a grant program under this subchapter to make grants to counties for transportation infrastructure projects located in areas of the state affected by increased oil and gas production. The department may adopt rules to implement this subchapter.” TEX. TRANSP. CODE [§256.103\(a\)](#).

The phrase “transportation infrastructure projects” is itself a defined term, limited to projects “intended to alleviate degradation caused by the exploration, development, or production of oil or gas.” *Id.* [§256.101\(2\)](#).

Counties that apply must have complied with the Legislature's command (added by the same piece of legislation) that they prepare a road-condition report that where possible they describe the specific cause of road degradation leading to the need for repair. *See id.* [§256.104\(a\)\(1\)](#); *id.* [§251.018](#) (new road-condition report requirements). An application is to

² This fund is a dedicated fund outside the general treasury. TEX. TRANSP. CODE [§256.102\(a\)](#); *see also id.* [§256.102\(b\)](#) (“money in the fund may be appropriated only ... for the purposes of this subchapter”).

include such a “report made by the county for the previous year.” *Id.* In addition, counties were required to submit plans for the “transportation infrastructure projects” for which they sought these dedicated funds. *Id.* §256.104(a)(1)(B). And as a condition for these state funds, they were required to create a County Energy Transportation Reinvestment Zone (CETRZ) to capture future property value increases near these projects — and to dedicate those future local tax revenues to similar future projects. *Id.* §256.104(a)(2); *id.* §222.1071(b)(1).

The statute provides that “grants distributed” in a fiscal year should be “allocated among counties” under a four-part formula based on weight-tolerance permits, oil-and-gas production taxes, well completions, and the volume of oil-and-gas waste injected. TEX. TRANSP. CODE §256.103(b).

D. TxDOT and its officials take initial steps toward focusing the TIF Grant Program on the most affected counties

As TxDOT moved forward with its internal rule making, it also provided some guidance to counties about what would be required of them. TxDOT described the legislation this way: “Senate Bill 1747: ... Creates a grant program for county roads in the energy development areas.” (8RR37); *see also* (2RR27: discussing this exhibit, which was “[t]o try to assist the counties in making their application for this grant

program”). This TxDOT presentation also described for counties some of the new CETRZ requirements. (8RR40)

Meanwhile, TxDOT officials and other interested public officials were meeting with counties. In a meeting in October 2013 with the county judge for La Salle County, a TxDOT official disclosed that they thought only a handful of counties in the Eagle Ford and West Texas regions might be able to timely meet all the requirements. (2RR108-09)

In November 2013, TxDOT formally adopted rules recognizing that only counties “in an area affected by increased oil and gas production” would be eligible for grants:

To be eligible for a grant from the fund, a county must:

- (1) be entirely or partially in an area affected by increased oil and gas production;...

43 TEX. ADMIN. CODE [§15.182](#). The rules provide that grant funds will be available “to each eligible county that submits a valid application” under the rules. *Id.* [§15.184](#).

Consistent with that reading of the law, TxDOT distributed county application forms with increased energy production as the first eligibility requirement: “County is entirely or partially in an area affected by increased oil and gas production.” (2RR25: discussing [PX27 at 8RR35](#)).

E. After the agency’s formal rulemaking, TxDOT comes under pressure to distribute funds more widely

TxDOT originally scheduled the application period for February 7, 2014 but was persuaded to delay that application period until March 7, 2014. (2RR112–13). It explained the delay as being influenced by “several elected officials,” saying the delay’s goal was “to allow each county more time to satisfy the eligibility requirements of SB 1747,” including both establishing a CETRZ and completion of a road-condition report. (8RR110–11: letter to counties dated January 30, 2014).

TxDOT’s formal notice to counties about the program explains that it was designed “to help repair or improve county roads in areas affected by energy-sector activities.” (8RR112; 8RR110). As required by rule, the notice also provided each county with a computation of the bare minimum distribution that an eligible county with their characteristics would receive, an artificial figure computed as if all counties were eligible and submitted a valid application. (2RR128); *see also* 43 TEX. ADMIN. CODE §15.187(b)(3) (requiring this precise figure be included in the formal notice to county judges that TxDOT will be accepting applications for the grant program).

F. TxDOT and its officials refuse to limit eligibility and instead award funds to all 191 counties that applied

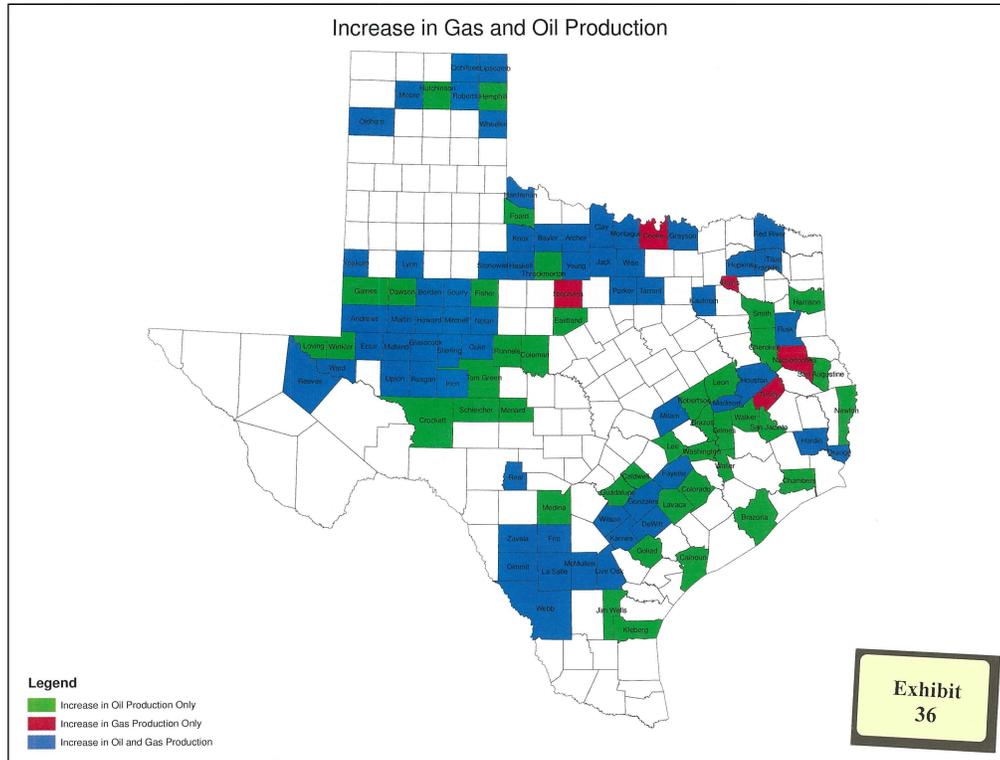
In all, 191 counties applied for the program. TxDOT approved the applications of all 191. (2RR21). Mark A. Marek, the director of engineering operations and the person who oversees the office that handled the TIF Grant Program application process, testified on behalf of TxDOT. (2RR20–21). His testimony confirms what happened.

1. “located in areas of the state affected by increased oil and gas production”

Marek confirmed that TxDOT took no steps to assess whether a county was in an area affected by increased oil and gas production. (2RR25). TxDOT was aware that some of the counties not only lacked an increase in production, they had “zero oil and gas production.” (2RR25)

Charlie Graham, a petroleum engineer, testified about the public data showing which areas of the state experienced an increase in oil and gas production and which did not. Of the 191 applicant counties, 15 had no oil and gas production in 2012 (the last full year before this statute was enacted). 2RR60–61. That same year, almost half of the applicant counties (87/191) had a decrease in oil production, while more than half (123/191) had a decrease in gas production. (RR60–62).

Mapping just the counties that had an increase in production shows that energy production has been geographically concentrated:



(8RR50: exhibit prepared by Mr. Graham). TxDOT did not limit grants to the areas of the state feeling this increase in oil and gas production, instead considering “every county in the state” eligible. (2RR24).

2. “road condition report described by Section 251.018 made by the county for the previous year”

The bill that created the TIF Grant Program added a new section requiring that a county’s “road condition report ... must include the primary cause of any road, culvert, or bridge degradation if reasonably ascertained.” TEX. TRANSP. CODE §251.018 (added by Senate Bill 1747).

Marek testified that TxDOT’s review of grant applications did not consider whether any counties actually satisfied this substantive requirement. (2RR36–37).

3. “establishing a county energy transportation reinvestment zone in the county”

The bill also created a new kind of “reinvestment zone” focused on energy needs, the County Energy Transportation Reinvestment Zone (CETRZ). Marek testified that TxDOT made no efforts to evaluate whether any county’s reinvestment zone (CETRZ) meets even the basic requirements for a reinvestment zone, such as including at least some taxable property the incremental value of which will be captured and dedicated to future transportation needs. (2RR32–33: aware that some counties proposed zones that included only non-taxable property, such as road right of way, state buildings, or university property).

G. This Litigation

This suit challenges how TxDOT officials are acting in regard to this program. (CR4-15). The State Defendants have argued that Texas courts lack jurisdiction to decide these questions. (CR95-103). The live petition makes clear that the County does not seek direct injunctive relief against a

state agency on its *ultra vires* claim but instead seeks that relief against the officials. (CR270-72).

The trial court granted some limited discovery, ordering that the State Defendants turn over the applications filed by all counties in electronic form.³ (CR256). At the ultimate hearing, the State Defendants began by introducing a copy of that bundle of applications into the record as a computer-readable DVD. (2RR10). La Salle County offered documentary evidence and testimony from five witnesses — a representative of TxDOT, a petroleum engineer, a witness regarding road reports, a witness regarding energy zones, and the County Judge for La Salle County.

The trial court granted the plea, and without limiting its grounds for doing so, stated its belief that an interpretation of the law that asked TxDOT to determine whether a county was eligible based on whether it was located in an area of increasing oil and gas production was too unreasonable to even be considered one possible valid reading. (2RR135-36). This appeal follows.

