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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 4, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **BOOT RANCH DEVELOPMENT, L.P.**  
**TCEQ DOCKET NO. 2006-1890-WR**

2007 JUN -4 PM 3:50  
CHIEF CLERKS OFFICE  
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Alice C. McKaughan".

Mary Alice C. McKaughan, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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2007 JUN -4 PM 3:50

TCEQ DOCKET NO. 2006-1890-WR

APPLICATION OF BOOT  
RANCH DEVELOPMENT L.P.  
TO AMEND CERTIFICATE OF  
ADJUDICATION NO. 14-1441

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§  
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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Requests for Hearing in the above-referenced matter. OPIC recommends that the requests for contested case hearing filed by 1) Sidney E. Crenwelge, 2) Stanley E. Crenwelge, 3) Cecil J. Crenwelge, 4) Archie D. Crenwelge, 5) Darlyn Jung, 6) Dora Lee Weirich Sewell, 7) Eugena A. Jenschke, 8) Mary Jane Henrich, 9) Donna Oehler, 10) Gregory Oehler, 11) Laura Bailey, 12) Judge Carter T. Schildknect,, 13) Shirley A. Preece, 14) Patrick H. Klein, 15) Charles A. Bendele, and 16) Meta Kathleen Bendele be granted. In support of its recommendation OPIC respectfully submits the following:

**I. INTRODUCTION**

Ranch Development, LP ("Boot Ranch" or "Applicant") owns Certificate of Adjudication No. 14-1441 ("Certificate") which authorizes Applicant to maintain a dam and reservoir on Upper Palo Alto Creek ("Creek") a tributary of the Pedernales River, tributary of the Colorado River, Colorado River Basin and impound therein not more than 6 acre feet of water in a reservoir. Boot Ranch is also authorized to divert 34 acre feet of water from its reservoir each

year at a maximum diversion rate of 1.89 cfs (800 gallons per minute (gpm)) for agricultural purposes to irrigate a maximum of 29 acres in Gillespie County. On May 25, 2005, Boot Ranch applied to the TCEQ to amend its Certificate to:

- 1) Increase the storage capacity of its reservoir from 6 acre feet to 93 acre feet;
- 2) Increase its authorized annual diversion amount from its reservoir from 34 to 232 acre feet per year;
- 3) Increase the diversion rate from its reservoir from 1.89 cfs (800 gpm) to 5.79 cfs (2,200 gpm);
- 4) Add an existing off-channel reservoir as part of the irrigation system,
- 5) Add recreation use to both reservoirs; and,
- 6) Increase the lands to be irrigated from 29 acres to a maximum of 100 acres of land out of a 1,921.5 acre tract in Gillespie County.

Boot Ranch's application was declared administratively complete on November 8, 2005.

On January 30, 2006, the TCEQ Chief Clerk mailed notice to all navigation districts in the Colorado River Basin as well as all holders of certified filings, permits and claims of water rights in the Colorado River Basin. Applicant published notice of the application in the *Fredericksburg Standard-Radio Post*, Gillespie County on February 8, 2006. The deadline to request a contested case hearing was March 10, 2006, thirty days after publication of the notice.<sup>1</sup> A public meeting

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<sup>1</sup> 30 TAC Section 295.171: A request for contested case hearing on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing.

was held on this Application on June 6, 2006. The comment period ended at the close of the public meeting. Comments were received from approximately one hundred and fourteen (114) people.

The TCEQ Executive Director's ("ED") Response to Comments was mailed on October 30, 2006. The TCEQ received a total of forty six (46) timely hearing requests. OPIC recommends that sixteen (16) of these 46 requests be granted. OPIC recommends granting these hearing requests because these requesters beneficially use Creek water for watering livestock, irrigation, support of wildlife and/or recreation and their use of the Creek may be adversely impacted by granting the Application. OPIC recommends denial of the remaining requests because these requesters either did not file their request by the applicable deadline or did not establish that they were affected parties.

## II. REQUIREMENTS OF APPLICABLE LAW

### A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an "affected person" must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.<sup>2</sup> In addition, the request must identify the person's personal justiciable interest affected by the application, including a brief, specific explanation regarding "the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to the members of the general public."<sup>3</sup>

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<sup>2</sup> 30 TEX. ADMIN. CODE ("TAC") §§ 55.251 *et seq.* and 30 TAC § 295.171.

