

Law Offices

of

**GLENN JARVIS**

Inter National Bank Building  
1801 South Second Street, Suite 550  
McAllen, Texas 78503  
*www.GlennJarvis.com*

Telephone (956) 682-2660

Telefax (956) 618-2660

August 14, 2009

Ms. LaDonna Castañuela, MC-105  
Office of Chief Clerk  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
12100 Park 35 Circle - Bldg. F , 1st Flr  
Austin, TX 78753

**VIA OVERNITE DELIVERY**

RE: San Angelo Water Supply Corporation  
TCEQ Docket No. 2009-1617-WR

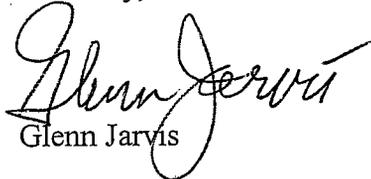
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 AUG 17 AM 10:45  
CHIEF CLERKS OFFICE

Dear Ms. Castañuela:

Enclosed for filing is original and 8 copies of Hearing Requesters Reply to Responses to Hearing Requests in the above-referenced matter. Please file stamp the extra copy and return to me.

If you have any questions, please do not hesitate to contact me.

Sincerely,

  
Glenn Jarvis

GJ:llc  
Encl.

xc: Mailing List

**Mailing List**  
**San Angelo Water Supply Corporation**  
**Docket No. 2009-1617-WR; Permit No. Adj 1318C**

**FOR APPLICANT:**

Will Wilde  
City of San Angelo  
P.O. Box 1751  
San Angelo, TX 76902-1751

**FOR THE EXECUTIVE DIRECTOR:**

Todd Galiga, Senior Atty., MC-173  
Texas Comm. on Environmental Qual.  
Environmental Law Division  
P.O. Box 13087  
Austin, TX 78711-3087

Craig Mikes, Technical Staff, MC-160  
Texas Comm, on Environmental Qual.  
Water Supply Division  
P.O. Box 13087  
Austin, TX 78711-3087

**FOR PUBLIC INTEREST COUNSEL:**

Mr. Blas Coy, Jr., Atty, MC-103  
Texas Commission on Environmental Qual.  
Public Interest Counsel  
P.O. Box 13087  
Austin, TX 78711-3087

**FOR THE OFFICE OF PUBLIC ASSISTANCE:**

Ms. Bridget Bohac, Director, MC-108  
Texas Commission on Environmental Qual.  
Office of Public Assistance  
P.O. Box 13087  
Austin, TX 78711-3087

**FOR CHIEF CLERK:**

Ms. LaDonna Castañuela, MC-105  
Texas Commission on Environmental Qual.  
Office of Chief Clerk, MC-105  
12100 Park 35 Circle - Bldg. F, 1st Flr  
Austin, TX 78753

**FOR ALTERNATIVE DISPUTE RESOLUTION:**

Mr. Kyle Lucas, MC-222  
Texas Commission on Environmental Qual.  
Alternative Dispute Resolution  
P.O. Box 13087  
Austin, TX 78711-3087

**REQUESTER(s):**

Carroll D. Blacklock  
1906 Coke St.  
San Angelo, TX 76905-6223

Fred R. Campbell  
P.O. Box 186  
Paint Rock, TX 76866-0186

Thomas L. Evridge  
16185 My Road  
Miles, TX 76861-5200

Ben O. Sims  
RR 1, Box 4  
Paint Rock, TX 76866-9401

Concerned Citizen  
Public Works Director  
P.O. Box 157  
Paint Rock, TX 76866-0157

Bernie & Lucy Mika  
P.O. Box 643  
Miles, TX 76861-0643

Ben O. Sims  
425 N. Crozier Ave.  
Paint Rock, TX 76866-3103

DOCKET NO 2009-1617-WR

2009 AUG 17 AM 10:45

APPLICATION NO 1318C OF THE  
CITY OF SAN ANGELO, SAN  
ANGELO WATER SUPPLY  
CORPORATION FOR AMENDMENT  
TO CERTIFICATION OF  
ADJUDICATION NO. 14-1318

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BEFORE THE  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

**HEARING REQUESTERS REPLY TO RESPONSES  
TO HEARING REQUESTS**

CONCHO RIVER BASIN WATER CONSERVANCY ASSOCIATION, on behalf of its members including the Hearing Requesters identified below,<sup>1</sup> by and through the Association, file their Reply to the Responses filed by the Executive Director and the Applicant in the above captioned matter, and would respectfully show the Commissioners the following:

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<sup>1</sup> A. J. Jones, Jr. (Certificate No. 14-1397 and domestic & livestock), Steven H. Hoelscher (Certificate No. 14-1394 and domestic & livestock), Jennifer A. Hoelscher (Certificate No. 14-1384 and domestic & livestock), Leonard Grantham (Certificate No. 14-1361), Duane Schniers - Mayor, City of Paint Rock (Certificate No. 14-1388), Wanda Hudson (Certificate No. 14-1340, 14-5600 and domestic & livestock), Bill Schneeman (Certificate No. 14-1349 and domestic & livestock), M. C. Vinson (Certificate No. 14-1385, 14-3612), Todd Schwertner (Certificate No. 14-1370 and domestic & livestock), Lonnie L. Buck (Certificate No. 14-4990), Gordon P and Nancy L. Snodgrass (Certificate No. 14-1328), August Haechten, Jr. (wtr rt and domestic & livestock), Wilburn Bailey Estate (wtr rt and domestic & livestock), Lewis Buck (wtr rt and domestic & livestock), Van Carson (wtr rt and domestic & livestock), Douglas R. Day (wtr rt and domestic & livestock), Dwayne Dishroon (wtr rt and domestic & livestock), Dwayne Dishroon, Trustee, (wtr rt and domestic & livestock), Wanda & W.G. Dishroon (wtr rt and domestic & livestock), Samie C. Ewald (wtr rt and domestic & livestock), Billy J. Helwig (wtr rt and domestic & livestock), Ben A. Willberg Estate (wtr rt and domestic & livestock), Douglas John (wtr rt and domestic & livestock), John C. Ketzler (wtr rt and domestic & livestock) Kevin L. Noland (wtr rt), Darrell Rushing (wtr rt and domestic & livestock), Kenneth Schwartz (wtr rt and domestic & livestock), Kent Schwartz (wtr rt and domestic & livestock), David Vinson (wtr rt and domestic & livestock), Clyde Watkins (wtr rt and domestic & livestock), Ricky Werner (wtr rt and domestic & livestock), Edward E. Werner Estate (wtr rt and domestic & livestock), Carolyn Schwertner (wtr rt and domestic & livestock), Kenneth R. Windham (wtr rt and domestic & livestock), Joyce A. Moore (wtr rt and domestic & livestock), Milburn Wright (wtr rt and domestic & livestock), Jerrilyn Wright Jones (wtr rt and domestic & livestock), Georgia C. Edwards (Certificate No. 14-1346 and domestic & livestock), Wayne Hudson (wtr rt and domestic & livestock), by and through the Concho River Basin Water Conservancy Association.

## Amendment Requested

Certificate of Adjudication No. 14-1318 authorizes Twin Buttes Dam and impoundment of water in Twin Buttes Reservoir. In this Application the Applicant, subject to the granting of its Application No. 1318B, seeks to amend Special Condition 5.C of the Certificate, which provides that a conduit shall be constructed in the dam

*". . . and equipped with a regulating gate for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Commission may determine lower appropriators are entitled."*

Applicant's request is to change this language so that it would read as follows:

*"Certificate Holder shall permit and provide for the free passage of inflows to Twin Buttes Reservoir through the conduit in amounts to which lower appropriators are entitled as determined by the Watermaster or the commission based on streamflow gages located on upstream watercourse that the Watermaster or the commission considers appropriate for making such determination."*

This Application is subject to the granting of its Application No. 14-1318B and is associated with requests for Amendments to Certificates of Adjudication No. 14-1298 and 14-1348, which are discussed in other Replies filed by the Hearing Requesters.

Careful reading of this language change indicates a substantial different meaning with respect to what flows reach the main stem of the Concho River downstream of Twin Buttes. The existing language states that (1) there is a free passage of normal flows "at all times" plus (2) the passage of water that the Commission determines lower appropriators are entitled. The proposed changed language only provides for the free passage of "inflows" in amounts which lower appropriators are entitled determined by the Watermaster. Instead of passing all normal flows "at all times" through the Dam plus amounts of "water" needed by lower appropriators, the proposed language limits the

free passage water to "inflows" needed by lower appropriators determined by the Watermaster. This is a significant reduction in flows (water) reaching the Concho River mainstem below Bell Street Dam controlled by Applicant.

The existing language in the Certificate does not say "the free passage of flows" into the Reservoirs or downstream in "amounts determined" by the Commission (Watermaster). It says the free passage of normal flows "at all times." The existing language then says "and the passage of those waters" to which the Commission (Watermaster) determines lower appropriators are entitled. "Those" waters refer clearly to other water than the inflows, *i.e.*, water impounded in the Reservoir. This meaning is made even clearer by a provision pertaining to what waters can be stored in the Reservoir (*i.e.*, storm and flood waters) that exists in Permit 1949 (the underlying water right to Certificate No. 14-1318), which was not carried forward or omitted from the terms of the Certificate. This circumstance is more fully discussed below.

This requested Amendment and associated amendments are linked to the more threshold issue of how the Twin Buttes Reservoir, Lake Nasworthy and associated dams and reservoirs of the Applicant are going to be managed so as to protect the water rights of those in the Concho River Basin. At the root of this threshold issue is the meaning of the terms now in the Certificate requested to be amended and the provision of Permit 1949, which was not carried forward in the Certificate, and a Water Accounting Plan recommended by the Executive Director, which also covers Certificate Nos. 14-1318B, 14-1318C, and 14-1298. It involves the underlying water rights of Applicant pertaining to Twin Buttes Dam and Reservoir. In order to illustrate the issues involved in this and associated Amendment cases, it is necessary to review not only the background of these particular Amendments, but the important events and unintended consequences on the Concho Basin leading

us up to these requested Amendments, which is both interesting and instructive and vitally important to the future of water right holders on the Concho River Basin.

### **BACKGROUND**

The setting is the Concho River Basin or watershed, which includes the Concho River beginning at its confluence with the Colorado River and including its unnamed tributaries and named tributaries, which includes the South Concho River, Dove Creek, Spring Creek, Middle Concho and North Concho in Tom Green, Concho, Runnels, Coke, Schleicher and Sterling Counties. The Concho is in the arid portion of the State and is an over-appropriated stream. A large amount of information was developed regarding the hydrology involved and water supply conditions on the Concho in the record in the Commission's files dealing with the establishment of a Watermaster on the Concho River (Petition for a Watermaster on the Concho River, *SOAH Docket No. 582-02-2130*; *TNRCC Docket No. 2000-0344-WR*, the "Watermaster Case"), which resulted in the Commission ordering that a Watermaster be established on the Concho finding that water rights in the Concho Basin were threatened and needed a Watermaster. The Watermaster Program was later confirmed by statute. For example, a hydrology report filed in that proceeding (Exhibit A-90) and testimony relating thereto showed that all water rights prior to 1929 amounted to 18,500 acre feet and that except for the year 1951 and possibly 1952, there were sufficient total annual natural flows in the river to take care of those senior water rights (See transcript of proceedings in the Watermaster Case, Pgs. 829-830, 833, 835, also Exhibit A-121). The 1929 date is significant because this is the priority date of Lake Nasworthy of Applicant (Certificate of Adjudication No. 14-1319), which is immediately downstream of the Twin Buttes Reservoir as noted by the Executive Director in its Response to the Hearing Requests. That is not to say that there was sufficient water for all water rights holders at any time that they need it, however, there were significant stream flows from the

named tributaries to the Concho River. At the same time, however, the watershed experienced large floods which went untapped into the Colorado River.

It was in this context of flood management that a project of the Bureau of Reclamation was conceived to construct a dam to control floods and conserve some of the flood flows for future use in times of need. This resulted in the issuance of Permit 1949 by the Commission (then Board of Water Engineers) in 1960. This Permit had significant conditions which were imposed upon the construction of Twin Buttes Reservoir because it placed a dam at the confluence of the major tributaries and main source of water supply for the Concho River downstream of the Dam. The important ones for consideration here are:

- "1. The permittee shall store only storm and flood waters of said stream, subject to all the rights of prior appropriators and lawful diverters below. Whenever the Board finds that the permittee is storing any water to which downstream appropriators and lawful diverters are entitled, the permittee shall release same to said appropriators or lawful diverters on the order of the Board. By accepting the permit, permittee agrees to abide by and comply with any such order of the Board without delay. Failure to comply with any such order shall constitute grounds for forfeiture and cancellation."
2. All water diverted from the reservoir for use through the Municipal Water System of the City of San Angelo, which was not consumed, was to be discharged back into the Concho River after the use of " . . . reasonable diligence to treat and purify such return waters so as not to materially impair the quality of the water of the receiving stream."
3. A conduit was to be constructed in the dam with an inlet at elevation 1883.50 feet with an opening of not less than 5 feet in diameter and equipped with a regulating gate " . . . for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Board may determine lower appropriators are entitled."
4. Water diverted from the reservoir by means of the regulating conduit prescribed was to flow through the channel of the Middle Concho River to Nasworthy Reservoir and released there for municipal use and through the South Concho River to the City's point of diversion for municipal use with irrigation water being released through the Nasworthy Dam by a structure carrying a capacity of not to exceed 100 cfs to the irrigation place of use.
5. All waters diverted for irrigation, which was not reasonably and beneficially used was to be returned to the Concho River.

6. The Permittee was required to install metering equipment at each diversion point, which would automatically record the total amount of water diverted and to cause to be relocated existing stream flow stations on Spring Creek and Middle Concho River, which were inundated by the Reservoir and established stream flow stations on Pecan and Dove Creeks. All stations to be maintained on a daily record basis and subject to the approval of the Commission.