³ As suit was being filed, TxDOT refused an open-records request to obtain copies of these same applications, *see* 8RR106 & 108, necessitating this discovery.

SUMMARY OF THE ARGUMENT

Are state officials required to adhere to the conditions that the Legislature places on the use of public funds? That is the essence of this dispute over the Transportation Infrastructure Fund (TIF), a dedicated fund into which the Legislature deposited \$225 million in 2013.

The fund is focused on the road degradation caused by oil and gas production. The same sentence that authorizes TxDOT to oversee the program includes the phrase “areas of the state affected by an increase and oil and gas production.”⁴ And the Legislature defined a key phrase tying together the whole statute (“transportation infrastructure project”) to be clear that it was focused solely on those “intended to alleviate degradation caused by the exploration, development, or production of oil or gas.”⁵

Nonetheless, TxDOT approved grants to all 191 counties that applied for funds — including some that TxDOT officials knew had no oil and gas production whatsoever. TxDOT also did not enforce the statutory condition that applicant counties have submitted a particular type of “road condition report” for the previous year, nor did it enforce the statutory condition that applicant counties have created a valid reinvestment zone.

⁴ TEX. TRANSP. CODE §256.103(a).

⁵ *Id.* §256.101(2) (narrow definition of “transportation infrastructure project”).

TxDOT's litigation position is somewhat remarkable. Rather than claim that this broad dispersal of these funds to every end of the state was its own agency decision, it blamed the Legislature. According to TxDOT, this statute — which is focused on oil and gas, from its main provisions down to its definitions — actually prohibited TxDOT from screening whether counties met these conditions.

What, then, would be needed to instruct an agency to respect the conditions the Legislature has attached to state funds? The TIF grant program has numerous, detailed conditions that support the Legislature's objectives. TxDOT and its officials are responsible for implementing the grant program. Their unapologetic refusal to enforce the grant program's explicit conditions warrants *ultra vires* scrutiny. The Court should reverse the plea to the jurisdiction so these claims can proceed.

STANDARD OF REVIEW

To the extent the plea argues for a particular statutory construction, the Court should assess whether the County's allegations describe conduct that would violate state law. That assessment can usually be made on the pleadings. *Tex. Dep't of Parks & Wildlife v Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Pleadings should be construed "liberally in favor of the plaintiffs and [the court should] look to the pleaders' intent." *Id.* Only

when the pleadings “affirmatively negate the existence of jurisdiction” should the plea be granted without leave to amend to correct any deficiencies identified by the court. *Id.* at 227; *see also Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839-40 (Tex. 2007) (approving a court of appeals holding that a litigant can generally “stand on his pleadings ... until a court determines the plea is meritorious” before being made to amend).

To the extent a plea challenges facts related to jurisdictional matters, the Court’s review “mirrors that of a traditional summary judgment motion,” placing the initial burden on the defendant “to meet the summary judgment proof standard for its assertion that the trial court lacks jurisdiction.” *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012) (citing *Miranda*, 133 S.W.3d at 228). Only if the government carries that burden would the plaintiff be required to show that some fact dispute exists. *Id.* “If a fact issue exists, the trial court should deny the plea.” *Id.*

ARGUMENT

By limiting which counties can receive TIF Grant Program funds, Senate Bill 1747 sets an outer bound for how the state agency administering that program (TxDOT) can do so faithfully to the text. TxDOT disagrees, saying that it may simply ignore the statutory conditions on grant funds.

TxDOT’s interpretation would render much of Senate Bill 1747 an effective nullity, undermining the balance struck by the Legislature.

I. What the Statute Means

A. The statute limits which counties can receive funds to focus on a specific problem: road degradation caused by new energy production

TxDOT is charged with implementing this grant program according to the Legislature’s directives, with authority to issue rules to serve those ends. TEX. TRANSP. CODE §256.103(a). The statute creates a dedicated fund, from which any other distribution is prohibited. *Id.* §256.102(b).

1. The plain text attaches conditions to the funds.

The statute focuses on areas of increased oil and gas production. The directive given to TxDOT is to administer the program “to make grants to counties for transportation infrastructure projects located in areas of the state affected by **increased** oil and gas production.” TEX. TRANSP. CODE [§256.103\(a\)](#) (emphasis added).

Lest there be any confusion, the statute defines the term “transportation infrastructure projects” as those projects intended to “alleviate degradation caused by the exploration, development, or production of oil or gas.” *Id.* [§256.101\(2\)](#). This narrowly defined term

appears in the command to TxDOT. *Id.* §256.103(a). The same term describes the type of project for which counties are permitted to ask for funding in their applications. *Id.* §256.104(a)(1)(B) (“provide a list of transportation infrastructure projects to be funded”). And the same term appears again in a provision commanding TxDOT to “seek other potential sources of funding” before approving a grant, so as to “maximize resources for the transportation infrastructure projects to be funded by grants under this subchapter.” *Id.* §256.104(b)(1). By using a term narrowly defined to focus on the road degradation caused by energy production, the Legislature again communicated that is the program’s focus. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 442 (Tex. 2009) (using the Legislature’s definition, even if it departs from ordinary meaning).

The statute attaches some conditions to the grant funds to further that purpose: using scarce state funds to alleviate road degradation caused by energy production. First, applicant counties must be in compliance with the Legislature’s requirement that road condition reports detail the causes of road degradation. *See id.* §256.104(a). Road condition reports have long been created by counties on a fixed schedule, with specific content and legal formalities. Senate Bill 1747 added a new wrinkle—under Section 251.018, each report “must include the primary cause of any road, culvert, or bridge degradation is reasonably ascertained.” *Id.* §251.018. As a strong

incentive for counties to comply, the only counties who can apply for TIF grant funds are those who made a compliant report for “the previous year.” *Id.* §256.104(a)(1). Moreover, by requiring that a copy of the report be submitted with a TIF application, *see id.* §256.104(a)(1), the Legislature provided TxDOT with a ready tool to verify that a county’s listed “transportation infrastructure projects” actually do aim at the problem of road degradation caused by energy production.

Second, applicant counties must create at least one county energy transportation reinvestment zone (CETRZ), which sets aside the entire increase in property value within its bounds for use in related projects. *Id.* §256.104(a); *see also id.* §222.1071(b) & (c)(1) (creation of zones within county for which “all of the captured appraised value of real property [is dedicated] to transportation infrastructure projects”). Once created, the county can use that tax increment to fund “one or more transportation infrastructure projects located within the zone.” *Id.* §222.1071(i)(1). The CETRZ thus amplifies the impact TIF dollars. While the TIF grants of state funds focus on current needs, the required CETRZ creates a future pool of local dollars for the same kinds of projects.

Senate Bill 1747 includes these conditions as carrots and sticks. Yet TxDOT’s litigation position is that these incentives are illusory because, in

its view, the law forbids it from enforcing these conditions. *See* CR249. That would reduce the careful legislative design to an empty exercise.

2. TxDOT's reading would lead to surplusage.

Courts should not adopt an interpretation that renders statutory language meaningless. *Livingston v. Beeman*, 408 S.W.3d 566, 574 (Tex. App.—Austin 2013, pet. filed) (“We likewise attempt to give effect to all of a statute’s words and avoid treating any language as surplusage if reasonable and possible.”) (*citing Mark’s v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010)); TEX. GOV’T CODE §311.021(2).

TxDOT asks the Court to do exactly that. Consider this hypothetical: a county applies that (1) has no oil and gas production at all; (2) chose not to file a formal road condition report for the prior year; and (3) proposes to create a CETRZ that includes no taxable property at all. In TxDOT’s view, none of these failings matters.

If TxDOT were right, this would have been a much shorter statute. Focusing on Section 256.103, if the Legislature truly meant that all counties were eligible, there would have been no need to say “located in areas of the state affected by increased oil and gas production.” TEX. TRANSP. CODE §256.103(a). Within that clause, TxDOT would also deny meaning to the phrase “**increased** oil and gas production”. When the

Legislature uses this type of qualifier, it “suggests that the Legislature at least contemplated the existence” of other possibilities. *Entergy*, 282 S.W. 3d at 441-42. Here, the Legislature surely considered the possibility that some areas of the state were not experiencing “increased” production but instead had “flat,” “decreasing,” or even “no” production. A court should not interpret a statute so as to render such a qualifier meaningless. *Id.* (citing *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000) and *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995)).

The Legislature also made clear that grants would be available to some, but not all, counties when it used the phrase “located in **areas of** the state.” TEX. TRANSP. CODE §256.103(a). In TxDOT’s view, that language is surplus. And TxDOT’s view also disregards the specific definition in the statute for “transportation infrastructure projects,” which is limited to road degradation from energy production.

Instead of rendering these interlocking provisions a nullity, the Court should presume that the Legislature chose words purposely. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (“We also presume the Legislature included each word in the statute for a purpose, and that words not included were purposely omitted.”). The text and structure of this law directs that grants go to some but not all parts of the state.

3. The context in which this law was enacted and the consequences of TxDOT's alternate construction support the County's interpretation.

As the Legislature's design recognizes, oil and gas production shifts with evolving technology and the fluctuating energy markets. Today, the Eagle Ford Shale and Permian Basin regions are experiencing an incredible boom. About six years ago, more urban counties over the Barnett Shale were experiencing their own boom. A decade from now, completely different areas of Texas may have their own road networks crushed by the load of increased production activity. The statute—given its plain meaning—will be able to focus scarce funds where the new energy production is.