<sup>3</sup> 30 TAC § 55.251(c)(2).

An “affected person” is one “who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application” in a manner not common to members of the general public.<sup>4</sup> Relevant factors considered in determining a person’s affected person status include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of the property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.<sup>5</sup>

A contested case hearing should be granted if an affected person’s hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made by the applicant or the executive director.<sup>6</sup> The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.<sup>7</sup>

#### **B. Requirements for Amendment of a Certificate of Adjudication**

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this

<sup>4</sup> 30 TAC § 55.256(a). “This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

<sup>5</sup> 30 TAC § 55.256(c).

<sup>6</sup> 30 TAC § 55.255(b)1

<sup>7</sup> 30 TAC § 55.255(c).

chapter.” Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
  - (A) is intended for a beneficial use
  - (B) does not impair existing water rights or vested riparian rights;
  - (C) is not detrimental to the public welfare;
  - (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
  - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; . . . .

Section 11.147(d) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality. Subject to the aforementioned requirements, a proposed amendment to a water right that does not increase the amount of water to be diverted or the authorized rate of diversion “shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.”<sup>8</sup>

### III. DISCUSSION

#### A. Determination of Affected Persons

##### 1. Heirs of the Estate of Alfred Weinheimer

Timely hearing requests were submitted by 1) Sidney E. Crenwelge, 2) Stanley E. Crenwelge, 3) Cecil J. Crenwelge, 4) Archie D. Crenwelge, 5) Darlyn Jung, 6) Dora Lee

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<sup>8</sup> TWC § 11.122 (b).

Weirich Sewell, 7) Eugenia A. Jenschke and 8) Mary Jane Henrich, collectively referred to herein as the (“Heirs.”) All the Heirs claim an interest in the property of the Estate of Alfred Wienheimer (“Estate”) which adjoins the Boot Ranch property and is immediately downstream of the Boot Ranch Property on Palo Alto Creek. The Heirs claim that the Creek is the main water source for their livestock and the wildlife that lives on their property. The Heirs are concerned that if the amendment is granted then it would dry up the Creek and force them to find an alternate, more expensive, source of water for their livestock. Certain Heirs also express concern about the effect that the loss of Creek flow would have to the value of their property.<sup>9</sup>

The Heirs have standing to request a hearing as current instream users of the Creek’s water that could be adversely affected by the granting of the application. A reasonable relationship exists between the interests claimed by the Heirs and the Application because the Creek flows downstream through the Estate and the Heirs have a right to use the Creek water for livestock and agricultural purposes.<sup>10</sup> The Commission must consider issues regarding water availability,<sup>11</sup> the protection of vested riparian water rights,<sup>12</sup> the protection of in stream uses,<sup>13</sup> and the protection of public welfare<sup>14</sup> in its determination of whether to grant or amend the Certificate. The proposed amendment may threaten the flow availability downstream, and,

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<sup>9</sup> Elisabeth Ida Terry and Mae Fritz raise this issue in their requests. The issue of an Application’s impact on property value is not relevant and material to the Commission’s decision on this application. Therefore, OPIC recommends that Elisabeth Ida Terry’s and Mae Fritz’s hearing requests not be granted.

<sup>10</sup> 30 TAC § 55.256(c)(3).

<sup>11</sup> See TWC § 11.134(b); 30 TAC §297.42.

<sup>12</sup> TWC 11.134(b)(3)(B)

<sup>13</sup> TWC § 11.147(d).

<sup>14</sup> TWC 11.134(b)(3)(C)

thereby, the regulated activity may impact the Heirs' use of the water in the Creek.<sup>15</sup> Moreover, section 11.147(d) of the Water Code requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality. Therefore, the Heirs have personal justiciable interests in their access to the surface water flowing over their property that is not common to members of the general public and is protected by the law under which the application will be considered. In light of the facts and issues raised by the Heirs, OPIC finds that they are affected persons entitled to a hearing.