Obviously, these conditions were to protect downstream senior water right holders and domestic and livestock users from the consequences and effects of the construction of Twin Buttes Dam and Reservoir.

As it turned out, these consequences did create water supply problems downstream of Twin Buttes Dam after it was closed in 1963, which created many complaints from users resulting in a Commission Order in 1974 to resolve the problems of senior water rights holders and domestic and livestock users on the Concho River (Watermaster Case record, *supra*, Transcript Pgs 171-181, Exhibit A-19). This resulted in a Commission Order on July 22, 1974, a copy of which is attached as Exhibit A, in which the Commission pointing out the terms of Permit 1949 found that the Permittee had stopped flows and the Commission ordered that normal inflows pass through Twin Buttes Reservoir and that water be released from storage in Twin Buttes Reservoir for downstream use in the same quantities as water was released for irrigation purposes through Lake Nasworthy and ordered releases through downstream dams of Applicant including Bell Street Dam.

After Certificate No. 1318 was issued by Commission in 1980, Applicant obtained the first Amendment to the Certificate pertaining to the return flow requirement of municipal water described in Paragraph 2 immediately above. Interestingly enough, this is another condition of Permit 1949 that was not adjudicated in the Adjudication case, but this one was carried forward into the Certificate. The result of the Amendment was to deprive the Concho River downstream of the

Applicant's Water Treatment Plant discharge point of these return flow waters, which maintained the flows in the River and provided a source of supply for downstream water rights holders and domestic and livestock users. The consequences on the Concho River was devastating and created additional water supply problems.

In 1984, complaints were filed with the Commission regarding the failure to pass through and/or release sufficient waters for downstream use and the Commission sent cease diversion and/or to release or pass through letters to water rights holders on the Concho (Watermaster Case record, Exhibit A-21, A-25 Transcript Proceedings Pgs. 182, 187-208, 241-250). These problems continued through 2002. In testimony of Mr. James Kowis who reviewed the USGS spring flow records upstream from Twin Buttes Reservoir and Applicant's diversion points and stream flows below Bell Street, which is below the last diversion point of the Applicant, he concluded:

"In reviewing and comparing the monthly mean stream flows values for the stations . . . . I saw that especially during the irrigation season of March through August, very little of the total mean monthly natural flow coming into the Twin Buttes Reservoir from the Middle Concho River, Spring Creek, Dove Creek and South Concho River was consistently being allowed to pass downstream to meet any senior water right demands. It appears that this inflow was being captured in or used out of either Twin Buttes Reservoir, Lake Nasworthy, Metcalfe Reservoir, Lone Wolf Reservoir or Bill Street Reservoir." (Exhibit 21, pg. 183, lines 1-9)

The year prior to the Commission's 1974 Order, the Commission commenced the Adjudication process under the Adjudication Act of 1967. It began at an initial public hearing on March 6, 1973 and took evidence beginning March 19, 1973 at subsequent public hearings. These hearings were held during the 1974 Order process, and thereafter the Commission issued its preliminary determination on April 14, 1975 and thereafter, a Final Determination of the claims to water rights on the Concho River segment of the Colorado River Basin, which was later approved

by the courts with modifications not pertinent here. This is significant to events and discussion below because the Commission in 1974 was ordering for passage of normal flows and release of stored water from Twin Buttes Dam and Reservoir during or near the same period of time that it was involved in adjudicating water rights on the Concho.

In the Applicant's Response to the Hearing Request, the Applicant refers to the Adjudication case and its impact on this Amendment case. Therefore, so that the Commissioner's will have the required information necessary to consider the threshold issues involved in these Amendment cases prior to a submittal to a contested case hearing, there is attached as Exhibit B, a copy of the Commission's narrative portion of its Final Determination and the Commission's findings and conclusions with respect to Permit 1949 upon which Certificate of Adjudication No. 1318 was issued by the Commission. Also attached as Exhibit C is a copy of the Final Judgment and Decree in the District Court approving the final determination in all respects pertinent to these cases dated June 14, 1979.

The underlying basis for the issuance of Certificate of Adjudication No. 14-1318 is the Final Determination dealing with Permit 1949 approved by the Court, as required by the Water Rights Adjudication Act. For the Commissioner's reference, attached as Exhibit D is a copy of the initial Certificate of Adjudication No. 14-1318 issued by the Commission based upon the Adjudication and Permit 1949, which is attached as Exhibit E.

With the above background in mind, this brings us to threshold issues that need to be decided by the Commission dealing with the underlying water rights pertaining to the management and operations of Twin Buttes Dam and Reservoir. Many of those filing hearing requests, attempted to have the threshold issues decided through Motions filed with the Executive Director to correct either

clerical errors or errors of law in regard to these underlying water rights based upon Permit 1949 and Certificate of Adjudication No. 14-1318. These issues are extremely important to the hearing Requesters with respect to their water rights in the future and especially in view of the Water Accounting Plan recommended by the Executive Director to be applied in this case.

### **THRESHOLD ISSUES**

A basis of the recommended Water Accounting Plan is that senior water rights holders and domestic and livestock users are entitled to receive water only when normal inflows are existing and entering Twin Buttes Reservoir. This is inconsistent with Special Condition 5.C of Certificate 1318, which was included in Permit 1949 which required a conduit at Twin Buttes Dam ". . . for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Department may determine lower appropriators are entitled" as meaning that the free passage of normal flows only has to be passed, in spite of the above language which states "at all times" when there is a request for water by a downstream water rights holder. It is also inconsistent with the main feature of Permit 1949 pertaining to the storage of only storm and flood water and release of stored water upon Order of the Commission (now the Watermaster) to which lower appropriators are entitled which was left out of Certificate No. 14-1318 more fully discussed below.

This issue is critical to downstream senior water rights holders and domestic and livestock users because if there is insufficient flows passed through the reservoir to keep the river wetted and in a condition to receive what other flows are necessary to meet their needs, there will be insufficient water in the stream for them to use when needed. The Water Accounting Plan fails to recognize that it is clear from the provisions in Permit 1949, which were not adjudicated, that only storm and flood

waters were to be stored in the reservoir and even the stored water is subject to downstream water rights and further, that the passage of non-flood waters was to be passed through at all times so as to flow downstream in the Concho River and subject to use by senior water right holders.

This is also significant to those water right holders, either senior or junior, upstream of Twin Buttes Reservoir because junior rights are prejudiced if flows are not in the Concho River for use when needed by downstream senior water right holders. By failing to pass through the normal flows as well as the needs of stored water to meet senior water rights holders downstream, there will be additional seniority calls on upstream junior water right holders.

In order to avoid unnecessary proceedings at the contested case hearing level and also the pending court case, it is essential that the Commission consider and decide the threshold issues as to the basis of the operation of Twin Buttes Reservoir and its system so that a proper Water Accounting Plan can be formalized recognizing that the underlying rights required the passage of normal flows "at all times" and the release of stored water, if necessary, for downstream senior water rights holders.

### **DISCUSSION OF THRESHOLD ISSUES**

The threshold issues involve the preparation of Certificate No. 14-1318 following the finalization of the adjudication case pursuant to the Water Rights Adjudication Act.<sup>2</sup> Or, alternatively, a question of the jurisdiction of the Commission to change conditions of a water right which were not litigated in the adjudication case. It is fundamental that the Commission's

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<sup>2</sup>Water Rights Adjudication Act of 1967, Subchapter G, Section 11.301, *et sec*, Texas Water Code, (V.T.C.A., 2008) (the "Adjudication Act")

jurisdiction and authority with respect to water rights is limited to that given under State statutes.<sup>3</sup>

More narrowly, these issues involve the adjudication of water rights in the Concho River Watershed, a tributary to the Colorado River, and specifically the water rights under Permit 1949 granted in 1960 with a priority date of May 6, 1959. After the adjudication case became final in 1979, the Certificate issued by the Commission in 1980 included the provisions of the water right of the Permit, which were adjudicated. It also carried forward into the Certificate all but one of the Special Conditions of the Permit, which were not adjudicated. One unadjudicated Special Condition dealing with storage of storm and flood water of the Permit,<sup>4</sup> was omitted, and did not find its way into the Certificate issued by the Commission. This omission was discovered during the pending Amendment proceeding.

We believe that the Commission made an error in the preparation of the Certificate under law, and/or does not have jurisdiction to change or amend a water right by omission of an unadjudicated Special Condition of the underlying water right. We believe that the Commission followed the law and what occurred was an error, which should be corrected or otherwise lacked jurisdiction to omit this important unadjudicated condition of the underlying water right (Permit).

In our effort to timely raise this issue, most all of the Requesters previously filed a Motion dated August 22, 2008 to the Executive Director to correct this error in the Commission's

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<sup>3</sup>See Vernon's Texas Code Annotated, Water Code, Section 5.013 (general jurisdiction), and see *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97 (TX.Sup.Ct. 2006) regarding the Commission's authority in changing or amending water rights.

<sup>4</sup>"The permittee shall store only storm and flood waters of said stream, subject to all the rights of prior appropriators and lawful diverters below. Whenever the Board finds that the permittee is storing any water to which downstream appropriators and lawful diverters are entitled, the permittee shall release same to said appropriators or lawful diverters on the order of the Board. By accepting this permit, permittee agrees to abide by and comply with any such order of the Board without delay. Failure to comply with any such order shall constitute grounds for forfeiture and cancellation."

preparation of Certificate No. 14-1318. The Applicant responded to the Motion and the Executive Director issued a letter dated October 30, 2008 stating reasons why he could not act upon this Motion because of procedural issues and other issues. On November 12, 2008, Requesters filed another Motion covering additional issues raised and statements made by Applicant and the Executive Director and to clarify (1) what they believed to be an inadvertent error, but (2) which now involved other more specific issues raised by the Applicant and the Executive Director, which needed to be further addressed and considered by the Executive Director.

The Executive Director denied this Motion, and Requesters filed a Motion to Overturn with the Commission which was allowed to be denied by operation of law.

Requesters thereafter appealed this decision to Court which is now pending in Cause No. D-1-GN-09-001101 in the 201<sup>st</sup> District Court in Travis County, *Concho River Basin Water Conservancy Association v. Texas Commission on Environmental Quality*.

As provided by the Adjudication Act, following issuance of the Final Judgment and Decree, the Commission prepared and issued Certificate 14-1318 evidencing the adjudicated water rights of the City based on the Final Judgment and Decree of the District Court. In doing it also included some of the unadjudicated special conditions of Permit 1949.

A review of the Commission's Final Determination and the Court's Final Judgment and Decree admittedly shows, that both contained only findings and conclusions relating to the identification of the water right holder location and the priority, extent, and purpose of use of the adjudicated right, but did not mention or deal with the special conditions of the right based on Permit 1949.

The Commission included in the Certificate the finding and conclusion of the Adjudication,

*i.e.*, priority, extent, and purpose of use of the adjudicated right as determined in the adjudication process, but it also carried forward some of the special conditions of Permit 1949 which were not adjudicated apparently so that the total water right of a holder could be shown by the Certificate. However, in this case, all of the unadjudicated special conditions of Permit 1949 were carried forward, except for one which, by error, was omitted.

Section 11.302 of the Adjudication Act, declares the policy of the Act. Its main purpose was to record and identify non-statutory water rights (*i.e.*, riparian rights except for domestic and livestock users) and to identify and quantify statutory right claims so that water rights over the State were identified and the greatest beneficial use could be achieved. The Act provides for a process by which these water rights can be identified and quantified. The Act provides for a final determination by the Commission accomplishing these specific purposes, that is, quantifying and identifying water rights in the State. These are basic elements and the extent and identification of what water rights are in existence over the entire State.<sup>5</sup>

The Act does not mention special conditions of water rights as they existed in Permits in the State. It spoke only to identification, quantification and recordation of the rights insofar as the amount of water that could be taken from a stream, purpose of use, rate of diversion, and in case of irrigation the land to be irrigated. If other issues pertaining to special conditions in Permits were raised in the adjudication case with notice to all parties, then such issues were litigated and became a part of the Final Determination and Court Decree.

Accordingly, the Final Determination on the Concho River was accomplished by the Commission and a Final Determination was issued only identifying and quantifying the water right

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<sup>5</sup>See, *In Re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438 (Tex.Sup.Ct. 1982) regarding the history and purpose of the Adjudication Act; See also, *City of Marshall and TCEQ v. City of Uncertain, et al.*

and the extent of such water right with respect to Permit 1949, but the other Special Conditions of Permit 1949 were not raised as an issue nor included or mentioned in the Determination with proper due process notice and litigated.

In accordance with the Adjudication Act, once the Final Determination was determined it was filed in Court and reviewed by the Court, which ultimately led to a final Court Judgment. At that point, only issues raised and litigated in the adjudication case could be considered by the Court. The only thing subject to review was what was included in the Final Determination of this water right which was an identification of the water right and the extent to which it had been "perfected" but did not contain the unlitigated special provisions of the water right otherwise included in Permit 1949 as issued by the State. The Court affirmed the Commission's Determination only in respect to the issues litigated.

After adjudication proceedings were completed judicially, § 11.323 of the Act provides for the issuance of a "Certificate of Adjudication" in providing as follows:

§ 11.323. Certificate of Adjudication

- (a) When a final determination of the rights to the waters of a stream has been made in accordance with the procedure provided in this subchapter and the time for a rehearing has expired, the commission shall issue to each person adjudicated a water right a certificate of adjudication, signed by the presiding officer of the commission and bearing the seal of the commission.
- (b) In the certificate, the commission shall include:
  - (1) a reference to the final decree;
  - (2) the name and post-office address of the holder of the adjudicated right;
  - (3) the priority, extent, and purpose of the adjudicated right and, if the right is for irrigation, a description of the irrigated land; and
  - (4) all **other information in the decree** relating to the adjudicated right.