TxDOT's reading is inconsistent with the object the legislature sought to obtain as well as the circumstances of this law's enactment. TEX. GOV'T CODE §311.023(1) & (2). It also leads to consequences that defeat the purpose of creating a special grant fund. *Id.* §311.023(5). Here, for example, TxDOT's interpretation threatens to fragment a \$225 million appropriation into 191 shards, with the resulting pieces — even the largest, such as the \$6.4 million for La Salle County, the #2 production county — too small to meaningfully address the problem. As every local voter knows, roads are expensive, and slicing road funds into such thin slices defeats the larger purpose. Reading the TIF Grant Program to require that TxDOT disperse trivially-sized grants to dozens of counties statewide with

declining or even zero energy production — siphoning those same funds from the concentrated problem areas that motivated the law — is contrary to the statute’s text, to its structure, and to its purpose.

B. Agency deference supports the County’s view.

The doctrine of agency deference is a rule of statutory construction that applies, if at all, to an agency’s formally promulgated rules, not to its litigation position. Only “formal opinions after formal proceedings” might be entitled to such deference, not “documents like the Department’s [litigation filings].” *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006); *cf. Tex. Dep’t of Ins. v. Am. Nat’l Ins. Co.*, 410 S.W.3d 843, 854 (Tex. 2012) (deferring when an agency “has promulgated a rule” dealing with the precise ambiguity); *see also Critical Health Connection, Inc. v. Tex. Workforce Comm’n*, 338 S.W.3d 758, 761 (Tex. App.—Austin 2011, no pet.) (echoing requirement that deference could only apply “to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief]”) (alteration in original).

Here, the agency’s formal rules agree with the County’s position that a county’s geographic connection to areas of increased oil and gas production is indeed a **condition of eligibility**:

§15.182. Eligibility. To be eligible for a grant from the fund, a **county must:**

- > (1) be entirely or partially in an area affected by increased oil and gas production;
- > (2) create a county energy transportation reinvestment zone under Transportation Code, §222.1071; and
- > (3) create an advisory board under Transportation Code, §222.1072 for the county transportation reinvestment zone.

43 TEX. ADMIN. CODE §15.182 (emphasis added); *see also id.* §15.184(a) (awards are made to “eligible counties” that submit “valid applications”); *id.* §15.188(b)-(c) (valid applications must include the county’s road condition report for the preceding year). Those rules are the last formally adopted statement of the agency’s view, and they confirm the interpretation advanced by the County in this litigation.

The way the TxDOT rules implemented the allocation formula underscore that, when it adopted those rules, the agency interpreted the statute as requiring a meaningful initial screen for county eligibility and application validity. Under §15.184(a), grant awards will be made only to “eligible counties” that have submitted “valid applications.” 43 TEX. ADMIN. CODE §15.184(a). Only counties that survive this screen are included in the allocation formula, which use that set of counties to define the baseline for computing awards. *Id.* §15.185. TxDOT’s interpretation of that allocation formula in its rules was correct — the funds are to be split only among a subset of Texas counties, not all Texas counties. That

TxDOT might wish a different outcome now does not rob its formal rules of their force in helping the Court understand the statute.

The courts do not yet have the benefit of the agency’s view of §15.184. Instead, TxDOT has taken the view that its officials had **no discretion** under the statute to make an initial screen of counties, such as that rule (and the statute) requires them to do. *But see* 43 TEX. ADMIN. CODE §15.184 (only “eligible counties” with “valid applications” can receive funds). When an agency argues that its own rules contradict a key feature of the statute, it borders on confessing to judgment that the rule is invalid under Section 2001.038. *See* TEX. GOV’T CODE §2001.038. Whether under the rubric of the County’s *ultra vires* claim or the Section 2001.038 claim it pleaded in the alternative, the practical outcome is the same. TxDOT and its officials are acting outside their legal authority. *See Tex. State Dep’t of Health Servs. v. Balquinta*, 429 S.W.3d 726, 749-51 (Tex. App. —Austin 2014, pet. filed) (explaining that where a rule is held to contradict a statute, “it would follow that any further enforcement of such provisions would be ultra vires of that same statutory authority”).

C. Section 256.103 emerged from a legislative compromise that should be honored.

The language about “increased oil and gas production” emerged from a Conference Committee that resolved the divergent approaches taken by

the Senate and the House. *See* Conference Committee Report, Tex. SB1747, 83rd Leg., R.S. (2013) (issued May 25, 2013).⁶

The Senate-passed version had included grants to counties, but it had no language focusing on specific areas of the state. Instead, the Senate version would have provided grants “for transportation infrastructure projects in a county containing at least one county energy transportation reinvestment zone.” Engrossed Bill, Tex. SB1747, 83rd Leg., R.S. (2013) (Apr. 23, 2013). Across all such counties, funds would be allocated based on a three-factor formula over which TxDOT would have no discretion. In spreading funds to any willing applicant, the pre-conference Senate version approaches what TxDOT contends the bill means today.

The House, however, refused to concur and instead passed a version focusing on “increased ... energy production,” while replacing the county-level allocation formula with non-exclusive “criteria for the awarding of grants” that TxDOT could employ to choose individual projects from across the state, on state or county roads. House Alternative Bill, Tex. SB1747, 83rd Leg., R.S. (2013) (May 22, 2013) (from §256.103(a)). The House would have asked TxDOT to “develop criteria” for choosing among specific projects, criteria required to include levels of energy production,

⁶ The committee report includes a chart showing some differences between the Senate, House, and final bill. *See* <http://www.lrl.state.tx.us/scanned/83ccrs/sb1747.pdf>

safety needs, traffic levels, and other factors such as “geographic distribution of grant funds.” *Id.* (from §256.103(c)).

What emerged from Conference Committee blended aspects of both versions. The Senate prevailed in keeping the focus on county roads and in retaining a fixed formula for funds to be allocated among participating counties. But the House prevailed in keeping language in the final bill that specified that the grant program was for “areas of the state affected by increased oil and gas production.” TEX. TRANSP. CODE §256.103(a).

TxDOT’s litigation position would adhere to the Senate approach, which failed to pass the House and never became Texas law. Instead, the actual text enacted by both houses requires the grant program to focus on areas of the state affected by increased oil and gas production.

D. Legislative history also backs up the County’s view

TxDOT has invoked some legislative history to support its view. *E.g.*, CR219 n.1 (collecting testimony). On examination, however, it has cited to debate about prior versions of the bill that were later rejected by one house or the other, before the final language emerged.

By contrast, the legislative history that was created about the final bill supports the County’s view that the intent was to target the areas that had suffered the most. For example, the Senate Research Center’s analysis of

the final version describes the goal as creating “a sustainable long-term plan dedicated to those areas” that had felt these effects:

The accelerated **road degradation in several of the counties throughout the state** in recent years has been attributed to the unexpected increased vehicle traffic due to the exploration of oil/gas. These roads were not intended to sustain the heavy trucks that are used in this process. County road and bridge budgets are not sufficiently funded to routinely maintain the roads, and counties are left with severe damage directly related to the energy exploration and production. The county roads **in these areas** need an immediate solution and a sustainable long-term plan **dedicated to those areas** that have created the surplus our state has benefited from.

Senate Research Center, Bill Analysis, SB1747, 83rd Leg. R.S. (2013)

(emphasis added) (available at <http://www.legis.state.tx.us/tlodocs/83R/analysis/html/SB01747F.htm>).

At a later oversight hearing in the House, several members of this same Legislature expressed surprise that TxDOT had announced that it would spread these scarce funds so widely. One representative candidly observed, “I was kind of surprised that my county was being included in any type of money coming from this when that’s not what I thought when it was presented before the Legislature, and surely not afterwards ... how it was rolled out was a little different than I expected.” Hearing, Select

Committee on Transportation Funding, Expenditures & Finance, 83rd
Leg. R.S. (May 6, 2014) (this statement begins around the 5:46:18 mark).⁷

An exchange between committee members at the same hearing further
described how TxDOT's approach was an unexpected one:

MEMBER: I was surprised. You know, we had some in my
county.... having a whole lot more exploration than I even
thought we were in my community, which isn't as heavy as it
is elsewhere. I think we all thought Mr. Chairman, that it was
all going to go to certain Eagle...

CHAIRMAN: I did, too. Yeah.

ANOTHER VOICE: Yeah.

MEMBER: ... Ford Shale, and Permian Basin. I was
perfectly fine with that, even though the folks up North
Texas said, 'what do you mean, they didn't help us out when
we had to fix our roads.' I mean, we've been in this for
awhile. It was just so dramatic on those roads...

CHAIRMAN: Had we not been on the list, you wouldn't
have heard us complain.

Id.

Legislative history can be an imprecise tool to discern fine details of a
statute, but here it at least confirms that some legislature could reasonably
have set out to design a grant program focused on only certain areas of the

⁷ The hearing video is available at: <http://www.house.state.tx.us/video-audio/committee-broadcasts/83/> (last visited December 22, 2014).

state.⁸ The district court, without specifying precisely what it thought the statute meant, rejected that as being so unreasonable a reading of this statute that it could not even plausibly be what the Legislature meant. 2RR135-36 (rejecting the view because it “does not make sense to me.”). This reading made sense, however, to several members of the Legislature. The County contends that, based on the plain statutory text, this same view is unambiguously correct. *See* Part I.A. But at the very least, it is one reasonable interpretation — and one that is supported by canons of statutory construction such as agency deference, avoiding surplusage, and consistency with the legislative history related to the final bill.

**

The statute focuses scarce grant funds on areas experiencing road degradation from an increase in oil and gas production. Given the text and structure of the law, that is the only reasonable construction. And to the extent there is any doubt, other signals of legislative intent, including even the doctrine of agency deference, confirm that this reading is correct.

⁸ Although these are technically post-enactment statements, they are by members of the same Legislature that passed the bill, made during the same session, and made as part of a formal legislative function (rather than in a court brief or whispered to a reporter). If any post-enactment statements have weight, these should.