2. Possible Vested Riparian Rights owners Donna Oehler, Gregory Oehler and Carter T. Schildknect

Donna Oehler, Gregory Oehler, Laura Bailey and Judge Carter T. Schildknect filed timely requests for hearing in which they state that the Creek runs through their property. All four requesters own land downstream from the Boot Ranch Property which was homesteaded in approximately 1850. Donna Oehler and Gregory Oehler's property is located approximately 5 miles downstream from Boot Ranch. Donna Oehler and Gregory Oehler's requests imply that the Creek water has been in use on their property since 1850 for watering livestock and irrigation purposes. Laura Bailey identifies herself as a sixth generation landowner whose property, passed down from her ancestors for over 150 years, is located five miles downstream from Boot Ranch. Judge Schildknecht owns a 25 acre historical farmstead approximately two miles downstream of the Boot Ranch Development. All requesters currently run livestock on their properties and depend on the Creek for watering their livestock.

These requesters are concerned that if the Certificate Amendment is granted that it will adversely affect the availability of water on their land for their livestock and wildlife. These

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<sup>15</sup> 30 TAC § 55.256(c)(4), (5).

requesters are also concerned that granting the Application will adversely affect the quality of the Creek water flowing downstream from the Boot Ranch. Judge Schildknecht states that he spoke with a Gillip County hydrologist who opined that if the amendment is granted the Creek downstream of Boot Ranch would run dry in times of dry weather.

Oehler, Gregory Oehler, Laura Bailey and Judge Carter T. Schildknecht should all be found to be affected persons under the same rationale as given for the Heirs. Moreover, since Laura Bailey's, the Oehlers' and Judge Schildknecht's land was homesteaded before 1895 it is probable that their land has vested riparian rights specifically protected under the Texas Water Code.<sup>16</sup> OPIC respectfully request that if Laura Bailey, the Oehlers and/or Judge Carter T. Schildknecht have a vested riparian water right that they supply this information in a timely filed reply so that information may be considered by the Commission. Pursuant to the above, OPIC recommends that the Commission grant Laura Bailey, the Oehlers and Judge Carter T. Schildknecht requests for a contested case hearing.

### 3. Impacted Ranchers & Home Owners

Requesters Shirley A. Preece, Patrick H. Klein, Charles A. Bendele, and Meta Kathleen Bendele own property within seven (7) miles downstream of the Boot Ranch Property. All eight (8) Requesters filed timely requests for hearing in which they state that the Creek runs through their property. These Requesters voice concerns about the adverse affect that granting the Certificate Amendment would have on the quantity of the water available in the Creek running across their property and the quality of that water.

Ms. Preece is concerned that granting the Certificate Amendment will cause the Creek to

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<sup>16</sup> *In Re; The Adjudication of the Upper Guadalupe Rive Segment Of the Guadalupe River Basin*, 625 SW2d 353, (Tex.App. San Antonio [4<sup>th</sup> Dist.] 1981) (Riparian rights are only vested to the extent they exist and are being used. Riparian Rights do not exist on land granted after 1895.); See also, TWC11.134(b)(3)(B).

run dry resulting in the death of wildlife, fish and century old oak and pecan trees on her property. Mr. Klein voices concerns that his livestock will not have any water to drink and that any available water downstream from Boot Ranch will be polluted by fertilizers, herbicides and pesticides from the Golf Course. Mr. Bendele is also concerned that the Creek will run dry and become polluted and stagnant causing a health risk to his family and stopping his family's recreational use of the Creek.

These Requesters are also affected by this Application because they currently use the Creek's water for watering livestock and recreation, their land is within seven miles downstream of Boot Ranch and the Creek runs through their properties. They have standing to request a hearing as a user of the Creek's surface water that could be adversely affected by the granting of the Application. They have a personal justiciable interests related to protection of their access to surface water flowing over their property that is not common to members of the general public and are protected by the law under which the application will be considered. A reasonable relationship exists between Requesters' claimed interests in maintaining the quality and quantity of the water flow in the Creek and the Application. The Creek flows downstream through Requesters' properties and they have a right to use the Creek water for livestock, recreational and agricultural purposes.<sup>17</sup> The Commission must consider issues regarding water availability,<sup>18</sup> the protection of in stream uses,<sup>19</sup> and the protection of public welfare<sup>20</sup> in its determination of whether to grant or amend the Certificate. The proposed amendment may threaten the flow

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<sup>17</sup> 30 TAC § 55.256(c)(3).

<sup>18</sup> See TWC § 11.134(b); 30 TAC §297.42.