The special conditions of Permit 1949 were not litigated and included in the Final Determination or Judicial Decree as "other information in the decree . . ." as provided in §11.323(4). These other aspects of Permit 1949 were not reviewed or changed because the Commission and the Court lacked jurisdiction to do so, unless raised and adjudicated after proper Constitutional notice and hearing, and included in the findings of fact and conclusions of the Final Determination and Court Decree.

In the preparation of the Certificate these special conditions of the water right, which are also the essence of the water right itself, remained the same and could not be changed unless litigated in the adjudication proceeding. They could be changed by amendment in a separate proceeding provided in the Texas Water Code and we are engaged in this case, See, *City of Marshall* case, *Supra*.

As noted, the Certificate carried forward and included the special conditions of the water right not litigated in the Adjudication, for example, Special Condition 5A, pertaining to the top of conservation pool, 5B. pertaining to return flows, 5C. elevation of the conduit of the Dam and required passage of normal flows. However, the special condition dealing with storage and downstream senior water right holders was omitted, and is pertinent and relevant to this water right initially by Permit 1949.

Neither the Adjudication Act nor any other statute provides a means by which provisions of a "Certificate of Adjudication" can be reviewed. Its preparation and issuance is a ministerial act intended to mirror the Final Determination issued in the adjudication proceeding. Other conditions pertaining to the water right contained in the Permit which were not litigated and included in the

findings of fact or conclusions in the Final Determination still exist to be carried forward in the Certificate, or alternatively the water right would be shown by the Certificate as to the Adjudicated provisions and the Permit as to the unadjudicated provisions.

The Applicant argues in its Response that the following general finding in the Final Determination entitled "*Merger for Administration Purposes*" is a finding for a substantive and intentional change of Permit 1949 by omitting the storage provision of Permit 1949 from the Certificate it provides:

"The allocation of water between users during times of shortage has confronted and confounded every administrator of water resources. Continual division of a stream into normal flow and storm and flood flow is a difficult engineering problem. If the administrator is to deal with not only this division but also to problem of allocating water between holders of certificates with a time priority and those without a time priority, particularly with the small quantity of water available in this segment, a wholly unworkable scheme will have been created. **Therefore, the [TWRC] has merged appropriative rights and rights recognized under ]Section 11.303, Water Code] into a common system as an equitable and workable means of administering the water rights adjudicated and has placed all recognized riparian claimants on a time priority with statutory water rights.** (App. D, Pg. 7)

This statement is found in the introductory portion of the Final Determination and not in the finding of fact and conclusion relating to Permit 1949 and under title of "*Merger for Administration Purposes*."

A clear reading of this provision in the Final Determination shows that it pertains to riparian water rights, and the merger of riparian water rights with appropriative water rights for administration purposes. The language in this statement of the Commission pertaining to allocation of water, and "normal and flood flow" references is only the predicate and basis of the Commission's Conclusion to merge statutory and riparian rights in the Final Determination. It does not say

anything about the conditions of a Permit (a statutory water right) pertaining to the storage of water or other type conditions, now generally referred to as "Special Condition". It does not reference impoundment or storage rights, and was not referenced or included in the finding of fact or conclusion pertaining to Permit 1949 involved herein. This omitted provision pertains to the impoundment and storage of storm and flood waters with the important proviso "subject to all the rights of prior appropriators and lawful diverters below," and does not relate to or involve the merger of riparian and statutory water rights and flows in that respect for administration purposes. To suggest that this statement in the Final Determination authorized the Commission, to omit this important condition of Permit 1949 in the Certificate is a *non-sequitur!*

The elements of the City's water rights is based upon Permit 1949, except to the extent that it was identified and quantified with respect to the amount of water diverted and "vested" and "perfected" as determined in the Final Determination and approved by the Court. Otherwise, the conditions of the Permit defines the basis and extent of the water right held by the City. Therefore, it is necessary to include all of the conditions contained in the Permit.

Applicants argue that this error in omitting the omitted provision was not "inadvertently made" but was intentionally made by the Commission. It must have been "inadvertently" made because why would the Commission include all of the other Special Conditions in Permit 1949 in the Certificate and omit this provision?

The Adjudication Act gave the Commission the authority and jurisdiction to "change" the underlying water right (here Permit 1949) only to the extent to which it had been adjudicated. Admittedly, neither the Commission's Final Determination or the Court Judgment, contained any findings of fact or conclusions of law pertaining to the Special Conditions contained in Permit 1949.

The only suggested basis is the general statement by the Commission in the Adjudication

Case pertaining to riparian rights discussed above and not relevant to this case. Thus, omitting this provision was a "change" in the underlying water right not authorized by the Adjudication Act nor any other law. It was a "change" which improved the water rights under Permit 1949 to authorize **more** than the right authorized before the Adjudication Case, without notice and without a hearing allowing other water right holders to contest the "drafting" of the Certificate. The Adjudication Act and no other law provides for an appeal of the drafting of the Certificate. The only appeal is of the Final Determination. The drafting of the Certificate is not a final Order of the Commission which is appealable.

To suggest that this omission was not "inadvertent" and intentional is to suggest that the Commission, without any supporting direct finding of fact and conclusion of law in the Adjudication Case, "changed" this important condition of Permit 1949 by the mere omission of it in the drafting of the Certificate. This cannot be so because the Commission would not do something to which it was not authorized to do and in a manner, violative of Constitutional requirements and due process rights of others having water rights downstream of Twin Buttes Reservoir in the Concho and Colorado River Basin.

This is an important provision protecting downstream senior water right holders and lawful diverters because of the general Commission policy as stated by staff, that once water is impounded it is not subject to call by downstream senior water right holders and other lawful diverters as needed. It is important to upstream junior water rights holders because it could subject them to more priority calls.

Permit 1949 is still alive and enforceable only if all of the provisions of Permit 1949 were carried forward in the Certificate which were not affected by the Adjudication Case. The

Adjudication Case was limited by the Adjudication Act as to what parts of the Permit were adjudicated. If issues regarding the Special Conditions were raised and litigated, they would be included in the Final Determination and Court Decree. They were not in either the Final Determination or Court Decree. Thus, the Special Conditions in the original Permit 1949 included in the Certificate are valid as well as the omitted provision.

Section 11.322(c) of the Adjudication Act provides that a "water right" not included in the Court Decree, does not exist any longer. Clearly, the water rights under Permit 1949 was included in the Adjudication Case to the extent that it was adjudicated. The Special Conditions of Permit 1949 which were not dealt with in the Adjudication Case, did not just go away. As noted above, they could be changed only by amendments to the water right or by cancellation according to law. This was not done in this case, because all of the unadjudicated Special Conditions of Permit 1949 were not carried forward in the Certificate. The Certificate excluded the omitted provision. Therefore, the omitted provision of Permit 1949 is still alive because it has not been lawfully amended or changed, but was only inadvertently not carried forward in the Certificate.

Applicant argues that the difficulty of determining the division of flows between flood and storm water and normal or ordinary flows has been previously recognized as an engineering problem and the Commission eliminated it in merging riparian rights with appropriation statutory rights. The Water Rights Adjudication Act did not address this "flow issue" as it naturally occurs in a stream. The Commission only addressed "flow issues" as discussed above in the merger of statutory and riparian rights. The Adjudication Act has no provision dealing with this "flow issue" or the disregard of provisions in Permits that deal with different flows of water as contained in the water right as originally issued by the Commission.

This issue of determining "normal flows" has no bearing or relevance to this case. It has been discussed in many court cases, however, at the same time, it appears to be "an upside down argument" in that all of the attention is paid to the question of determining "normal flows" as oppose to determining "storm and flood flows." Storm and flood flows are easily determined by common observation with current technology and measuring techniques. It reminds us of older cases which found groundwater to be ". . . so secret, occult, and concealed that an attempt to administer any set of legal rules and respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible . . ." (*Houston & T.C. Railway Company v. East*, 98 Tex. 146 (1904), but see discussion by Justice Wilson, in his dissent, in *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, at 299-300 (1955) of advances in knowledge and technique with respect to waters over the years after 1904 to which the Commission can acknowledge.

Moreover, §11.021(a) still defines State water as being ". . . water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake and of every bay or arm of the Gulf of Mexico, and the storm water, flood water, and rain water of every river, natural stream, canyon, ravine, depression, and watershed in the State is the property of the State."

To suggest that the Adjudication Act changed the distinctions between flows and streams as contained in Special Conditions of Permits either before or after the Adjudication Act is incorrect and is overly broad. There is no law, including the Adjudication Act, that provides that such flow conditions in statutory rights can be changed other than through the Amendment and Cancellation process. Modern hydrologic concepts and engineering can deal with distinction between flows in properly prepared water accounting plans.

It is no longer the case that water is so ". . . secret, occult, and concealed . . ." with more modern hydrologic techniques. Determining flows with respect to inflows to a reservoir can be

engineeringly determined and accounted for. Storm and flood waters are identifiable and associated with current storm weather conditions. Other remaining flows are normal flows. It does not take more than a human mind assisted by modern hydrology to determine these natural conditions.

Moreover, the suggestion that the statements relating to the merger for administrative purposes of riparian and other statutory claims as support for the intentional omission of the omitted provision is inconsistent with the Commission's intentional carrying forward in the preparation of the Certificate the provision contained in Special Condition 5C of the Certificate dealing with the passage of the "normal flows" through the conduit at Twin Buttes. If the Commission was applying a policy and exercising its general jurisdiction over water rights by a rule that there is no distinctions between "flows" why would it have included a provision in the Certificate dealing with the passage of "normal flows" in Special Conditions 5C of the Certificate involved in this case. As noted above, near the same time that the Commission was adjudicating the water rights on the Concho, it was involved in the proceeding resulting in 1974 Order (Exhibit A) in which it ordered that the "normal inflows" pass through Twin Buttes Dam and that "stored water" be released for downstream use. If the Commission intended such a change in the water right it would have stated so in a clear fashion. No, the omission of the omitted provision was not a substantive decision of the Commission in the preparation of the Certificate because to do so is contrary to law. It was an inadvertent error by omission.

Alternatively, the Commission had no jurisdiction or authority to omit the omitted provision in Permit 1949 in the Certificate, and to do would violate Movants' due process and constitutional rights.

The change of the water rights under Permit 1949 by omission of the omitted provision cannot be considered as an amendment of that provision because the statutes relating to amendment

of a water rights were not followed or even alluded to in any way in the Final Determination, the Court Decree which was confined by the Adjudication Act to issues raised before the Commission in the Adjudication Case.

The omission of this provision in the Certificate is critically important in this case because the proposed amendment changing the language as requested will further reduce downstream flows and impair downstream water rights, and the proposed Water Accounting Plan further reduces flows downstream available for water users because it eliminated the free passage of normal flow to inflows when a call for water is made and determined by the Watermaster. The plan completely ignores the words in the Certificate carried forward from Permit 194 regarding the free passage of normal flows "at all times" and interprets "and" as limiting the free passage of normal flows at all times to those waters to which the Commission may determine lower appropriators are entitled. It is this interpretation that is a basis of the Water Accounting Plan recommended by the Executive Director. If the omitted provision dealing with the impoundment of storm and flood waters were present in the Certificate, certainly it is clear that the words "passage of those waters to which the Commission may determine lower appropriators are entitled" means the storm and flood waters that are impounded in the reservoir. This is so because the omitted provision made the storm and flood waters storage rights subject to "all the rights of prior appropriators and lawful diverters below."

Thus, when the omitted provision is read in conjunction with Special Condition 5.C of the Certificate, it is clear that the basis of the Executive Director's Water Accounting Plan passing normal flows only when there is a request for water downstream and if not available, not releasing impounded flows, which is subject to downstream rights, is incorrect and not consistent with the underlying water rights dealing with Twin Buttes Dam and Reservoir. Moreover, additional and

existing measuring devices must be required by the Commission so that the management and operation of the Twin Buttes and Applicant's overall system may be properly administered by the Watermaster.

### HEARING REQUESTS

We agree with the recommendations of the Executive Director with respect to their status as affected persons and interest in this case. All water rights holders on the Concho Watershed are well known to the Watermaster and shown on his records. Many of the same parties participated in the Watermaster Case as well as other amendment cases and the current court appeal mentioned above. Several of them testified in the Watermaster Case and are vitally interested in this case either as water rights holders or domestic and livestock users. Further necessary information will be provided to the Executive Director.

A question was raised regarding the status of the Concho River Basin Water Conservancy Association. It is a non-profit corporation having filed its Articles of Incorporation with the Secretary of State and was issued Charter No. 01580772-01 dated May 2, 2000, issued by the Secretary of State of Texas. Article Four (4) of its Articles of Incorporation, provides that its purpose is:

“The purposes for which the corporation is organized are: (1) to protect and conserve private property rights of landowners and water right holders in the Concho River Basin; (2) to promote water conservation; (3) to promote and encourage cooperation between water users, so as to enable members to work together as a unit in matters of mutual concern; (4) to promote management practices conducive to more economical operation of the Concho River Basin and monitoring of the flow of the Concho River Basin and its tributaries; (5) to concern itself with matters of interest to the association which may be before any legislative bodies, courts or agencies, or which may affect the interest of the members; and (6) to disburse information and other action deemed appropriate to carry out these purposes.”

The Association has appeared in other cases involving the Concho River Basin and Watershed and is authorized to represent those identified in footnote 1 above, which is consistent

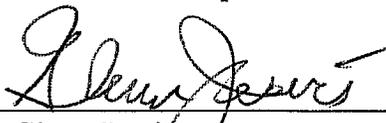
with its purposes. The Association meets the requirements under 30 TAC § 55.252(a) in that (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group or association seeks to protect are germane to the organization's purpose; and (3) because one or more of those identified in footnote 1 above are Requester(s) and participating through the Association.