II. The *Ultra Vires* Claims Should Not Have Been Dismissed on a Plea to the Jurisdiction.

A. The evidence confirms that the State Defendants did not follow the statute

If the Court accepts the County’s statutory construction, the plea should be denied if the State Defendants’ alleged conduct exceeds those bounds. The pleadings allege that it does. *See* CR264-71. To the extent this is a factual question, the evidence developed at the hearing far exceeds the minimum threshold of proof to survive a plea on the question. *Tex. Dep’t of Parks & Wildlife v Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004) (summary-judgment standards and burdens apply). Here, the State Defendants concede the key facts about their conduct:

- They did not exclude counties not “located in an area of the state affected by increased oil and gas production” (2RR24-25);
- they did not exclude counties who failed to provide the kind of enhanced road-condition report specified as a condition for funds (2RR36-37); and
- they did not exclude counties who failed to comply with the requirement that they create a county energy transportation reinvestment zone as specified as a condition for funds (2RR32-33).

This presents a classic *ultra vires* situation. Claims alleging that a state official has acted beyond his or her legal authority are *ultra vires* claims that fall outside of the State’s umbrella of sovereign immunity and, thus, are

within the subject-matter jurisdiction of the courts. *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945).

And although not strictly necessary to decide the plea, the record developed at the hearing confirms that some counties *should* be excluded from receiving grant funds if the State Defendants were following the statute. For example:

- many of the counties who applied had either declining production or no oil and gas production at all (2RR50; 2RR60-62);
- some counties submitted “road condition reports” that failed baseline requirements for such reports or were for a time period other than required by the statute (2RR82–83 & 2RR86); and
- some counties included CETRZ paperwork that on its face shows there is no taxable property at all, failed to identify the taxable area, or otherwise failed to meet the law (2RR92-94).

The district court should not have dismissed the *ultra vires* claims.

B. Valid *ultra vires* remedies are available

The TIF Grant Program operates as a zero-sum fund. Each county added to the approved list reduces the size of every other county’s potential award. 2RR23 (TxDOT witness).

In the district court, the State Defendants argued that no relief could ever be possible after the initial grant allocations were announced. CR230. In effect, they argue that once they have announced an intention *how* they

intend to violate the law, it is too late. But TxDOT’s own program rules, and the record developed at the hearing, shows that relief is still possible. Counties must receive approval on a project-by-project basis to begin construction. 2RR41 (testimony confirming that no reimbursement will be provided for projects that have not obtained approval for that specific project on Certification Form 2); 8RR10 (program guidance regarding this “Approval to Commence Construction”). An injunction could, for example, prevent TxDOT officials from approving new projects in any county that should have been ineligible, thus preserving more grant funds to be allocated properly under the statute.

Unlike suits for money damages, *ultra vires* claims help defend the integrity of the public treasury and legislative control over scarce resources: “extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring those resources are spent as intended.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). This kind of remedy — ordering state officials to stop spending scarce resources in a way inconsistent with legislative command — is a proper form of *ultra vires* relief. *Id.* at 376 (noting that the Court’s approach “ensures that statutes specifically directing payment, like any other statute, can be judicially enforced going forward”); *see also Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914, 919-21 (Tex.

App.—Austin 2010, pet. denied) (confirming that the remedies available to a court include enjoining illegal future expenditures).

III. Injunctive Relief Should Be Issued on Appeal.

For the reasons just explained, the trial court undoubtedly had subject-matter jurisdiction to order meaningful *ultra vires* relief. But the passage of time, and the ongoing depletion of the TIF Grant Fund, may yet take that power from the appellate courts.⁹

The TIF Grant Fund operates, for any given grant cycle, as a limited fund. 2RR23 (explaining that each county approved necessarily reduces the funds available to each other county); *see also* 43 TEX. ADMIN. CODE §§15.185 & 15.186 (formula). Payments made from the fund go from one government entity to another, so any attempt to roll them back implicates immunity at both ends. As each increment of money leaves the fund, the courts lose a corresponding measure of power to order meaningful relief.

Courts of appeals have power to issue injunctive relief to protect their jurisdiction. *E.g., In re Tex. Ass'n of Sports Officials*, 2011 Tex. App. LEXIS 3455, at 4, No. 03–11–00269–CV (Tex. App.—Austin May 6, 2011) (orig. proceeding); *see also* TEX. GOV'T CODE §22.221(a). “No principle is better settled than that a court will protect its jurisdiction by preserving the

⁹ The trial court was asked to issue a temporary injunction but dismissed all claims before reaching that question. *See* 2RR19 (accepting evidence for both purposes).

subject matter of the litigation in order to make its decrees effective.”

Dawson v. First Nat’l Bank, 417 S.W.2d 652, 653 (Tex. App.—Tyler 1967, no writ) (per curiam).

The situation here — where the subject-matter in dispute may be transferred away from judicial reach during the appeal— can support an appellate injunction to preserve jurisdiction. For example, in one of the leading cases, the Texas Supreme Court affirmed a court of appeals that had enjoined a city from transferring a disputed item to another person, from whom it might be impractical to recover. *Dallas v. Wright*, 36 S.W.2d 973, 975–76 (1931). That plaintiff sought an order against the city to cancel the item (a tax certificate), and “in order for the court to make an order of cancellation effective, it was necessary that the city should either voluntarily remain in possession ... or be enjoined from disposing of it, so that the certificate ... and the holder thereof, might be and remain subject to the orders of the court.” *Id.* at 196. To the extent there are similar concerns here, injunctive relief can preserve jurisdiction.

These injunctions have most commonly been issued in private disputes over assets. But the jurisdictional need is the same: without relief, the subject matter of the suit may escape review. *E.g.*, *In re Shields*, 190 S.W.3d 717, 719 (Tex. App.—Dallas 2005) (orig. proceeding) (enjoining the sale of a home); *In re Health Discovery Corp.*, 148 S.W.3d 163, 165 (Tex. App.—

Waco 2004) (orig. proceeding) (enjoining the sale of shares). This Court has also recognized the need for injunctive relief when practical concerns, as here, could make a later remedy hollow. *In re Tex. Ass'n of Sports Officials*, 2011 Tex. App. LEXIS 3455, at 4, No. 03-11-00269-CV (Tex. App.—Austin May 6, 2011) (orig. proceeding) (issuing injunction to stop UIL from taking actions that might effectively end a competing organization of sports officials as a viable entity).

Appellate courts issuing these jurisdiction-preserving injunctions do not usually discuss equitable considerations.¹⁰ Nonetheless, out of respect for the importance of the correct law being applied to this fund, La Salle County expects that this Court might wait to issue an injunction until it has reached some initial evaluation of the merits. If the Court does agree that

¹⁰ The State Defendants suggested below that temporary relief would have been pointless because the courts should have no discretion to limit the effect of supersedeas. *See* CR320-22 (answering this argument). That echoes the contention just rejected by the Texas Supreme Court in *In re State Board for Educator Certification*, where it reasoned that “[b]oundless entitlement to supersede adverse non-money judgments ... would vest unchecked power in the executive branch, at considerable expense to the judicial branch, not to mention the wider public we both serve.” No. 13-0537, slip op. at 10 (Tex. Dec. 19, 2014). That this appeal challenges whether state officials are following the law makes the judicial role more important, not less.

the conduct here is *ultra vires*, it should immediately order an injunction to preserve the TIF Grant Fund for the remainder of the appeal.¹¹

¹¹ If this Court's decision terminated the appellate process, this injunction might not be necessary. But that merely begins a unpredictable timetable of rehearings, petitions for review, and waiting for an appellate mandate. The expectation is that a complex or important case can spend an additional year or more within the appellate system. Failure to issue an injunction while this court still has control over the timetable thus risks the complete loss of jurisdiction for Texas courts.

PRAYER

The Court should reverse the trial court's judgment of dismissal and remand for merits proceedings on these claims. The Court should also issue a writ of injunction to protect jurisdiction over this controversy until the appellate mandate returns it to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 22, 2014, this **Appellant's Brief** was served on counsel under Texas Rule of Appellate Procedure 9.5(b):

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CERTIFICATE OF COMPLIANCE

This brief complies with Texas Rules of Appellate Procedure 9.4 because the sections covered by the rule contain no more than 7641 words. The font used in the body of the brief is no smaller than 14 points, and the font used in the footnotes is no smaller than 12 points.

/s/ Don Cruse

Don Cruse

APPENDIX

Tab A

**Order of Dismissal
(CR335)**

Tab B

Texas Transportation Code (excerpts)

Excerpts from the Texas Transportation Code

§251.018. Road Reports.

A road condition report made by a county that is operating under a system of administering county roads under Chapter 252 or a special law, including a report made under Section 251.005, must include the primary cause of any road, culvert, or bridge degradation if reasonably ascertained.

§256.101. Definitions.

In this subchapter:

- (1) "Fund" means the transportation infrastructure fund established under this subchapter.
- (2) "Transportation infrastructure project" means the planning for, construction of, reconstruction of, or maintenance of transportation infrastructure, including roads, bridges, and culverts, intended to alleviate degradation caused by the exploration, development, or production of oil or gas. The term includes the lease or rental of equipment used for road maintenance.
- (3) "Weight tolerance permit" means a permit issued under Chapter 623 authorizing a vehicle to exceed maximum legal weight limitations.
- (4) "Well completion" means the completion, reentry, or recompletion of an oil or gas well.

Sec. 256.102. Transportation Infrastructure Fund.

(a) The transportation infrastructure fund is a dedicated fund in the state treasury outside the general revenue fund. The fund consists of:

- (1) any federal funds received by the state deposited to the credit of the fund;
- (2) matching state funds in an amount required by federal law;
- (3) funds appropriated by the legislature to the credit of the fund;
- (4) a gift or grant;
- (5) any fees paid into the fund; and
- (6) investment earnings on the money on deposit in the fund.

§256.102 cont'd

(b) Money in the fund may be appropriated only to the department for the purposes of this subchapter.