<sup>19</sup> TWC § 11.147(d).

<sup>20</sup> TWC 11.134(b)(3)(C)

availability downstream, and, thereby, the regulated activity may impact Requesters' use of the water in the Creek.<sup>21</sup> Therefore, OPIC recommends that these Requesters be found to be affected persons entitled to a hearing.

OPIC recommends that the hearing requests filed by the following requesters be denied as untimely because they were filed after March 10, 2006: Morey M. Weldon, William F. Weldon, Michael Hartman, Clark A. Kibler, Patricia Kibler, Chris Brown, Bill Brown, Louis E. Buehn, James Schonaerts, Margaret Meyers, Ronald W. Johns, Kirby L. Brown and David K. Langford on behalf of the Texas Wildlife Association ("TWA"), Robert Brandes, Calvin Ransleben, Commissioner, Precinct No. 3, Bruce McNabb and David Peake III. OPIC also recommends that the Commission deny the following hearing requests because the requesters did not identify their location relative to Boot Ranch: Louis E. Buehn, Chris Brown and Bill Brown. The Commission should deny the hearing requests filed by John E. (Corkey) Thompson, Commissioner, Precinct No. 4, Curtis Cameron, Commissioner, Precinct No. 1, James Schonaerts, Margaret Myers, Ronald Johns, Louis E. Buehn, Kirby Brown, Robert Brandes and Edwin and Linda Mae Beyer because their hearing requests did not establish a personal justicable interest in the Application that is not common to the general public. The hearing requests of David W. Peake, Katherine F. Peake and Ronald Jones should also be denied because their concerns regarding the Application's effect on water quality and quantity in the Creek and the Pedernales River are attenuated by the 15-20 mile distance between their land and Boot Ranch. The hearing requests of Ms. Elizabeth Ida Terry and Ms. Irene Mae Fritz should be denied because their hearing requests only raised concerns regarding the effect that the Application would have on their property value which is not a relevant and material issue.

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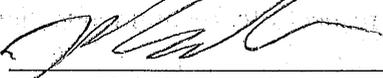
<sup>21</sup> 30 TAC § 55.256(c)(4), (5).

#### IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the following requesters: 1) Sidney E. Crenwelge, 2) Stanley E. Crenwelge, 3) Cecil J. Crenwelge, 4) Archie D. Crenwelge, 5) Darlyn Jung, 6) Dora Lee Weirich Sewell, 7) Eugena A. Jenschke, 8) Mary Jane Henrich, 9) Donna Oehler, 10) Gregory Oehler, 11) Laura Bailey, 12) Judge Carter T. Schildknect,, 13) Shirley A. Preece, 14) Patrick H. Klein, 15) Charles A. Bendele, and 16) Meta Kathleen Bendele. For the reasons set forth above, OPIC recommends that the Commission deny the hearing requests of the following requesters: (1) Louis E. Buehn, P.E., (2) Chris Brown, (3) Bill Brown, (4) John E. (Corkey) Thompson, Commissioner, Precinct No. 4, (5) James Schonaerts, (6) Margaret Myers, (7) Ronald W. Johns, M.D., Ph.D., (8) Kirby Brown, (9) Robert Brandes, (10) Edwin Beyer, (11) Linda Mae Beyer, (12) David W. Peake, (13) David Peake, III, (14) Ms. Elizabeth Ida Terry, (15) Ms. Irene Mae Fritz, 16) Clark A. Kibler, 17) Patricia P. Kibler, 18) Michael Hartman, 19) Morey Weldon, 20) William Weldon, 21) Katherine F. Peake, 22) Curtis Cameron, Commissioner, Precinct No. 1, 23) Calvin Ransleben, Commissioner Precinct No. 3, 24) Bruce McNabb and 25) David K. Langford. OPIC may change its recommendation based upon the information supplied in a timely filed reply. Based on the foregoing, OPIC respectfully requests that the Commission refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

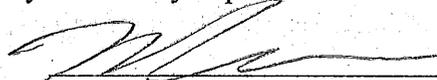
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2007, the original and eleven true and correct copies of the Office of the Public Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Mary Alice Boehm-McKaughan

**MAILING LIST**  
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**TCEQ DOCKET NO. 2006-1890-WR**

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