### **CONCLUSION**

We respectfully request that the Commission (a) grant the hearing requests as recommended by the Executive Director and deny this Application for the Amendment changing the language in Special Condition 5.C as requested, or alternatively, order a contested case hearing; (b) enter an appropriate order or other directives properly defining the underlying water rights of the Applicant under Permit 1949 and Certificate No. 14-1318 as including the omitted provision of Permit 1949 discussed above within the terms of Certificate No. 14-1318; and (c) direct that the Water Accounting Plan be modified consistent with existing Special Condition 5.C of Certificate No. 14-1318 and the omitted provision of Permit 1949, see footnote 4 above, according to their terms as discussed above. In this manner, this threshold issue would be resolved and if the case could not be otherwise resolved between the parties better define the issues involved in a contested case hearing, and save considerable time and expense involved in a contested case hearing and potentially the pending court case. The alternative is to order an expensive and time consuming contested case having to address these threshold legal issues which, ultimately, must be decided by the Commission.

Respectfully submitted,

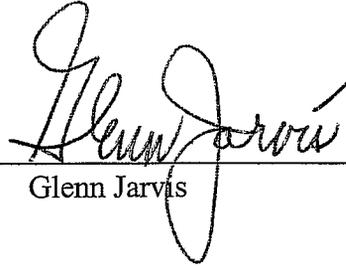
LAW OFFICES OF GLENN JARVIS  
Inter National Bank Building  
1801 South Second Street, Ste. 550  
McAllen, Texas 78503  
(956) 682-2660 - telephone  
(956) 618-2660 - telecopier

BY:   
Glenn Jarvis  
State Bar No.: 10588000

ATTORNEY FOR CONCHO RIVER BASIN WATER  
CONSERVANCY ASSOCIATION

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Hearing Requesters Reply to Responses to Hearing Requests, has been sent via first-class mail, to the persons on the attached Mailing List on this 17<sup>th</sup> day of August, 2009.



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Glenn Jarvis

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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CHIEF CLERKS OFFICE

**Mailing List**  
**San Angelo Water Supply Corporation**  
**Docket No. 2009-1617-WR; Permit No. Adj 1318C**

FOR APPLICANT:

Will Wilde  
City of San Angelo  
P.O. Box 1751  
San Angelo, TX 76902-1751

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga, Senior Atty., MC-173  
Texas Comm. on Environmental Qual.  
Environmental Law Division  
P.O. Box 13087  
Austin, TX 78711-3087

Craig Mikes, Technical Staff, MC-160  
Texas Comm. on Environmental Qual.  
Water Supply Division  
P.O. Box 13087  
Austin, TX 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Mr. Blas Coy, Jr., Atty, MC-103  
Texas Commission on Environmental Qual.  
Public Interest Counsel  
P.O. Box 13087  
Austin, TX 78711-3087

FOR THE OFFICE OF PUBLIC ASSISTANCE:

Ms. Bridget Bohac, Director, MC-108  
Texas Commission on Environmental Qual.  
Office of Public Assistance  
P.O. Box 13087  
Austin, TX 78711-3087

FOR CHIEF CLERK:

Ms. LaDonna Castañuela, MC-105  
Texas Commission on Environmental Qual.  
Office of Chief Clerk, MC-105  
12100 Park 35 Circle - Bldg. F, 1st Flr  
Austin, TX 78753

FOR ALTERNATIVE DISPUTE RESOLUTION:

Mr. Kyle Lucas, MC-222  
Texas Commission on Environmental Qual.  
Alternative Dispute Resolution  
P.O. Box 13087  
Austin, TX 78711-3087

REQUESTER(s):

Carroll D. Blacklock  
1906 Coke St.  
San Angelo, TX 76905-6223

Fred R. Campbell  
P.O. Box 186  
Paint Rock, TX 76866-0186

Thomas L. Evridge  
16185 My Road  
Miles, TX 76861-5200

Ben O. Sims  
RR 1, Box 4  
Paint Rock, TX 76866-9401

Concerned Citizen  
Public Works Director  
P.O. Box 157  
Paint Rock, TX 76866-0157

Bernie & Lucy Mika  
P.O. Box 643  
Miles, TX 76861-0643

Ben O. Sims  
425 N. Crozier Ave.  
Paint Rock, TX 76866-3103

# TEXAS WATER RIGHTS COMMISSION



AN ORDER directing San Angelo Water Supply Corporation to release water from Twin Buttes Reservoir and directing the City of San Angelo, Texas, to provide for the passage of the releases.

On July 22, 1974, there came on to be considered before the Texas Water Rights Commission the matter of insufficient water in the Concho River below the Bell Street Dam in San Angelo, Texas, to provide for domestic and livestock water and to honor superior and senior water rights on the Concho River.

After considering the matter the Commission finds:

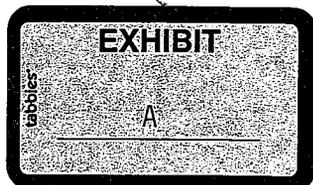
1. San Angelo Water Supply Corporation, hereafter referred to as "permittee," owns Permit No. 1949 authorizing Twin Buttes Reservoir which provides as a condition as follows:

"The permittee shall store only storm and flood waters of said stream, subject to all the rights of prior appropriators and lawful diverters below. Whenever the Board finds that the permittee is storing any water to which downstream appropriators and lawful diverters are entitled, the permittee shall release same to said appropriators or lawful diverters on the order of the Board. By accepting this permit, permittee agrees to abide by and comply with any such order of the Board without delay. Failure to comply with any such order shall constitute grounds for forfeiture and cancellation."

2. Below Twin Buttes Dam on the Concho River the City of San Angelo owns two dams, Lone Wolf Dam under Certified Filing No. 155, and Bell Street Dam under Permit No. 1669.

3. Permittee has stopped the flow of the Middle Concho River, the South Concho River, Dove Creek, and Spring Creek, and their contributing tributaries, and is impounding the water in Twin Buttes Reservoir; and has failed to release sufficient inflows from Twin Buttes Reservoir for domestic and livestock uses and for other superior and senior water rights downstream on the Concho River.

4. Permittee has been supplying water from Twin Buttes Reservoir to Tom Green County Water Control and Improvement District No. 1 for irrigation purposes.



5. To satisfy the above noted condition in Permit No. 1949, to provide for domestic and livestock needs, and to honor superior and senior water rights below San Angelo, Texas, on the Concho River, permittee should be directed to provide for the passage of the normal inflows through Twin Buttes Reservoir; in addition, due to the failure to release sufficient inflows from Twin Buttes Reservoir, permittee should be directed to release water from the reservoir at the same time and in the same quantities as water is hereafter diverted for irrigation purposes in the Tom Green County Water Control and Improvement District No. 1; and, the City of San Angelo, Texas, should be directed to pass the releases through Lone Wolf Dam and Bell Street Dam.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS WATER RIGHTS COMMISSION that:

San Angelo Water Supply Corporation is hereby directed to provide for the passage of the normal inflows through Twin Buttes Reservoir;

In addition to the releases of the normal flows, San Angelo Water Supply Corporation is hereby directed to release water from Twin Buttes Reservoir at the same time and in the same quantities as water is hereafter diverted for irrigation purposes in the Tom Green County Water Control and Improvement District No. 1, until otherwise notified; and,

The City of San Angelo, Texas, is hereby directed to pass the releases from Twin Buttes Reservoir through Lone Wolf Dam and Bell Street Dam.

The Secretary of the Commission is directed to issue a certified copy of this order to the San Angelo Water Supply Corporation, Tom Green County Water Control and Improvement District No. 1, and the City of San Angelo, Texas.

Executed and entered of record, this the 23rd day of July, 1974.



Audrey Strandtman  
Audrey Strandtman, Secretary

TEXAS WATER RIGHTS COMMISSION

Joe D. Carter  
Joe D. Carter, Chairman

Burke Holman  
Burke Holman, Commissioner

Dorsey B. Hardeman  
Dorsey B. Hardeman, Commissioner

IN THE MATTER OF THE                    I                    BEFORE THE TEXAS WATER  
ADJUDICATION OF THE CONCHO        I                    RIGHTS COMMISSION  
RIVER SEGMENT OF THE  
COLORADO RIVER BASIN

FINAL DETERMINATION

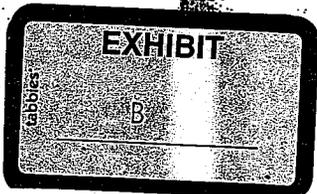
The Texas Water Rights Commission hereby makes its final determination of claims of water rights in the Concho River Segment of the Colorado River Basin. This action is taken pursuant to Title 2, Subtitle A, Chapter 5, Subchapter G of the Texas Water Code (1971).\* Jurisdiction was established at the initial public hearing in San Angelo, Texas, on March 6, 1973, and evidence was received on March 19, 1973 and at subsequent public hearings. The Commission's preliminary determination was entered on April 14, 1975. Contest hearings were held on September 23, 24, and 25, 1975 and on October 29, 1975.

The Commission has considered the record of these proceedings, including the examiner's report, the investigation report, the appendix to the investigation report, the written statement of facts, documentary evidence admitted into evidence, the contests filed and the exceptions and briefs filed by parties, in making the following findings of fact and conclusions of law:

INTRODUCTION

1. The Concho River Segment of the Colorado River Basin consists of the Main Concho River and its tributaries between the confluence of the river with the Colorado River and the headwaters of the North Concho, Middle Concho and South Concho Rivers and their tributaries including Spring Creek and Dove Creek and their tributaries and including all or portions of Concho, Runnels, Tom Green, Coke, Schleicher, Irion, Crockett, Reagan, Upton, Midland, Glasscock, Howard and Sterling Counties, Texas. State water within this area is used for municipal irrigation, industrial and recreational purposes.

\*All statutory references are to the Texas Water Code unless otherwise noted.



2. In the adjudication of water rights which includes permits, certified filings and claims filed pursuant to Section 5.303 (previously Article 7542a, Section 4, Vernon's Annotated Civil Statutes), the Commission has applied state statutory and judicial criteria. In accordance with Section 5.021, all flows of the various streams in the Concho River Segment are State waters subject to this adjudication except water being used for domestic and livestock purposes.

3. In determining water rights in the Concho River Segment, beneficial use, as the term has been defined by law, is an essential element for any claimant seeking recognition of a water right. Beneficial use is use of that amount of water which is economically necessary for a purpose authorized by Chapter 5 of the Water Code, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose (Section 5.002).

#### STATUTORY RIGHTS

4. Statutory appropriators are persons (1) who have made a beneficial use of water in a lawful manner under the provisions of any act of the legislature before the enactment of Chapter 171, General Laws, Acts of the 33rd Legislature, 1913, as amended, or (2) who filed with the State Board of Water Engineers a record of their appropriation as provided by the 1913 Act, as amended, known as a "certified filing," or (3) who have made a beneficial use of water within the limitations of a permit lawfully issued by the Texas Water Rights Commission or its predecessors.

5(a) Permits which have not been developed due to their recent issuance cannot be adjudicated as vested rights. The Commission, therefore, has recognized such a right to the extent of the development according to the terms and conditions of the permit and has authorized the holder of such a permit to continue diligent development.

(b) Subject to the foregoing, the Commission therefore determines that appropriative rights are limited to the amounts specifically appropriated and beneficially used for the purposes specified, and recognizes the maximum quantity of water beneficially used and, if appropriate, the maximum acreage irrigated, together with the diversion rates and time priorities thereof.

(c) An appropriator who was diverting water from an unauthorized diversion point was allowed to continue this practice where it was determined that the deviation from the terms of the appropriative right was inconsequential. This authorization was conditioned on the absence of intervening appropriators between the authorized point of diversion and the unauthorized point at which the water was actually diverted.

(d) An appropriator who was irrigating acreage located outside the authorized area was allowed to continue this practice where it was determined that the deviation from the terms of the appropriative right was inconsequential.

6. Due to several destructive floods during this century on the Main Concho River, the most severe of which occurred in 1936, a number of on-channel dams authorized by permits and certified filings were breached and became incapable of creating the on-channel reservoirs specified by the terms of the permits and certified filings. Some of the dams were never repaired while others that were rebuilt were washed out by subsequent floods. Where the permits or certified filings authorize diversion from the authorized reservoirs and do not authorize the diversion of normal flow, the appropriative rights herein recognized are limited to the maximum annual quantity of water diverted from the authorized reservoirs and beneficially used for the purposes authorized. If a permit or certified filing requires the construction and maintenance of a dam and limits the diversion and use of water to storm and flood water, the diversion of the normal flow of the watercourse is not in accordance with the terms and conditions of the water right and such use cannot be considered development of the water right. Where it was established in evidentiary hearings that an authorized dam was constructed in accordance with a permit or certified filing, it is recognized herein to the maximum capacity established, regardless of its present condition.

7. The appropriative rights of holders of term permits, those granted for a specific number of years, were adjudicated and are included in this determination. The appropriative rights of holders of temporary permits, those granted for a period of less than three

years, were not included in this adjudication or this determination. The appropriative rights of holders of contractual permits, those authorizing use of water based upon a written agreement with a water right holder, are recognized under the water right holder's permit or certified filing.

#### RIPARIAN RIGHTS

8. In determining the nature and extent of riparian right claims, the Commission has applied the following statutory criteria:

(a) The Texas Water Code does not recognize any riparian right in the owner of land the title to which passed out of the State of Texas after July, 1, 1895. In this regard, it is sufficient that equitable title to the land passed from the State of Texas prior to July 1, 1895.

(b) Claims of riparian rights not filed in substantial compliance with Section 5.303 are barred and extinguished.