(c) Sections 403.095 and 404.071, Government Code, do not apply to the fund.

§ 256.103. Grant Program

(a) The department shall develop policies and procedures to administer a grant program under this subchapter to make grants to counties for transportation infrastructure projects located in areas of the state affected by increased oil and gas production. The department may adopt rules to implement this subchapter.

(b) Grants distributed during a fiscal year must be allocated among counties as follows:

(1) 20 percent according to weight tolerance permits, determined by the ratio of weight tolerance permits issued in the preceding fiscal year for the county that designated a county energy transportation reinvestment zone to the total number of weight tolerance permits issued in the state in that fiscal year, as determined by the Texas Department of Motor Vehicles;

(2) 20 percent according to oil and gas production taxes, determined by the ratio of oil and gas production taxes collected by the comptroller in the preceding fiscal year in the county that designated a county energy transportation reinvestment zone to the total amount of oil and gas production taxes collected in the state in that fiscal year, as determined by the comptroller;

(3) 50 percent according to well completions, determined by the ratio of well completions in the preceding fiscal year in the county that designated a county energy transportation reinvestment zone to the total number of well completions in the state in that fiscal year, as determined by the Railroad Commission of Texas; and

(4) 10 percent according to the volume of oil and gas waste injected, determined by the ratio of the volume of oil and gas waste injected in the preceding fiscal year in the county that designated a county energy transportation reinvestment zone to the total volume of oil and gas waste injected in the state in that fiscal year, as determined by the Railroad Commission of Texas.

§ 256.104. Grant Application Process

(a) In applying for a grant under this subchapter, the county shall:

- (1) provide the road condition report described by Section 251.018 made by the county for the previous year; and
- (2) submit to the department:

(A) a copy of the order or resolution establishing a county energy transportation reinvestment zone in the county, except that the department may waive the submission until the time the grant is awarded; and

(B) a plan that:

- (i) provides a list of transportation infrastructure projects to be funded by the grant;
- (ii) describes the scope of the transportation infrastructure project or projects to be funded by the grant using best practices for prioritizing the projects;
- (iii) provides for matching funds as required by Section 256.105; and
- (iv) meets any other requirements imposed by the department.

(b) In reviewing grant applications under this subchapter, the department shall:

- (1) seek other potential sources of funding to maximize resources available for the transportation infrastructure projects to be funded by grants under this subchapter; and
- (2) consult related transportation planning documents to improve project efficiency and work effectively in partnership with counties.

(c) Except as otherwise provided by this subsection, the department shall review a grant application before the 31st day after the date the department receives the application. The department may act on an application not later than the 60th day after the date the department receives the application if the department provides notice of the extension to the county that submitted the application.

Tab C

**TxDOT Rules
(excerpts)**

Excerpts from Title 43 of the Texas Administrative Code

RULE §15.182. Eligibility

To be eligible for a grant from the fund, a county must:

- (1) be entirely or partially in an area affected by increased oil and gas production;
- (2) create a county energy transportation reinvestment zone under Transportation Code, §222.1071; and
- (3) create an advisory board under Transportation Code, §222.1072 for the county energy transportation reinvestment zone.

RULE §15.184

Award

(a) Mandatory award. The department will award a grant from the fund to each eligible county that submits a valid application in accordance with §15.188 of this subchapter (relating to Application Procedure).

(b) Amount. The department will determine the amount of the award in accordance with the allocations under §15.185 and §15.186 of this subchapter (relating to Allocation to Counties and Calculation of Award, respectively) and will pay the amount as described by §15.192 of this subchapter (relating to Payment of Money).

RULE §15.185

Allocation to Counties

(a) Allocation formula. Of the total amount awarded from the fund during a state fiscal year:

- (1) 20 percent will be allocated under subsection (b) of this section according to the weight tolerance permits ratio;
- (2) 20 percent will be allocated under subsection (c) of this section according to the oil and gas production taxes ratio;
- (3) 50 percent will be allocated under subsection (d) of this section according to the well completion ratio; and
- (4) 10 percent will be allocated under subsection (e) of this section according to the volume of oil and gas waste injected ratio.

§15.185 cont'd

(b) Weight tolerance permits ratio. The amount allocated to a county under subsection (a)(1) of this section in a fiscal year is determined by:

(1) dividing the weight tolerance permits issued in the preceding state fiscal year for that county, as determined by the Texas Department of Motor Vehicles, by the weight tolerance permits issued in the preceding state fiscal year for all counties that will receive money under subsection (a)(1) of this section in that year; and

(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(1) of this section.

(c) Oil and gas production taxes ratio. The amount allocated to a county under subsection (a)(2) of this section in a state fiscal year is determined by:

(1) dividing the amount of oil and gas production taxes collected by the Texas Comptroller of Public Accounts (comptroller) in that county in the preceding state fiscal year by the total amount of oil and gas production taxes collected by the comptroller in the preceding state fiscal year in all counties that will receive money under subsection (a)(2) of this section in that year; and

(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(2) of this section.

(d) Well completion ratio. The amount allocated to a county under subsection (a)(3) of this section in a state fiscal year is determined by:

(1) dividing the number of well completions in that county in the preceding state fiscal year, as determined by the Railroad Commission of Texas, by the total number of well completions in the preceding state fiscal year in all counties that will receive money under subsection (a)(3) of this section in that year; and

(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(3) of this section.

(e) Oil and gas waste injected ratio. The amount allocated to a county under subsection (a)(4) of this section in a state fiscal year is determined by:

(1) dividing the volume of oil and gas waste injected in the preceding state fiscal year in that county, as determined by the Railroad Commission of Texas, by the total volume of oil and gas waste injected in the preceding state fiscal year in all counties that will receive money under subsection (a)(4) of this section in that year; and

(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(4) of this section

RULE §15.186

Calculation of Award

(a) Allocation of excess. If the department determines that the total amount of funds allocated to one or more counties under §15.185 of this subchapter (relating to Allocation to Counties) exceeds the amount requested in the county's application, the department will total all of those excess amounts. The department will, as an additional step in the allocation process for the same designated period, reallocate that total in accordance with the procedures in §15.185 of this subchapter as if it were the initial allocation, except that the counties whose requested amounts have been satisfied will not be considered for the purposes of the reallocation.

(b) Award. The addition of any excess amounts to a county's initial allocation will constitute the total amount of the grant award to that county for the designated period; provided, however, that a county's grant award for any designated period may not exceed the amount requested in its application.

RULE §15.187

Acceptance of Applications

(a) Request for applications. From time to time the commission may designate a period during which the department will accept applications for grants from the fund and, for each designated period, prescribe conditions for submission.

(b) Notice. The department will publish notice of the request for applications on the department's website and will provide a written notice to the county judge of each county in the state. The notice will specify:

(1) the period of time for submitting applications;

(2) the estimated total amount of money available for grants from the fund for the designated period;

(3) the estimated allocation for each county in the state based on the allocation formula described in §15.185 of this subchapter (relating to Allocation to Counties) using the assumption that all counties will be eligible and apply; and

(4) any additional conditions for submission.

RULE §15.188

Application Procedure

(a) Application form. An eligible county may submit to the department an application for a grant from the fund.

(1) The application must be submitted electronically using the department's automated system designated for the grant program.

(2) A county is responsible for obtaining its use of a computer system and access to the Internet.

(3) Upon request, a county may use the department's computer system at any district office location.

(4) For an application to be valid, the county must submit the application during a period designated under §15.187 of this subchapter (relating to Acceptance of Applications) and satisfy the requirements of this section.

(b) Plan requirements. An application must contain a plan that:

(1) provides a prioritized list of transportation infrastructure projects to be funded by the grant;

(2) describes the scope of each listed transportation infrastructure project including:

(A) a clear and concise description of the proposed work;

(B) a map delineating project location and termini;

(C) an implementation plan, including a schedule of proposed activities;

(D) an estimate of project costs;

(E) the project funding sources; and

(F) other information required by the department;

(3) specifies the total amount of grant funds being requested in the application;

(4) identifies matching funds required under §15.183 of this subchapter (relating to Matching Funds); and

(5) identifies other potential sources of funding to maximize resources available for the listed transportation infrastructure projects.

(c) Additional submissions. In addition to the application form, the county must also submit:

(1) a road condition report described by Transportation Code, §251.018 made by the county for the preceding year;

(2) a copy of the order establishing a county energy transportation reinvestment zone in the county; and

(3) documentation evidencing the creation of an advisory board as required under Transportation Code, §222.1072.

(d) Information for previous grant. If the county has received a grant under this subchapter, it must also submit:

(1) a certification that all previous grants have been or are being spent in accordance with the applicable plan submitted under subsection (b) of this section; and

(2) an accounting of expenditures under the previous grant, including any amounts spent on administrative costs.