(c) Claims of riparian rights, if valid under existing law, are recognized to the extent of the maximum actual application of water to beneficial use without waste, and to the extent acreage was irrigated, if applicable, during any calendar year from 1963 to 1967, inclusive. However, in any case where a riparian claimant has, prior to August 28, 1967, commenced or completed the construction of works designed to apply a greater quantity of water to beneficial use, the right is recognized to the extent of the maximum amount of water actually applied to beneficial use without waste during any calendar year from 1963 to 1970, inclusive, if the claimant filed an additional sworn statement as provided by Section 5.303(e) and (h).

9. Subject to the statutory limitations regarding riparian rights the Commission finds that the following judicial criteria are applicable:

(a) Lands which border or have frontage upon a stream or watercourse are riparian, and the owner is deemed to have a correlative right to share in the use of the normal flow of those waters which pass his land. No riparian has a property right in the water, but only a right of use.

(b) All land abutting upon a running stream is riparian as to that part of the survey which lies within the watershed of the stream. The boundary of riparian land is restricted to land the title to which

is acquired by one transaction, and a parcel of land may lose its riparian character and status when separated from the stream by grant or deed.

(c) The riparian owner is subject to the doctrine of reasonable use which limits all rights to the use of water to that quantity reasonably required for beneficial use and prohibits waste or unreasonable use, or unreasonable methods of use or diversion.

(d) A riparian's use of water for irrigation, industry and other non-natural uses is inferior to the use of water for sustaining human life and the life of domestic animals.

(e) Because of the general semi-arid condition in the Concho River Segment and the fact that streams in the Segment have a flow which fluctuates seasonally, some riparian owners have erected minor holding structures which serve as pumping pools on streams from which water is diverted for irrigation. Where the storage capacity of these structures is insignificant, this activity has been determined to be permissible as a riparian water right.

#### OTHER CLAIMS OF WATER RIGHTS

10. Section 5.303 provided for the recordation and limitation of other water rights in addition to riparian rights. These rights were claims under former Article 7500a,\* Vernon's Annotated Civil Statutes, to impound, divert or use State water for other than domestic and livestock purposes, for which no permit has been issued; claims of water rights under the Irrigation Acts of 1889 and 1895 which were not filed with the State Board of Water Engineers in accordance with the Irrigation Act of 1913, as amended; and other claims of water rights except claims under permits or certified filings.

(a) The Commission finds that no one introduced into evidence and substantiated a declaration of intent which was not filed with the State Board of Water Engineers in accordance with the Irrigation Act of 1913, as amended.

(b) The Commission gave consideration to numerous claims of "equitable" water rights. Several claimants of water rights

\*With the enactment of the Texas Water Code in 1971, Article 7500a was repealed and codified as Sections 5.140 and 5.141.

presented evidence in support of Section 5.303 claims that during the period 1963 to 1970, inclusive, they had contracted with the U.S. Department of Agriculture Commodity Stabilization Service by Soil Bank Conservation Reserve Contract, commonly named Soil Bank agreements, by which the landowner was paid by the federal government not to harvest or graze designated tracts. If the landowner had irrigated the designated tracts during the contract term, the use of State water would have been neither economical nor beneficial unless the landowner breached the contract by harvesting or grazing, and subjected himself to penalties.

In the course of its investigations and hearings, the Commission has become aware of certain instances in which strict application of the provisions of the Water Rights Adjudication Act of 1967 seems to work undue and apparently unanticipated hardship upon persons claiming under Section 5.303 and 5.307 of such Act. The legislation is explicit and does not vest the Commission with any latitude to deviate from the limitations expressed in Section 5.303(b) which limits recognition of claims described in Section 5.303(a) to the extent of the maximum actual application of water to beneficial use without waste during any calendar year from 1963 to 1967, inclusive, and under certain circumstances, to the extent of the maximum amount of water applied to beneficial use during any calendar year from 1963 to 1970, inclusive.

The Commission is of the view that it has no jurisdiction or authority to recognize an equitable water right under the Water Rights Adjudication Act or under any other provisions of the Water Code except where the recognition of such right has been established by judicial precedent as in the Lower Rio Grande litigation where the Court took into account a combination of unique factors found only in certain reaches of that river. (State of Texas v. Hidalgo County Water Control and Improvement District No. Eighteen, 443 S.W.2d 728). The District Court, on the other hand, is vested with the power to invoke equity to remedy situations where there is no adequate remedy at law (Texas Constitution Article V, Section 8). Therefore, the Commission recommends that the Court recognize equitable water rights for claimants under Section 5.303 of the Adjudication Act in the Concho River Segment under exceptional circumstances. The Commission

suggests that such circumstances would include those situations where Section 5.303 claimants had applied water to beneficial use prior to 1963 but did not use water during the historical period because the irrigable land was in a "soil bank contract"; because the source of water supply was so polluted with minerals during the historical period that to make the irrigation of land with such water impractical since the water would have been deleterious to any lands upon which it was applied; or for other unusual and extenuating circumstances brought to the attention by exception to the final determination.

(c) The Commission also considered several claims of water rights presented pursuant to former Article 7500a,\* Vernon's Annotated Civil Statutes. Under this article, enacted originally in 1895 and often amended, a landowner could construct on his own property a reservoir of a maximum size which varied with each amendatory statute and could use the water in the reservoir for any use without being required to obtain a permit. See City of Anson v. Arnett, 250 Tex. Civ. App. -- Eastland 1952, writ ref'd n.r.e.). A dam may not be constructed across a navigable stream unless authorized by a permit or certified filing. See Garrison v. Bexar-Medina-Atascosa County Water Improvement District No. 1, 404 S.W.2d 376 (Tex. Civ. App. -- Austin 1966, writ ref'd n.r.e.). The 47th Legislature amended Article 7500a effective March 17, 1941, being Chapter 36, Section 1 on page 53 of the Session Laws, to restrict the use of water from such a reservoir to domestic and livestock purposes in the absence of a permit authorizing other uses. In considering the claims of water right under former Article 7500a,\* the Commission has recognized claims attaching to reservoirs which were constructed within the maximum size allowed under the statute in effect at the time of construction, and which were built prior to March 17, 1941. The owner of such a reservoir constructed after March 17, 1941, has no water right for other than domestic and livestock purposes unless such use was authorized under a permit.

#### MERGER FOR ADMINISTRATIVE PURPOSES

11. The allocation of water between users during times of shortage has confronted and confounded every administrator of water.

\*With the enactment of the Texas Water Code in 1971, Article 7500a was repealed and codified as Sections 5.140 and 5.141.

resources. Continual division of a stream into normal flow and storm and flood flow is a difficult engineering problem. If the administrator is to deal with not only this division but also the problem of allocating water between holders of certificates with a time priority and those without a time priority, particularly with the small quantity of water available in this segment, a wholly unworkable scheme will have been created. Therefore, the Commission has merged appropriative rights and rights recognized under Section 5.303 into a common system as an equitable and workable means of administering the water rights adjudicated and has placed all recognized riparian claimants on a time priority with statutory water rights. The time priority for riparian is the date of first beneficial use of water established under the claim. The time priority for permits is the date the application was formally accepted for filing with the Commission or its predecessors. For the purpose of determining time priority of certified filings the Commission determines that the following are relevant:

- Acts 1889, 21st Leg., Ch. 88, Sections 4 through 8;
- Acts 1895, 24th Leg., Ch. 21, Sections 5 through 7; and
- Acts 1913, 33rd Leg., Ch. 171, Section 14.

#### NEWLY ISSUED PERMITS AND AMENDMENTS

12. The addendum to this determination contains, in chronological order of the date of issuance, all permits or amendments to permits and certified filings which were issued by the Commission during the pendency of the adjudication but subsequent to the last evidentiary hearing before the preliminary determination on the affected permit or certified filing. Due to their recent issuance, these permits and amendments could not be considered in the adjudication and are not included in this determination.

#### FAILURE TO FILE AND SUBSTANTIATE CLAIMS

13. Sections 5.303 and 5.307 of the Water Rights Adjudication Act of 1967 require all claimants of water rights except users of water for domestic and livestock purposes to file a statement of the claim of right with the Commission. The Commission finds that the failure to file a sworn statement extinguishes and bars any claim of water rights under Section 5.303, and the failure to file a sworn claim in accordance with the Commission's Notice of Adjudication under Section 5.307 bars the recognition of any right under this determination.

As a basic premise those parties to the adjudication proceeding asserting water right claims under Sections 5.303 and 5.307 have an affirmative obligation to produce credible evidence to substantiate the nature and extent of their claims. The Commission finds that any party whose claim was not substantiated by credible evidence cannot be recognized a water right under this determination.

ORDER

NOW, THEREFORE, BE IT ORDERED as the Final Determination of the Texas Water Rights Commission that the Commission makes findings of fact and conclusions defining the nature and extent of valid claims of water rights, if any, as to each respective party as hereinafter enumerated. The parties are indexed alphabetically and listed in numerical order of diversion point, or by tract number when there is no diversion point. The Commission declares that the right to use the water of the State of Texas in the Concho River Segment of the Colorado River Basin on the basis of the findings of fact indicated, in the annual quantities stated, for the purposes indicated, and at the rates of diversion and time priorities, is set forth below following the alphabetical index.

TRACT NO: NONE

OWNERSHIP: SAN ANGELO WATER SUPPLY CORPORATION

IR 216 Vol. 8 SF 623-681, Vol. 12 SF 237-288 and Vol. 13 SF 26-34 Findings:

- Permit No. 1949 authorizes the impoundment of 170,000 acre-feet of storm and flood water in a 600,000 acre-foot capacity on-channel reservoir on the South and Middle Concho Rivers (Twin Buttes Reservoir). The permit also authorizes the diversion from the reservoir of 29,000 acre-feet of water per year at a maximum rate of 120 cfs for municipal purposes, and the diversion of 25,000 acre-feet of water per year at a maximum rate of 150 cfs for the irrigation of 10,000 acres of land in Tom Green County, with the actual application of water not to exceed 2.5 acre-feet of water for each acre irrigated.
- Diversion from Twin Buttes Reservoir under Permit No. 1949 is by gravity flow at Diversion Point 1285 and water is transported through the bed and banks of the Middle Concho River into Lake Masworthy. Water for irrigation purposes is then diverted at Diversion Point 1285 on Lake Masworthy into a gravity flow canal for conveyance to the lands authorized irrigation through the Tom Green County Water Control and Improvement District No. 2. Water for municipal purposes passes through Lake Masworthy at Diversion Point 1290 and is conveyed by the bed and banks of the South Concho River to the City of San Angelo Water Plant at Diversion Point 1350.
- The maximum use of water under Permit No. 1949 for irrigation purposes was 10,931 acre-feet of water in 1972 for the irrigation of 8,000 acres of land.
- Permittee has exercised due diligence in perfecting Permit No. 1949 to the maximum extent of 25,000 acre-feet of water for the irrigation of 10,000 acres of land.
- Permit No. 1949 and the facilities located at Twin Buttes Reservoir are part of an integrated surface water supply system along the Middle Concho and South Concho Rivers which serves the municipal needs of the City of San Angelo. Other water rights included in this system are Permit No. 1120, Permit No. 168 and Certified Filing No. 155 of the City of San Angelo.
- Water use by the City of San Angelo under this system of water rights has been reported without differentiating what quantity of water is attributable to which individual water right. The maximum amount of water used under these combined water rights (Certified Filing No. 155, Permit No. 168, Permit No. 1120 and Permit No. 1949) was 13,782 acre-feet of water in 1972 for municipal and industrial uses.
- Permit No. 1949 has a time priority of May 6, 1959 and is fourth in seniority among the four rights comprising the City of San Angelo's water delivery system on the Middle Concho and South Concho Rivers.
- Of the 13,782 acre-feet of water used by the City of San Angelo for municipal purposes in 1972, 6,534 acre-feet of water per year are attributable to Certified Filing No. 155 and Permit No. 168 as full perfection of those rights since they are senior in time to Permits No. 1120 and 1949. Permit No. 1120, as the next water right in seniority in this system, has been perfected to the extent of the remaining 7,248 acre-feet of water per year for municipal purposes.
- Contractual Permit No. 61, issued to the Texas Parks and Wildlife Department on September 26, 1968, is based on Permit No. 1120 of the City of San Angelo and any water use under Contractual Permit No. 61 accrues to the perfection of Permit No. 1120. The maximum use of water under Contractual Permit No. 61 was 678 acre-feet of water in 1972 for industrial (fish hatchery) purposes.
- The order partially cancelling Permit No. 1120 dated February 10, 1961, stipulates that the 25,000 acre-feet of water authorized for municipal and industrial use under Permit No. 1120 is included in the 29,000 acre-feet of water authorized for municipal use under Permit No. 1949. Water use for municipal and industrial use under Permit No. 1120, therefore, is also attributable to the partial perfection of Permit No. 1949.
- Permit No. 1949 has been perfected to the extent of 8016 acre-feet of water per year for municipal purposes.
- Permittee has exercised due diligence in perfecting Permit No. 1949 to the maximum extent of 29,000 acre-feet of water for municipal purposes.
- On October 28, 1974, for the first time since construction, Twin Buttes Reservoir under Permit No. 1949 reached its conservation storage capacity of 170,000 acre-feet of water. With the exception of 8 days during the period of October 28, 1974 through June 11, 1975, Twin Buttes Reservoir was maintained at or in excess of conservation storage capacity.

BASIS OF RIGHT RECOGNIZED - PERMIT NO. 1949  
 SOURCE OF WATER - MIDDLE AND SOUTH CONCHO RIVERS  
 NO. OF RESERVOIRS - 1 CAPACITY 600,000 ACRE-FEET, AUTHORIZED IMPOUNDMENT 170,000 ACRE-FEET  
 PURPOSE OF USE - MUNICIPAL AND IRRIGATION  
 AMOUNT OF WATER - IRRIGATION; 10,931 ACRE-FEET PER YEAR; MUNICIPAL USE; 8,016 ACRE-FEET PER YEAR  
 NO. OF ACRES - 8000  
 IRRIGATED TRACT SHOWN IN EXHIBIT NO. 7, APPENDIX TO INVESTIGATION REPORT FOR CONCHO SEGMENT, COLORADO RIVER BASIN, DATED SEPTEMBER 8, 1972, DESCRIBED AS FOLLOWS:  
 WITHIN THE BOUNDARIES OF TOM GREEN COUNTY WCID NO. 1.  
 TRACT LOCATION - TOM GREEN COUNTY  
 MAP NO. - 5 OF 11, PAGE 11 AND 18 OF 11, PAGE 18  
 DIVERSION - 270 CFS AT DIVERSION POINT 1285 (120 CFS FOR MUNICIPAL PURPOSES AND 150 CFS FOR IRRIGATION PURPOSES); THEN 120 CFS AT DIVERSION POINT 1285 (FOR IRRIGATION PURPOSES)  
 PRIORITY DATE - MAY 6, 1959  
 REMARKS - PERMITTEE HAS A LICENSE TO PERFECT PERMIT NO. 1949 TO THE FULL EXTENT AUTHORIZED OF 29,000 ACRE-FEET OF WATER PER YEAR FOR MUNICIPAL PURPOSES AND 25,000 ACRE-FEET OF WATER PER YEAR FOR THE IRRIGATION OF 10,000 ACRES OF LAND. THE 10,000 ACRE-FEET AUTHORIZED BY MUNICIPAL PURPOSES INCLUDES THE 25,000 ACRE-FEET AUTHORIZED FOR MUNICIPAL AND INDUSTRIAL USES UNDER PERMIT NO. 1120 OWNED BY THE CITY OF SAN ANGELO. PERMITTEE IS AUTHORIZED TO USE THE BED AND BANKS OF THE MIDDLE CONCHO RIVER FOR TRANSPORTATION OF WATER TO DIVERSION POINT NO. 1350, THE CITY OF SAN ANGELO WATER TREATMENT PLANT FOR MUNICIPAL PURPOSES. THE QUANTITY OF WATER HEREIN RECOGNIZED IS INDEPENDENT OF THAT QUANTITY RECOGNIZED UNDER CERTIFIED FILING NO. 155 AND PERMIT NO. 168 OF THE CITY OF SAN ANGELO, DIVERSION POINTS 1330, 1350 AND 1360. PERMITTEE IS RECOGNIZED THE RIGHT TO RELEASE WATER INTO LAKE MASWORTHY AND DIVERT AT DIVERSION POINT NO. 1285 FOR IRRIGATION USE.

OWNERSHIP: CITY OF SAN ANGELO

IR 217 Vol. 8 SF 682-690 Findings:

- Permit No. 1120, as partially cancelled on February 10, 1961, authorizes the impoundment of 10,500 acre-feet of storm and flood water in an on-channel reservoir on the Middle Concho and South Concho Rivers (Masworthy Dam and Reservoir). The permit also authorizes the diversion from the reservoir at Diversion Point 1290 of 25,000 acre-feet of water per year at a maximum rate of 120 cfs for municipal and industrial purposes.
- Permit No. 1446 authorizes an increase in the impoundment of water in Masworthy Reservoir from 10,500 acre-feet to 12,500 acre-feet.
- The order partially cancelling Permit No. 1120 dated February 10, 1961, stipulates that the 25,000 acre-feet of water authorized for municipal use under Permit No. 1120 is included in the 29,000 acre-feet of water authorized for municipal use under Permit No. 1949 and is not to be in addition to that appropriation.
- Permit No. 1120 and the facilities located at Masworthy Reservoir are part of an integrated surface water supply system along the Middle Concho and South Concho Rivers which serves the municipal needs of the City of San Angelo. Other water rights included in this system are Permit No. 1949 of the San Angelo Water Supply Corporation and Permit No. 168 and Certified Filing No. 155 of the City of San Angelo. The operation of this system involves the storage of 34,000 acre-feet of water in Twin Buttes Reservoir, Masworthy Reservoir and San Ficklin Reservoir and its release and conveyance down the bed and banks of the South Concho and Middle Concho Rivers to Lone Wolf Reservoir, and diversion of a total of 35,534 acre-feet of water at the City of San Angelo's water treatment plant.
- Water use by the City of San Angelo under this system of water rights has been reported without differentiating what quantity of water is attributable to which individual right. The maximum amount of water used under these combined water rights (Certified Filing No. 155, Permit No. 168, Permit No. 1120 and Permit No. 1949) was 13,782 acre-feet of water in 1972 for municipal and industrial uses.
- Permit No. 1120 has a time priority of March 11, 1949, and is the third water right in seniority among those rights comprising the City of San Angelo's water delivery system on the South Concho and Middle Concho Rivers.
- Of the 13,782 acre-feet of water used by the City of San Angelo in 1972, 6,534 acre-feet per annum are attributable to Certified Filing No. 155 and Permit No. 168 as full perfection of those rights since they are senior in time to Permit No. 1120. The remaining 7,248 acre-feet of water per annum are attributable to the partial perfection of Permit No. 1120 as the next water right in seniority in this system.
- The 7,248 acre-feet of water per annum recognized as perfected under Permit No. 1120 also constitutes perfection to that extent of Permit No. 1949 as the order partially cancelling Permit No. 1120 provided that the water authorized for municipal use under Permit No. 1120 was to be included in the authorized appropriation for municipal use in Permit No. 1949.
- Contractual Permit No. 61 issued to the Texas Parks and Wildlife Department on September 26, 1968, authorized the diversion of 880 acre-feet of water per year from Lake Masworthy for industrial (operation of fish hatchery) purposes. This permit was based on a contract between the Texas Parks and Wildlife Department and the City of San Angelo for the use of water under Permit No. 1120.
- The maximum use of water under Contractual Permit No. 61 was 768 acre-feet of water in 1972 for industrial (fish hatchery purposes).
- Water use under Contractual Permit No. 61 accrues to the City of San Angelo for perfection of Permit No. 1120 upon which the contract is based.
- The application for Permit No. 1446 was filed on February 12, 1948.
- The 12,500 acre-foot impoundment authorized under combined Permits No. 1120 and No. 1446 has been perfected to the maximum authorized.
- Permittee has exercised due diligence in perfecting Permit No. 1120 to the maximum authorized of 25,000 acre-feet for municipal and industrial purposes.

BASIS OF RIGHT RECOGNIZED - PERMITS NO. 1120 AND 1446  
 SOURCE OF WATER - MIDDLE AND SOUTH CONCHO RIVERS  
 NO. OF RESERVOIRS - 1 CAPACITY 12,500 ACRE-FEET  
 PURPOSE OF USE - MUNICIPAL AND INDUSTRIAL  
 AMOUNT OF WATER - 8016 ACRE-FEET PER YEAR  
 DAM AND RESERVOIR SHOWN IN EXHIBIT NO. 7, APPENDIX TO INVESTIGATION REPORT FOR CONCHO SEGMENT, COLORADO RIVER BASIN, DATED SEPTEMBER 8, 1972.  
 DAM LOCATION - TOM GREEN COUNTY  
 MAP NO. - 5 OF 11, PAGE 11  
 SURVEY - 172  
 DIVERSION - 120 CFS AT DIVERSION POINT 1290  
 PRIORITY DATE - MARCH 11, 1949  
 REMARKS - PERMITTEE HAS A LICENSE TO PERFECT PERMIT NO. 1120 TO THE FULL EXTENT AUTHORIZED OF 25,000 ACRE-FEET OF WATER PER ANNUM FOR MUNICIPAL AND INDUSTRIAL PURPOSES. THIS 25,000 ACRE-FEET APPROPRIATION IS INCLUDED IN THE 29,000 ACRE-FEET AUTHORIZED FOR MUNICIPAL USES UNDER PERMIT NO. 1949 OWNED BY THE SAN ANGELO WATER SUPPLY CORPORATION (DIVERSION POINT NO. 1290). PERMITTEE IS AUTHORIZED TO USE THE BED AND BANKS OF THE MIDDLE CONCHO RIVER FOR TRANSPORTATION OF WATER TO DIVERSION POINT NO. 1350, THE CITY OF SAN ANGELO'S WATER TREATMENT PLANT. THE QUANTITY OF WATER RECOGNIZED HEREIN IS INDEPENDENT OF THAT QUANTITY RECOGNIZED UNDER CERTIFIED FILING NO. 155 AND PERMIT NO. 168 OF THE CITY OF SAN ANGELO, DIVERSION POINTS 1330, 1350 AND 1360.

NO. 44,900-A

IN THE MATTER OF THE  
ADJUDICATION OF THE  
CONCHO RIVER SEGMENT  
AND ITS TRIBUTARIES  
OF THE COLORADO  
RIVER BASIN

X  
X  
X  
X  
X

IN THE DISTRICT COURT  
TOM GREEN COUNTY, TEXAS  
51ST JUDICIAL DISTRICT

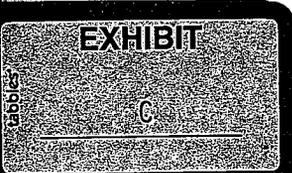
FINAL JUDGMENT AND DECREE

42-403

BE IT REMEMBERED on the 14 day of June, 1979, came on to be heard the above entitled and numbered cause, said cause being an action to finally adjudicate water rights in the Concho River Segment of the Colorado River Basin; and came the Texas Department of Water Resources (formerly the Texas Water Rights Commission), by and through its attorneys of record, and came Exceptors by and through their attorneys of record, and all exceptions having been finally resolved, either through hearing and argument before the Court, reflected by the Court's prior Interlocutory Orders, or by the Court's approval of Exceptions remanded to the Texas Water Rights Commission for its further consideration, the Court makes this its ruling; it is therefore ORDERED, ADJUDGED AND DECREED as follows:

I.

Subject to the modifications contained in Paragraph II of this Final Judgment and Decree, Modified Final Determination of the Texas Water Rights Commission, dated August 16, 1976, attached hereto as Appendix "A", and incorporated herein for all purposes, is affirmed by the Court. This Judgment and Decree is final and conclusive as to all existing and prior water rights and claims to water rights in the Concho River Segment of the Colorado River Basin as of the date August 16, 1976; provided, however, that this Judgment is without prejudice to: (1) any permits or amendments to permits or certified filings issued by the Texas Water Rights Commission, or its successor agency, between that date and the date of this Judgment; and (2) those permits and amendments



described in the Addendum to the Modified Final Determination. Such permits or amendments shall be treated as provided for under Section 11.336, Tex. Water Code.

II.

The Modified Final Determination of the Texas Water Rights Commission is modified by the Court as follows:

(A) With respect to Claimant J. Eldon Williams (page 47 of the Commission's Final Determination), Finding of Fact No. 14 by the Commission is modified to read as follows:

14. First use of water from the Concho River for irrigation purposes within the claim area and Certified Filing area was in March, 1911.

An additional Finding of Fact is added to the Commission's findings as follows:

17. Claimant's timely filed Section 5.303 Claim No. 3172 indicated no irrigation during the period 1963-1967, inclusive, on land located within claim area C-3172, because the acreage was in the soil bank from 1960-1970. Prior to the time this land was placed in the soil bank, it was consistently irrigated with water from the Concho River.

The Commission's conclusions regarding Claimant Williams' water right are modified to read as follows:

BASIS OF RIGHT RECOGNIZED - CERTIFIED FILING NO. 292 AND PERMIT NO. 371; ADDITIONALLY, CLAIM NO. 3172 BASED UPON THE COURT'S EQUITABLE POWERS

SOURCE OF WATER - CONCHO RIVER  
NO. OF RESERVOIRS - 1 CAPACITY 67 ACRE-FEET (P-371)  
SECOND RESERVOIR - 1 CAPACITY 55 ACRE-FEET (1/3 INTEREST)  
PURPOSE OF USE - IRRIGATION  
AMOUNT OF WATER - 135 ACRE-FEET PER YEAR  
NO. OF ACRES - 106  
IRRIGATED TRACT SHOWN ON EXHIBIT NO. 1429, DESCRIBED AS FOLLOWS: WITHIN THE BOUNDARIES OF CERTIFIED FILING NO. 292, PERMIT NO. 371, AND CLAIM NO. 3172 ON OWNED TRACT.  
TRACT LOCATION - TOM GREEN COUNTY  
MAP NO. - 9 OF 11, PAGE 15  
SURVEY NO. - 351, 352, 353  
DIVERSION RATE - 3.3 CFS (1500 GPM) TOTAL AT DIVERSION POINTS NOS. 1620 AND 1625  
PRIORITY DATE - MARCH 31, 1911

(B) With respect to Claimant Leonard Grantham (page 51 of the Commission's Final Determination), the Commission's findings are modified by the addition of the following Finding:

10. Claimant's timely filed Section 5.303 Claim No. 2341 indicated no irrigation during the period 1963-1970, inclusive, from land located east of Willow Creek and north of T-1710, because the acreage was in the soil bank program. This land had been consistently irrigated prior to the time it was placed in the soil bank.

The Commission's conclusions regarding Claimant Grantham's water right are modified to read as follows:

BASIS OF RIGHT RECOGNIZED - CLAIM NO. 2341, PARTIALLY  
BASED UPON THE COURT'S  
EQUITABLE POWERS

SOURCE OF WATER - CONCHO RIVER  
NO. OF RESERVOIRS - 1 CAPACITY 15 ACRE-FEET  
PURPOSE OF USE - IRRIGATION  
AMOUNT OF WATER - 76 ACRE-FEET PER YEAR  
NO. OF ACRES - 62  
IRRIGATED TRACT SHOWN ON EXHIBIT NO. 1453,  
DESCRIBED AS FOLLOWS: WITHIN THE BOUNDARIES  
OF CLAIM AREA C-2341.