Tab D

Blank TIF Grant Program Application Form (8RR35)

Application
County Transportation Infrastructure Fund Grant Program
Fiscal Year 2014



Name of County: _____ Date of Submission: _____

Contact Information

Contact Person _____ Title _____
Mailing Address _____ Email Address _____
City, State _____ Phone # _____
Zip Code _____ Fax # _____

Eligibility Requirements

- County is entirely or partially in an area affected by increased oil and gas production
- County has created an Energy Transportation Reinvestment Zone under Transportation Code §222.1071 (order attached)
- County has created an advisory board as required under Transportation Code §222.1072 (documentation attached)
- County has a Road Condition Report, as required by Transportation Code §251.018 (Road Condition Report with primary cause of any road, culvert, or bridge degradation attached)

Plan Requirements

- Project List attached
- Maps of project locations attached

Project Funding

Total Estimated Cost of All Projects \$ _____ 1

Total Matching Funds by the County _____ % \$ _____ 2

*Percentage of County Match must be at least 20% of Line 1 (or 10% if Economically Disadvantaged County).
Sum of lines 2A through 2D
This is the amount of funds the County will provide*

Sources of Matching Funds for Listed Projects
(List additional potential sources, such as donations and federal funds, if any)

County Funds Amount: \$ _____ 2A

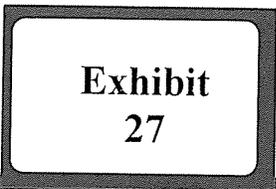
Other Sources: Amount: \$ _____ 2B

Amount: \$ _____ 2C

Amount: \$ _____ 2D

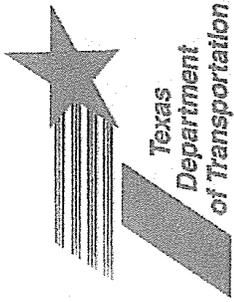
Total Amount of Grant Funds Requested \$ _____ 3

*Subtract line 2 from line 1
This is the amount of Grant Funds your County is requesting*



Tab E

**Slide Deck Regarding
TIF Grant Program
(excerpts: 8RR43 & 8RR45)**



Loaded Trucks Per Gas Well

(Based on Information from Fort Worth)

- 1,184 loaded trucks to bring one gas well into Production, plus
- 353 loaded trucks per year to maintain, plus
- 997 loaded trucks every 5 Years to re-frac the well

This is equivalent to roughly 8 Million cars plus an additional 2 Million cars per year to maintain

Tab F

**La Salle County
Road Condition Report
(excerpts from vol. 5 and vol. 6)**

- Roadway Limits
- Surface Type
- Roadway Average Width
- Roadway Length
- Pavement Markings
- Financial Resources Required to improve roadway
- Observed Traffic

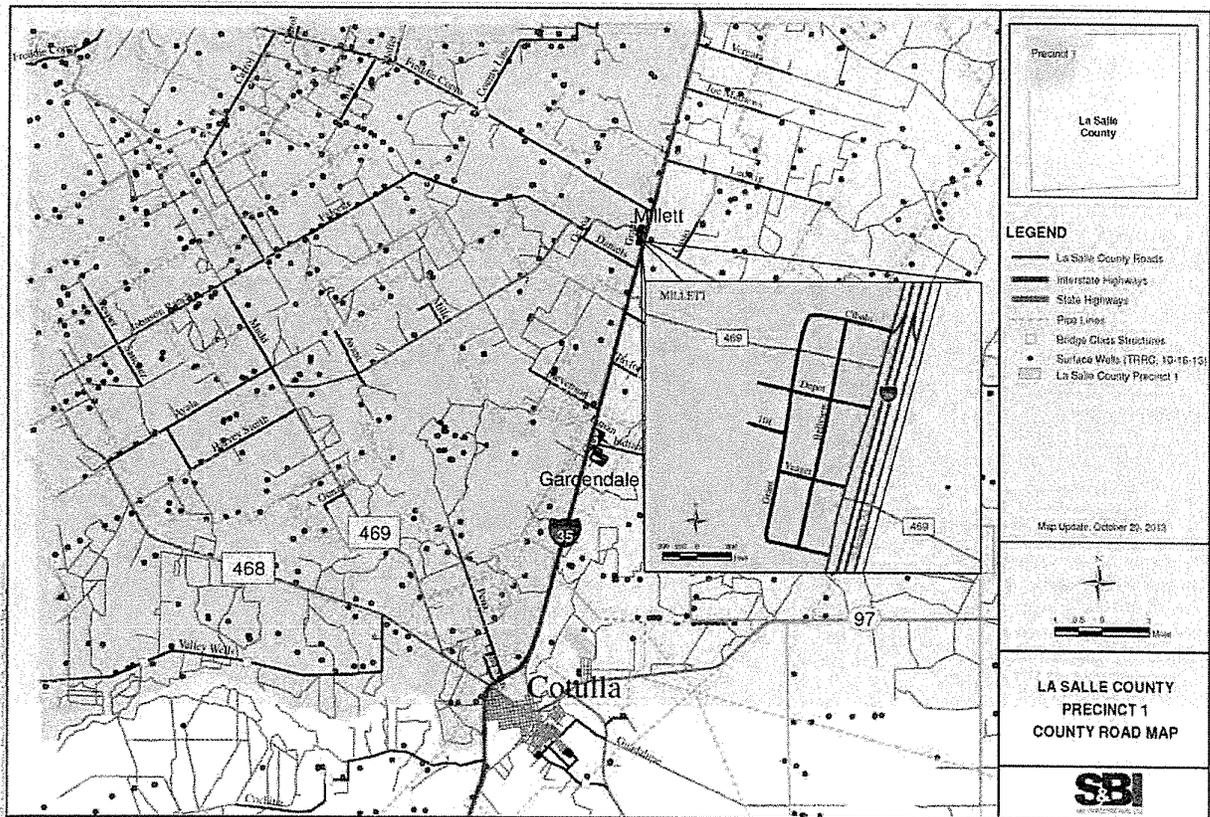
CULVERT INFORMATION

The following information has been provided to give the commission a brief description of each culvert within each county road.

- General Shape
- Material Type
- Approximate Dimensions
- Approximate Length
- General Condition
- Approximate Location
- Signage

PRIMARY CAUSE OF DEGRADATION

The primary cause of degradation of the roadway, culvert and bridge was derived by visual survey of the traffic type during field visits. The traffic type was confirmed by comparing the roadways with oil well locations and determining probable route of energy related traffic for oil and gas drilling, production and disposal activities. The following map for Precinct 1 shows the county roads and oil well locations used for confirmation of degradation.



The primary cause of roadway, culvert and bridge degradation is shown on the following table.

Precinct 1 - Primary Cause of Degradation

Street Name	Surface	Condition	Traffic	Traffic Type	Length (mi.)	Cause of Degradation
A. Gonzalez	Dirt	C	Light	Light Duty	0.623	Energy Traffic
Avant (0.289 mile)	Dirt	C	Light	Light Duty	0.289	Local traffic
Avant (1.001 mile)	Dirt	C	Light	Light Duty	1.001	Local traffic
Ayala	Dirt	C	Heavy	Heavy Duty	3.901	Heavy Energy Traffic
Bellview	Dirt	C	Light	Light Duty	0.386	Local traffic
Carrol Road (0.25)	Dirt	C	Light	Heavy Duty	0.25	Heavy Energy Traffic
Carrol Road (5.46)	Dirt	C	Light	Heavy Duty	5.46	Heavy Energy Traffic
Cibolo	Dirt	C	Light	Passenger Cars	0.14	Local traffic
County Line Road	Dirt	C	Light	Heavy Duty	3.735	Heavy Energy Traffic
County Road 101	Dirt	C	Light	Passenger Cars	0.065	Local traffic
Daniels	Dirt	C	Light	Passenger Cars	1.672	Local traffic
Depot	Dirt	C	Light	Passenger Cars	0.192	Local traffic
Falcette	Dirt	D	Moderate	Heavy Duty	7.117	Heavy Energy Traffic
Freddie Copps	Dirt	D	Heavy	Heavy Duty	9.093	Heavy Energy Traffic
Grant	Dirt	B	Light	Passenger Cars	0.484	Local traffic
Harvey Smith	Dirt	D	Moderate	Heavy Duty	3.492	Heavy Energy Traffic
Johnson Ranch	Dirt	C	Moderate	Heavy Duty	4.99	Heavy Energy Traffic
Lonestar	Paved	C	Light	Heavy Duty	0.758	Energy Traffic
Miller	Dirt	C	Moderate	Heavy Duty	0.749	Heavy Energy Traffic
Moffett	Dirt	C	Light	Heavy Duty	0.432	Heavy Energy Traffic
Mudd Road	Dirt	C	Moderate	Heavy Duty	2.433	Heavy Energy Traffic
Pena Street	Dirt	D	Heavy	Heavy Duty	3.22	Heavy Energy Traffic
Sanchez	Dirt	C	Light	Heavy Duty	0.991	Heavy Energy Traffic
Solo Road	Dirt	C	Light	Heavy Duty	1.463	Heavy Energy Traffic
Stevenson	Dirt	D	Heavy	Heavy Duty	1.652	Heavy Energy Traffic
Valley Wells Road	Dirt	C	Moderate	Heavy Duty	8.388	Heavy Energy Traffic
Vesper	Dirt	C	Light	Heavy Duty	1.352	Heavy Energy Traffic
Yeager	Dirt	C	Light	Passenger Cars	0.114	Local traffic

SCORING CRITERIA

With the information that was collected from the field observations, we were able to rate the priority of the roads and compare them against other roads in the bond program to determine and priority factor for each road considered for the County bond program.

The variables used to rank the roads are

- Surface Type ~ A rating of 1-5 has been used, with 1-paved, 3-gravel & 5 - dirt
- Surface Condition ~ A rating of 1-5 has been used, with 1 "A" Condition – 5 "F" Condition
- Traffic Amount ~ A rating of 1-5 has been used, with 1 Light, 3 Moderate, 5 Heavy
- Traffic Type ~ A rating of 1-5 has been used, with 1 Passenger to 5 Heavy Industrial

- Roadway Average Width
- Roadway Length
- Pavement Markings
- Financial Resources Required to improve roadway
- Observed Traffic

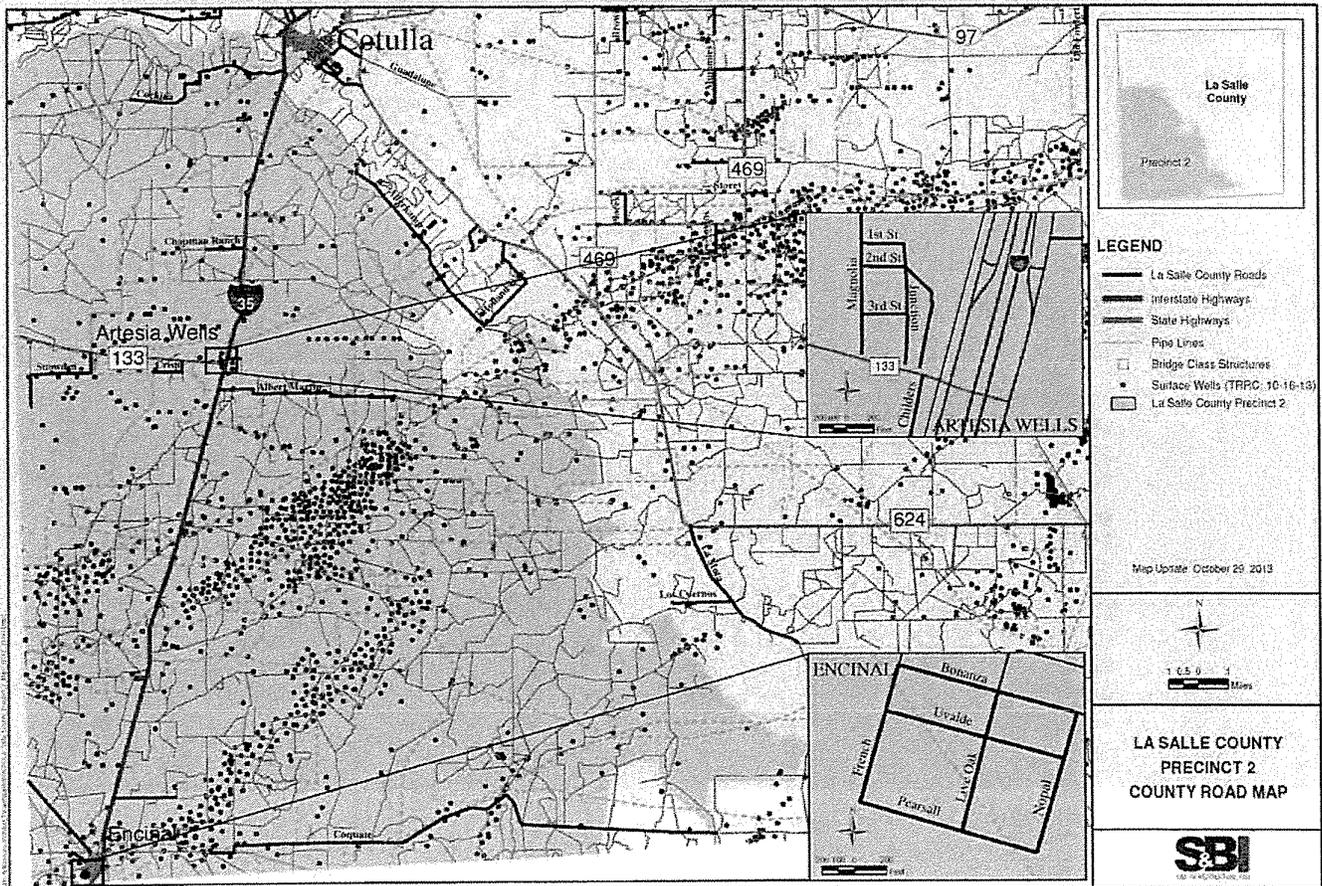
CULVERT INFORMATION

The following information has been provided to give the commission a brief description of each culvert within each county road.

- General Shape
- Material Type
- Approximate Dimensions
- Approximate Length
- General Condition
- Approximate Location

PRIMARY CAUSE OF DEGRADATION

The primary cause of degradation of the roadway, culvert and bridge was derived by visual survey of the traffic type during field visits. The traffic type was confirmed by comparing the roadways with oil well locations and determining probable route of energy related traffic for oil and gas drilling, production and disposal activities. The following map for Precinct 2 shows the county roads and oil well locations used for confirmation of degradation.



- Financial Resources Required to improve roadway

- Observed Traffic

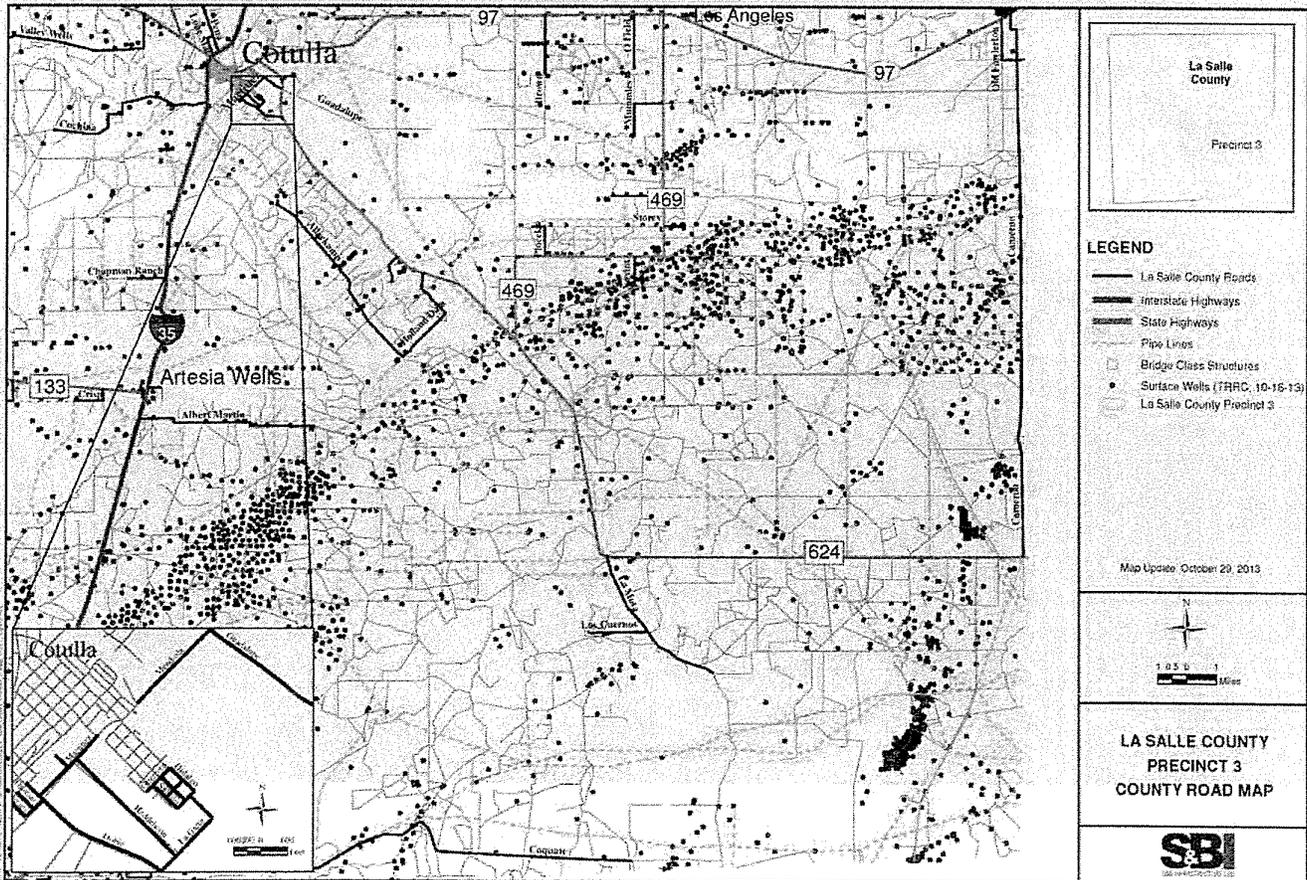
CULVERT INFORMATION

The following information has been provided to give the commission a brief description of each culvert within each county road.

- General Shape
- Material Type
- Approximate Dimensions
- Approximate Length
- General Condition
- Approximate Location

PRIMARY CAUSE OF DEGRADATION

The primary cause of degradation of the roadway, culvert and bridge was derived by visual survey of the traffic type during field visits. The traffic type was confirmed by comparing the roadways with oil well locations and determining probable route of energy related traffic for oil and gas drilling, production and disposal activities. The following map for Precinct 3 shows the county roads and oil well locations used for confirmation of degradation.



The primary cause of roadway, culvert and bridge degradation is shown on the following table.

Precinct 3 - Primary Cause of Degradation

Street Name	Surface	Condition	Road Class	Traffic	Traffic Type	Length (mi.)	Cause of Degregation
Allerkamp Road	Dirt	C	1st	Moderate	Heavy Duty	2.00	Heavy Energy Traffic
Allerkamp Road	Dirt	C	1st	Moderate	Heavy Duty	5.166	Heavy Energy Traffic
Arturo Gonzalez	Paved	C	2nd	Light	Passenger Cars	0.03	Local traffic
Cameron Lane	Dirt	D	1st	Moderate	Heavy Duty	18.424	Heavy Energy Traffic
Cataranas	Dirt	B	2nd	Light	Passenger Cars	0.42	Local traffic
Dobie Road	Dirt	C	2nd	Light	Light Duty	1.701	Energy Traffic
Holland Dam Road	Dirt	C	2nd	Moderate	Heavy Duty	3.46	Heavy Energy Traffic
Huddleston	Paved	C	2nd	Light	Heavy Duty	0.750	Heavy Energy Traffic
Johnson Road	Dirt	C	3rd	Light	Light Duty	1.05	Energy Traffic
La Mota	Dirt	C	1st	Light	Light Duty	2.920	Energy Traffic
La Mota	Dirt	C	1st	Light	Light Duty	2.71	Energy Traffic
Los Cuernos	Dirt	B	3rd	Light	Passenger Cars	2.040	Local traffic
Los Novios	Dirt	C	2nd	Light	Heavy Duty	1.02	Heavy Energy Traffic
Martinez Road	Paved	C	2nd	Moderate	Passenger Cars	0.456	Local traffic
Thomas	Paved	C	2nd	Light	Passenger Cars	0.10	Local traffic
Velasquez	Paved	C	2nd	Light	Passenger Cars	0.102	Local traffic

SCORING CRITERIA

With the information that was collected from the field observations, we were able to rate the priority of the roads and compare them against other roads in the bond program to determine and priority factor for each road considered for the County bond program.