TRACT LOCATION - TOM GREEN COUNTY  
MAP NO. - 9 OF 11, PAGE 15  
SURVEYS - 364 AND 365  
ABSTRACTS - 266 AND 263  
DIVERSION - 4.9 CFS (2200 GPM) TOTAL AT  
DIVERSION POINTS NOS. 1770  
AND 1781  
PRIORITY DATE - 1951

707

(C) The Commission's Final Determination regarding Claimant Leamon Tankersley, Trustee (page 16 of the Commission's Final Determination), is modified to read as follows:

FINDINGS OF FACT

1. Certified Filing No. 327 was filed for record in Irion County on June 27, 1914 by Fayette Tankersley.
2. Certified Filing No. 327 declared the appropriation of water from Spring Creek by a dam on Spring Creek with a gravity flow headgate and by a pump with a capacity of 8,000 gpm on Spring Creek, both points of diversion being located on the east line of Irion County Survey No. 706, for the irrigation of land in Irion County Surveys Nos. 703, 704, 705, 706, 707, 708, 719, 720, 721, 722 and 723, and stated that the number of acres that will be irrigated will be approximately 500.
3. Claimant Leamon Tankersley, Trustee, is the owner of a tract of land within Irion County Surveys Nos. 705, 706, 707, 708 and 719, as shown on Exhibit R-26.
4. The maximum number of acres within Claimant's ownership irrigated with water from Spring Creek in any calendar year was 138 acres in 1963, 1964 and 1965. This area is designated Areas A, B, C, D, E and F on Exhibit No. R-26.

- Field A contains 16 acres; field B contains 49 acres; field C contains 33 acres; field D contains 14 acres; field E contains 20 acres; and, field F contains 6 acres. These fields are primarily comprised of Rioconcho clay loam soils.
5. Water was diverted by pump from Spring Creek at I-0270 for irrigation of Claimant's tract. The maximum rate at which water was diverted from Spring Creek at D-0270 for irrigation within Claimant's tract was 4.01 cfs (1,900 gpm).
  6. The maximum amount of water diverted from Spring Creek at D-0270 for irrigation of 138 acres of land within Claimant's tract was 974 acre-feet in 1964.
  7. Water diverted from Spring Creek at D-0270 was conveyed to the fields by unlined earthen ditches from which it was distributed to the fields by a level border flood irrigation method.
  8. The irrigated fields are located such that A is the closest to D-0270, B and C are farther away and D, E and F are the farthest away from D-0270.
  9. The pattern of irrigation started with the irrigation of field A; then fields B and C were irrigated together; and then fields D, E and F were irrigated together.
  10. Of the 974 acre-feet of water diverted at D-0270 for irrigation within fields A, B, C, D, E and F, 48.6 acre-feet of water was diverted for field A, 485.9 acre-feet of water was diverted for fields B and C, and 437.4 acre-feet of water was diverted for fields D, E and F.
  11. There were seven separate applications of water to each of fields A, B, C, D, E and F in 1964 with an equal amount of water diverted during each application to the fields.
  12. During each application in 1964, approximately 6.94 acre-feet of water was diverted to field A, 69.42 acre-feet of water was diverted to fields B and C, and 62.48 acre-feet of water was diverted to fields D, E and F. Each application in 1964 measured approximately 5.2 inches per acre in field A, 10.16 inches per acre in fields B and C, and 18.7 inches per application in fields D, E and F.
  13. The upper 6 feet of the Rioconcho soil holds about 12.1 inches of available moisture. It is from this upper 6-foot soil profile that the vast majority of water is consumed due to crop growth. The optimum goal of irrigation is to replace the moisture consumed from the upper 6-foot soil profile at certain intervals.
  14. The accepted conservation practice in the area of Claimant's tract is to replace the moisture in the soil consumed due to the growing of alfalfa at a point in time when about half of the available moisture has been depleted. Based on the soil characteristics, an application of about 5-1/2 inches of water by irrigation to the soil is considered optimum and will replace the depleted moisture from the soil profile.
  15. Claimant's earthen canal and level border flood irrigation system may have been about 70% efficient. With improvements to the system, an efficiency of 80% could be reached without unreasonable expense.
  16. Assuming an 80% efficiency factor, the amount of water necessary for optimum irrigation of alfalfa with 7 applications during the growing season would be about 48.125 inches.
  17. Alfalfa grown in the area of Claimant's tract requires on the average a greater quantity of water than is required in any other portion of the State.
  18. The gravity diversion system at D-0275 was used for the irrigation of land within Area G as shown on Exhibit No. R-26 in about 1920.

19. The maximum number of acres within Claimant's portion of Certified Filing No. 327 that have been irrigated during any calendar year since 1914 is 138. Irrigation within Claimant's tract occurred sporadically after the 1920's and no irrigation occurred from 1950 to 1961. Irrigation within the tract has continued sporadically after 1968.
20. An intent to expand the irrigation within Claimant's tract to a maximum of about 200 acres was expressed by Claimant.
21. Claimant diverts water from a well or spring by pump at D-0280, which is used for irrigation within Claimant's tract.

CONCLUSIONS OF LAW

1. The water diverted from D-0280 is not State water within Section 11.021, Texas Water Code, and is not subject to the jurisdiction of the Texas Department of Water Resources.
2. Claimant is recognized the right under Certified Filing No. 327 to impound 50 acre-feet of water by a dam and reservoir on Spring Creek at Diversion Point D-0275 and to divert and use 553.5 acre-feet of water per annum from Spring Creek at D-0270 and D-0275 at a maximum rate of diversion of 4.01 cfs (1,800 gpm) for the irrigation of 138 acres of land within Claimant's tract in Irion County Survey Nos. 705, 706, 707, 708 and 719, with a priority date of June 27, 1914, all as summarized as follows:

407

BASIS OF RIGHT RECOGNIZED - CERTIFIED FILING NO. 327  
SOURCE OF WATER - SPRING CREEK  
NO. OF RESERVOIRS - 1 CAPACITY 50 ACRE-FEET  
PURPOSE OF USE - IRRIGATION  
AMOUNT OF WATER - 553.5 ACRE-FEET PER YEAR  
NO. OF ACRES - 138  
IRRIGATED TRACT SHOWN IN EXHIBIT NO. R-26,  
DESCRIBED AS FOLLOWS: WITHIN THE BOUNDARIES  
OF CERTIFIED FILING NO. 327 ON OWNED TRACTS.  
TRACT LOCATION - IRION COUNTY  
MAP NO. - 3 OF 4, PAGE 5  
SURVEYS - 705, 706, 707, 708, 719  
DIVERSION - 4.01 CFS (1800 GPM) TOTAL  
AT DIVERSION POINTS NOS.  
0270 AND 0275  
PRIORITY DATE - JUNE 27, 1914  
REMARK: CLAIMANT IS RECOGNIZED NO RIGHT UNDER  
CERTIFIED FILING NO. 327 TO DEVELOP GREATER USE  
THAN DETERMINED HEREIN.

(D) The Commission's Final Determination regarding water rights for Metcalfe Dam and Reservoir, pursuant to exceptions filed by the City of San Angelo and the Commission's redetermination of that water right, are modified in the following respects:

(1) With respect to Claimant Texas Parks and Wildlife Department (page 40 of the Commission's Final Determination), the Commission's Final Determination is modified as follows:

The second sentence of Finding of Fact No. 1 is deleted; Finding of Fact No. 4 is deleted; and the description of the reservoir ("No. of Reservoir - 1 capacity 1157 acre-feet"), included in the water right recognized, is deleted. Additionally, the following sentence is added to the "Remarks" concerning this water right: Ownership of this reservoir and the right of impoundment is held by the City of San Angelo.

(2) The following additional findings and conclusions regarding water rights held by the City of San Angelo are inserted:

DIVERSION POINT NO: None  
TRACT NO: None

OWNERSHIP:  
CITY OF SAN ANGELO

Pursuant to Texas Water Rights Commission Order of June 13, 1977.  
Findings:

1. Certified Filing No. 99 evolved from an appropriation affidavit filed with the County Clerk of Tom Green County, Texas, on or about April 29, 1914 by Charles B. Metcalfe. Among other things, Certified Filing No. 99 declared an intent to use water from an existing 1157 acre-foot capacity reservoir owned by Mr. Metcalfe.
2. The City of San Angelo is the successor in title to Certified Filing No. 99.
3. On August 26, 1929, the Texas Game, Fish and Oyster Commission predecessor of the Texas Parks and Wildlife Department, filed Application No. 1219 to appropriate 1000 acre-feet of water from the Concho River at the Metcalfe Dam and Reservoir. Based upon this application, Permit No. 1142 was granted on December 20, 1929, authorizing the construction and maintenance of said dam and also the diversion of the 1000 acre-feet of water impounded therein.
4. It is undisputed by the Texas Parks and Wildlife Department and the City of San Angelo that the Metcalfe Dam and Reservoir described in Certified Filing No. 99 is the same dam and reservoir authorized under Permit No. 1142.
5. The City of San Angelo voluntarily agreed to have Certified Filing No. 99 cancelled save and except the right of impoundment in Metcalfe Dam and Reservoir. On December 1, 1960, the Board of Water Engineers entered an order forfeiting, revoking and cancelling Certified Filing No. 99 save and except that portion relating to the right of impoundment; i.e., the Metcalfe Dam and Reservoir.
6. Certified Filing No. 99 was erroneously classified as totally cancelled by the Texas Water Rights Commission and, therefore, was not included in the adjudication of the water right claims in the Concho River Segment. Mr. George Krause, former Texas Water Rights Commission project engineer for the Concho River Segment, listed in his investigative report the ownership of Metcalfe Dam and Reservoir in the name of the Texas Parks and

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116

Wildlife Department under Permit No. 1142. Consequently the water right pertaining to the maintenance and operation of the dam and reservoir was eventually recognized under Permit No. 1142 in the name of the Texas Parks and Wildlife Department.

7. The Texas Parks and Wildlife Department concedes that the City of San Angelo is the owner and maintainer of the Metcalfe Dam and Reservoir.
8. The City of San Angelo has continually maintained the Metcalfe Dam and Reservoir as an integral part of the City's water system.

CONCLUSIONS OF LAW

1. The City of San Angelo is recognized under Certified Filing No. 99 as the owner and has the right to maintain the Metcalfe Dam and Reservoir.
2. The Texas Parks and Wildlife Department is not recognized the right of ownership and maintenance of Metcalfe Dam and Reservoir under Permit No. 1142. This in no way limits or impedes that recognition in the modified final determination of the rights of the Texas Parks and Wildlife Department to divert and use State water from the designated diversion point or the right to perfect the maximum authorized amount under Permit No. 1142.

174

BASIS OF WATER RIGHT RECOGNIZED - CERTIFIED FILING NO. 99

SOURCE OF WATER - SOUTH CONCHO RIVER  
NO. OF RESERVOIRS - 1 CAPACITY 1157 ACRE-FEET  
PURPOSE OF USE - RECREATION  
AMOUNT OF WATER - NONE; WATER RIGHT INCLUDES RIGHT OF IMPOUNDMENT ONLY  
TRACT LOCATION - TOM GREEN COUNTY  
MAP NO. - 5 OF 11, PAGE 11  
SURVEY NO. - 169 AND 175  
DIVERSION - NONE  
PRIORITY DATE - APRIL, 1914  
REMARKS - THE CITY OF SAN ANGELO'S RIGHT UNDER CERTIFIED FILING NO. 99 AS OWNER OF METCALFE DAM AND RESERVOIR IN NO WAY LIMITS OR IMPEDES THE RECOGNITION IN THIS FINAL DECREE OF THE RIGHTS OF THE TEXAS PARKS AND WILDLIFE DEPARTMENT TO DIVERT AND USE STATE WATER FROM THE DESIGNATED DIVERSION POINT OR THE RIGHT TO PERFECT THE MAXIMUM AUTHORIZED AMOUNT UNDER PERMIT NO. 1142.

III.

The Texas Department of Water Resources is directed to take such further action as is required by the Texas Water Rights Adjudication Act to implement this Final Judgment and Decree. In issuing Certificates of Adjudication the Commission may incorporate recent amendments of water rights into the certificate.

IV.

Costs of court are taxed equally against the Commission and each Exceptor.

7 9

SIGNED AND ENTERED THIS 14 DAY OF June, 1979.

Earl W. Smith  
EARL SMITH, JUDGE  
51ST JUDICIAL DISTRICT  
TOM GREEN COUNTY, TEXAS

APPROVED AS TO FORM AND ENTRY REQUESTED:

MARK WHITE  
Attorney General of Texas

Douglas G. Caroom  
DOUGLAS G. CAROOM  
Assistant Attorney General  
Chief, Environmental Protection  
Division

ATTORNEYS FOR TEXAS DEPARTMENT  
OF WATER RESOURCES (FORMERLY  
THE TEXAS WATER RIGHTS COMMISSION)

P. O. Box 12548, Capitol Station  
Austin, Texas 78711  
AC 512/475-4143

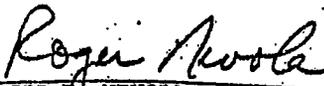
O. L. Parkish, Jr.  
O. L. PARKISH, JR.  
ATTORNEY FOR EXCEPTOR J. ELDON  
WILLIAMS

Parkish & McGregor  
P. O. Box 246  
Ballinger, Texas 76821

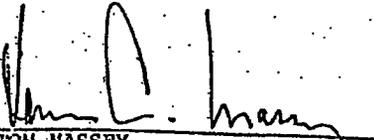
Craig Porter  
CRAIG PORTER  
ATTORNEY FOR EXCEPTOR LEONARD  
GRANTHAM, JR.