The variables used to rank the roads are

- Surface Type ~ A rating of 1-5 has been used, with 1-paved, 3-gravel & 5 - dirt
- Surface Condition ~ A rating of 1-5 has been used, with 1 "A" Condition – 5 "F" Condition
- Traffic Amount ~ A rating of 1-5 has been used, with 1 Light, 3 Moderate, 5 Heavy
- Traffic Type ~ A rating of 1-5 has been used, with 1 Passenger to 5 Heavy Industrial
- Road Classification ~ A rating of 1-5 has been used with 1 being a 3RD class road to 5 being a 1st class roads.

Priority Factor

Once these ratings were established we wanted to create a formula to help prioritize the different variables to come up with an aggregate score to rate the priority of the roadway. The following is the formula used to come up with the final priority score

$$(\text{Surface Factor} * 2) + (\text{Condition Factor} * 7) + (\text{Traffic Amount} * 5) + (\text{Traffic Type} * 2) + (\text{Road Class} * 1.67) = \text{Priority Factor}$$

By multiplying the factors by different amounts, we are able to put more value on different values. For example, by multiplying the Condition factor by 7, we are able to make this factor the most important to the overall Priority Value of the road. Also, by applying a factor of 2 to both the surface type and Traffic Type, we have made sure that those factors are applied to the overall priority factor but have less of an impact to the overall score as the condition and traffic amount factors.

EXAMPLE:

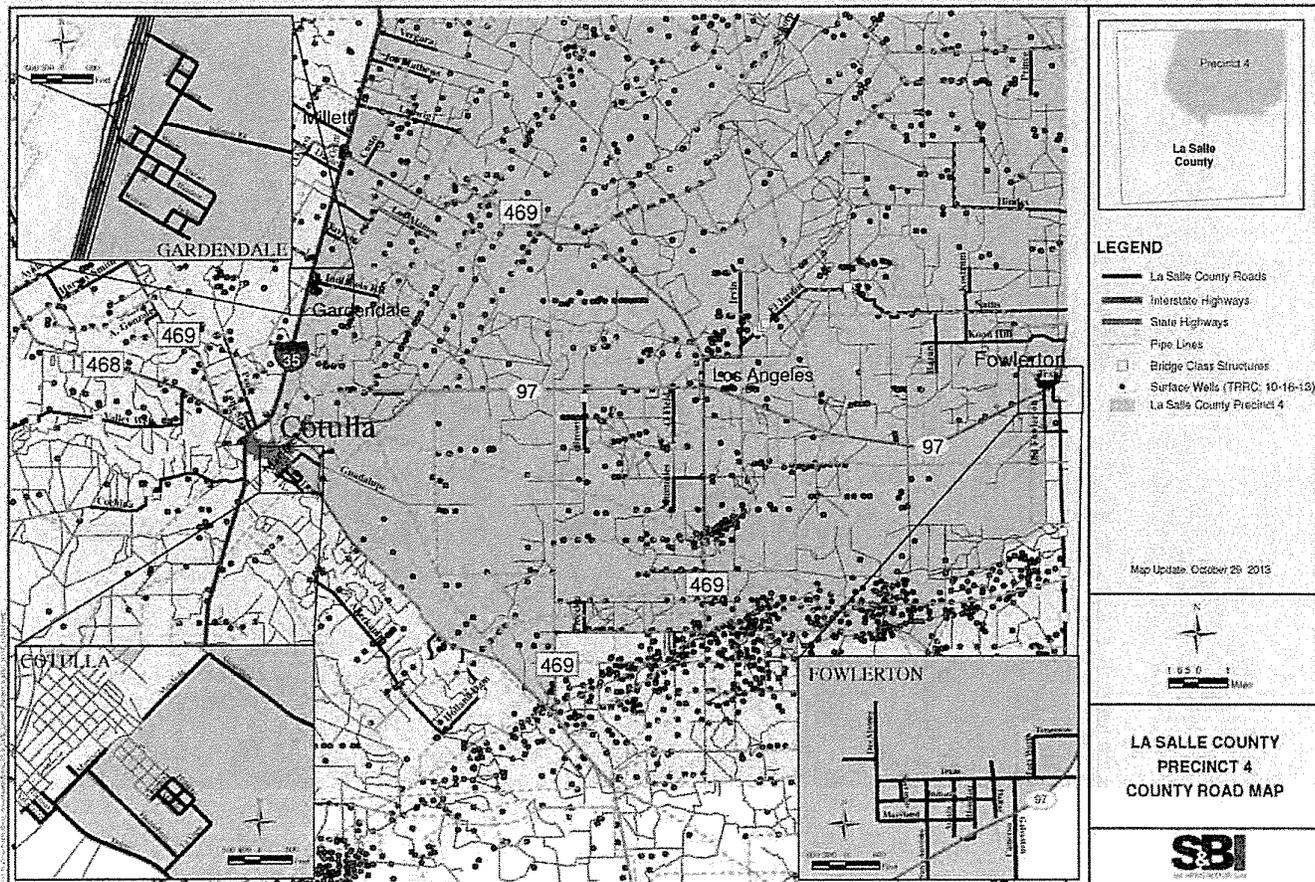
The best case scenario would be a road that has gravel surface, in good condition, with light traffic of heavy industrial vehicles would give the results shown below.

Surface Factor 3
 Condition Factor 1
 Traffic Factor 5
 Traffic Type Factor 1
 Road Class Factor 3

$$(3*2)+(1*7)+(5*5)+(1*2)+(3*1.67)= 45$$

With the scale factors that we are applying to the roadway conditions we get a minimum value of 20, being a road that needs no consideration for replacement and a maximum value of 100, being a road that should be considered the highest priority for replacement.

Street Name	Surface	Condition	Road Class	Traffic	Traffic Type	Length (mi.)	Cost Estimate	Priority Rating
Allerkamp Road	Dirt	C	1st	Moderate	Heavy Duty	2.00	\$1,565,254	CIP
La Mota	Dirt	C	1st	Light	Light Duty	2.92		CIP
Dobie Road	Dirt	C	2nd	Light	Light Duty	1.701	\$1,658,236	CIP
Martinez Road	Paved	C	2nd	Moderate	Passenger Cars	0.456		CIP
Cameron Lane	Dirt	D	1st	Moderate	Heavy Duty	18.424	\$16,581,600	71.4
Allerkamp Road	Dirt	C	1st	Moderate	Heavy Duty	5.166	\$4,649,400	64.4
Holland Dam Road	Dirt	C	2nd	Moderate	Heavy Duty	3.459	\$3,113,100	61.0
Los Novios	Dirt	C	2nd	Light	Heavy Duty	1.024	\$921,600	51.0
La Mota	Dirt	C	1st	Light	Light Duty	2.705	\$2,434,500	50.4
Johnson Road	Dirt	C	3rd	Light	Light Duty	1.051	\$945,900	43.7
Cataranas	Dirt	B	2nd	Light	Passenger Cars	0.419	\$377,100	36.0
Arturo Gonzalez	Paved	C	2nd	Light	Passenger Cars	0.034	\$30,600	35.0
Thomas	Paved	C	2nd	Light	Passenger Cars	0.104	\$93,600	35.0
Velasquez	Paved	C	2nd	Light	Passenger Cars	0.102	\$91,800	35.0
Los Cuernos	Dirt	B	3rd	Light	Passenger Cars	2.04	\$1,836,000	32.7



The primary cause of roadway, culvert and bridge degradation is shown on the following table.

Precinct 4 - Primary Cause of Degradation

Street Name	Surface	Condition	Road Class	Traffic	Traffic Type	Length (mi.)	Cause of Degregation
Austin	Dirt	B	2nd	Light	Passenger Cars	0.271	Energy Traffic
Bazan Road	Dirt	C	2nd	Moderate	Heavy Duty	2.012	Heavy Energy Traffic
Broken Arrow	Dirt	B	2nd	Light	Heavy Duty	0.168	Energy Traffic
Brown Road	Dirt	C	2nd	Moderate	Heavy Duty	1.991	Heavy Energy Traffic
Castro	Dirt	D	3rd	Light	Passenger Cars	0.936	Energy Traffic
Cemetery Private	Paved	C	3rd	Light	Light Duty	0.534	Energy Traffic
Colorado	Dirt	B	2nd	Light	Passenger Cars	0.118	Energy Traffic
County Road 103	Dirt	B	3rd	Light	Passenger Cars	0.15	Local traffic
County Road 104	Dirt	B	3rd	Light	Passenger Cars	0.13	Local traffic
County Road 401	Dirt	B	3rd	Light	Passenger Cars	0.07	Local traffic
Dallas	Dirt	C	3rd	Light	Passenger Cars	0.195	Energy Traffic
Des Moines	Dirt	C	3rd	Light	Passenger Cars	0.411	Energy Traffic
Dirty Shame	Dirt	C	2nd	Moderate	Heavy Duty	1.757	Heavy Energy Traffic
Dobie Road	Dirt	C	2nd	Light	Light Duty	1.701	Energy Traffic
El Jardin Road	Dirt	D	1st	Moderate	Heavy Duty	5.8	Heavy Energy Traffic
Fort Worth	Paved	C	2nd	Light	Passenger Cars	0.14	Local traffic
Franklin	Dirt	C	3rd	Light	Passenger Cars	1.1013	Energy Traffic
Galveston	Dirt	B	3rd	Light	Passenger Cars	0.101	Local traffic