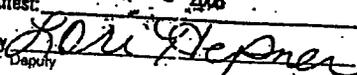
Upton, Shannon, Porter & Johnson  
P. O. Box 1272  
San Angelo, Texas 76902

411

  
\_\_\_\_\_  
ROGER H. NEVOLA  
ATTORNEY FOR EXCEPTOR  
LEAMON TANKERSLEY, TRUSTEE

Vinson & Elkins  
Austin National Bank Tower  
Austin, Texas 78701

  
\_\_\_\_\_  
TOM MASSEY  
ATTORNEY FOR EXCEPTOR  
CITY OF SAN ANGELO  
115 S. Randolph  
San Angelo, Texas 76903  
915/653-2448

**CERTIFIED COPY CERTIFICATE**  
**STATE OF TEXAS COUNTY OF TOM GREEN**  
I hereby certify that the above is a true & correct  
copy of the original record on file in my office.  
Sheri Woodfin, District Clerk, Tom Green, Texas  
Attest: JUN 3 2008  
By:   
Deputy

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 14-1318

OWNER: San Angelo Water  
Supply Corporation  
P. O. Box 1928  
San Angelo, Texas 76902

COUNTY: Tom Green

PRIORITY DATE: May 6, 1959

WATERCOURSE: Middle Concho River  
South Concho River  
and Spring Creek

BASIN: Colorado River

WHEREAS, by final decree of the 51st District Court of Tom Green County, in Cause No. 44,900-A, In Re: The Adjudication of Water Rights in the Concho River Segment of the Colorado River Basin, dated June 14, 1979, a right was recognized under Permit 1949, authorizing the San Angelo Water Supply Corp. to appropriate waters of the State of Texas as set forth below:

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Colorado River Basin is issued to the San Angelo Water Supply Corp., subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing dam and reservoir on the Middle Concho River, Spring Creek and the South Concho River and impound therein not to exceed 170,000 acre-feet of water. Point on the dam at the center of the Middle Concho River is S 89° 30' W, 7150 feet from the southeast corner of the Valentine Kaerner Survey 183, Abstract 1551, Tom Green County, Texas.

2. USE

A. Owner is authorized to divert and use not to exceed 29,000 acre-feet of water per annum from the aforesaid reservoir for municipal purposes. However, the 29,000 acre-feet herein authorized includes the 25,000 acre-feet authorized for municipal and industrial purposes under Certificate of Adjudication 14-1319.

B. Owner is also authorized to divert and use not to exceed an additional 25,000 acre-feet of water per annum from the aforesaid reservoir to irrigate a maximum of 10,000 acres of land within the boundaries of the Tom Green County WCID No. 1.

3. DIVERSION

A. Location:

(1) At the outlet works of Twin Buttes Reservoir which is N 77° W, 8160 feet from the southeast corner of the Valentine Kaerner Survey 183, Abstract 1551, Tom Green County, Texas.

(2) At the headgate structure located near the south end of the dam authorized by Certificate of Adjudication 14-1319, which is N 64° W, 3215 feet from the southeast corner of the J. F. Fuchs Survey 172, Abstract 204, Tom Green County, Texas.

B. Rate:

Maximum combined diversion rate at diversion point 1 is 270 cfs (150 cfs-irrigation and 120 cfs-municipal). Maximum diversion rate at diversion point 2 is 120 cfs.

4. PRIORITY

The time priority of owner's right is May 6, 1959.

EXHIBIT

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5. SPECIAL CONDITIONS

- A. Owner shall be limited to storage in and diversion from the aforesaid reservoir below elevation 1940.2 feet above mean sea level (top of conservation pool).
- B. All water hereunder for use through the municipal water system of the City of San Angelo except that which escapes or is consumed as a consequence of the reasonable and beneficial use thereof shall forthwith be discharged into the Concho River at the surplus water return points, the location of which with reference to the corner of an original land grant or survey shall be filed with and approved by the Department. Prior to discharging such return water into the Concho River, owner shall use reasonable diligence to treat and purify such return water so as not to materially impair the quality of the water of the receiving stream.
- C. A conduit shall be constructed in the aforesaid dam with the inlet at elevation 1883.5 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Department may determine lower appropriators are entitled.
- D. Owner is authorized to use the bed and banks of the Middle Concho River to convey and deliver water to be appropriated hereunder to Nasworthy Reservoir. The waters herein appropriated for municipal use shall be released through the existing gate structure of Nasworthy Dam and owner is authorized to use the bed and banks of the South Concho River below Nasworthy Dam to convey and deliver said water to the point of diversion at the existing intake and pumping facilities of the City of San Angelo. The waters herein appropriated for irrigation use shall be released through Nasworthy Dam by means of a headgate structure to be located near the south end of said dam for the point of diversion of irrigation water.
- E. All waters diverted for irrigation use hereunder except that which escapes or is consumed as a reasonable and beneficial use thereof and in the manner specified herein shall forthwith be discharged at the four following surplus water return points:
  - (1) At a point located N 24° 30' E, 2035 feet from the southwest corner of the Heinrich Falter Survey 140, Abstract 198, Tom Green County, Texas;
  - (2) At three points located S 65° W, 5280 feet, S, 3365 feet and N 78° 30' E, 3075 feet from the Northwest corner of the A. D. Grigsby Survey 106, Abstract 5885, Tom Green County, Texas.
- F. The owner shall install a metering instrument at each diversion point which will automatically record the total amount of water diverted. The owner shall make determinations of water surface elevations in the herein permitted reservoir and in Nasworthy Reservoir by means of recording gages set to U. S. Geological Survey or U. S. Coast and Geodetic Survey datum, each of which shall be protected by a well house designed for such purposes and the Department shall be furnished complete records of such determinations. Owner shall also relocate, or cause to be relocated, the existing streamflow stations on Spring Creek and Middle Concho River which will be inundated by the reservoir and establish, or cause to be established, recording streamflow stations on Pecan and Dove Creeks. Owner shall maintain daily

CERTIFICATE OF ADJUDICATION 14-1318; PAGE 3 OF 3.

records of waters released through the conduit hereinabove required to be constructed in said dam. All streamflow stations shall be set to the same datum described above and the Department shall be furnished complete records of the house, and the streamflow stations and the installation, design and operation thereof shall be subject to approval of the Department.

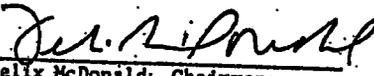
- G. The authorized irrigated area under this certificate shall be coterminous with the boundaries of the Tom Green County WCID No. 1. The owner shall notify the Department of all changes in the boundaries of said District.

The locations of pertinent features related to this certificate are shown on Pages 8 & 9 of the Concho River Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Department of Water Resources and the office of the County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions provided for in the final decree of the 51st District Court of Tom Green County, in Cause No. 44,900-A, In Re: The Adjudication of Water Rights in the Concho River Segment of the Colorado River Basin, dated June 14, 1979, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to the Rules of the Texas Department of Water Resources and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

  
Felix McDonald, Chairman

DATE ISSUED:

March 12, 1980

ATTEST:

  
Mary Ann Hafner, Chief Clerk

**Permit**  
to  
**Appropriate Public Waters**  
of the  
**State of Texas**

No. 1949

13

Whereas, the SAN ANGELO WATER SUPPLY CORPORATION, the post-office address of which is San Angelo, Texas, on the 6th day of May, 1959, filed with the Board of Water Engineers of the State of Texas Application No. 2122 for a permit to appropriate annually 61,500 acre feet of water by impounding 170,000 acre feet of the public waters of the State of Texas in a reservoir to be constructed by the United States Department of Interior, Bureau of Reclamation, in Tom Green County, Texas, with an impounding capacity of 600,000 acre feet, divided by the Bureau of Reclamation as follows: 150,000 acre feet for water conservation; 430,000 acre feet for flood control; and 20,000 acre feet for sedimentation and dead storage; and

Whereas, on the 15th day of June, 1959, after due notice the Board of Water Engineers held a public hearing at its office in Austin, Texas, as prescribed by law, which hearing was further held on the 30th day of June, the 1st and 2nd days of July, and the 3rd, 4th and 5th days of August, 1959, and after hearing and considering all the evidence affecting said application, took the same under advisement and continued the hearing from day to day pending final decision until the 15th day of December, 1959, whereupon the said Board did grant said Application No. 2122 in part and as hereinafter set forth.

**NOW, THEREFORE, THE**  
**BOARD OF WATER ENGINEERS**  
**OF THE STATE OF TEXAS DOES BY THESE PRESENTS GRANT THIS PERMIT**

unto the said San Angelo Water Supply Corporation to appropriate, divert and use certain public waters of the State, to consist of the storm and flood waters of the Middle and South Concho Rivers, tributaries of the Concho and Colorado Rivers, in Tom Green County, Texas, measured at the points of diversion, not to exceed 29,000 acre feet of water per annum for the purpose of municipal use through the municipal water system of the City of San Angelo, Texas, and not to exceed 25,000 acre feet of water per annum for the purpose of irrigating 10,000 acres of land in Tom Green County near Veribest, Texas, or so much thereof as may be necessary when beneficially used for the enumerated purposes. It is specifically provided, however, that the 29,000 acre feet of water authorized to be diverted hereunder for municipal use shall include all waters diverted under Permit No. 1120 (Application No. 1196) as amended by Permit No. 1446 (Application No. 1551), so that the cumulative total annual diversions under Permit No. 1120 and that portion of the permit herein granted for municipal use shall not exceed 29,000 acre feet of water per annum.

To store the water to be appropriated, the permittee is authorized to impound 170,000 acre feet of water in the reservoir described above which is to be created by the construction of an on-channel dam on the South and Middle Concho Rivers, station 0 + 00 of which is to be located at a point which bears North 54° 17' West 3900 feet from the northeast corner of the H. Cramm Original Survey No. 1807, on the east bank of the South Concho River in Tom Green County, Texas, distant in a southerly direction from San Angelo, Texas, approximately 10 miles, such dam being more fully described in the plans filed by the permittee with the application, to which reference is hereby made for all purposes; provided, however, that the permittee shall be limited to storage in and diversion from said reservoir below

EXHIBIT

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79

elevation 1940.2 feet above mean sea level (top of conservation pool). It is further specifically provided that before acquiring or maintaining any right to divert water hereunder, permittee shall be authorized by the United States of America or appropriate agency thereof to store the waters herein permitted to be impounded in said reservoir.

The permittee shall store only storm and flood waters of said stream, subject to all the rights of prior appropriators and lawful diverters below. Whenever the Board finds that the permittee is storing any water to which downstream appropriators and lawful diverters are entitled, the permittee shall release same to said appropriators or lawful diverters on the order of the Board. By accepting this permit, permittee agrees to abide by and comply with any such order of the Board without delay. Failure to comply with any such order shall constitute grounds for forfeiture and cancellation.

All water diverted hereunder for use through the municipal water system of the City of San Angelo except that which escapes or is consumed as a consequence of the reasonable and beneficial use thereof shall forthwith be discharged into the Concho River at the surplus water return points, the location of which with reference to the corner of an original land grant or survey shall be filed with and approved by the Board. Prior to discharging such return water into the Concho River, permittee shall use reasonable diligence to treat and purify such return water so as not to materially impair the quality of the water of the receiving stream.

A conduit shall be constructed in said dam with the inlet at elevation 1889.50 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Board may determine lower appropriators are entitled.

The water authorized to be appropriated hereunder shall be diverted from the reservoir by means of the conduit described above. Permittee is authorized to use the channel of the Middle Concho River to convey and deliver said water to Nasworthy Reservoir. The waters herein appropriated for municipal use shall be released through the existing gate structure of Nasworthy Dam and permittee is authorized to use the bed and banks of the South Concho River below Nasworthy Dam to its junction with the Concho River to convey and deliver said water to the point of diversion at the existing intake and pumping facilities of the City of San Angelo. The waters herein appropriated for irrigation use shall be released through Nasworthy Dam by means of a headgate structure to be located near the south end of said dam for the point of diversion of irrigation water. Permittee is authorized to construct a concrete lined canal approximately thirteen miles in length, with a bottom width of six feet and a carrying capacity of not to exceed 150 cubic feet of water per second of time to convey the waters diverted for irrigation to the place of use.

Before acquiring any right to divert water for irrigation use hereunder, permittee shall file with and have approved by the Board detailed plans and specifications showing the location, size and capacity of the headgate and main canal; the field notes of each tract of land to be irrigated, including the owner thereof; the original land survey or grant in which the land is located and the bearing and length of each line bounding the land; and the location of each irrigation surplus water return point with reference to the corner of an original land survey or grant.

All waters diverted for irrigation use hereunder except that which escapes or is consumed as a reasonable and beneficial use thereof and in the manner specified herein shall forthwith be discharged into the Concho River at the surplus water return points designated as required herein.

The duty of water for irrigation on which the said permittee may divert and appropriate in any one year shall not exceed two and one-half (2.5) acre feet of

water for each acre of land actually irrigated within the confines of the land area described above.

The permittee shall install a metering instrument at each diversion point which will automatically record the total amount of water diverted. The permittee shall make determinations of water surface elevations in the herein permitted reservoirs and in Nagworthy Reservoir by means of recording gages set to U. S. Geological Survey or U. S. Coast and Geodetic Survey datum, each of which shall be protected by a well house designed for such purposes and the Board shall be furnished complete records of such determinations. Permittee shall also relocate, or cause to be relocated, the existing streamflow stations on Spring Creek and Middle Concho River which will be inundated by the reservoir and establish, or cause to be established, recording streamflow stations on Pecan and Dove Creeks. Permittee shall maintain daily records of waters released through the conduit hereinabove required to be constructed in said dam. All streamflow stations shall be set to the same datum described above and the Board shall be furnished complete records of the datum herein required to be kept. The metering instruments, the gages with well house, and the streamflow stations and the installation, design and operation thereof shall be subject to approval of the Board.

No diversions shall be made by permittee at a rate in excess of 120 cubic feet per second of time for municipal use and 150 cubic feet per second of time for irrigation use.

Any other relief sought or additional matter requested in said Application No. 2112 which is not specifically granted by this permit is hereby expressly denied.

All construction work shall be done in accordance with plans approved by this Board and any changes or alterations made in said plans shall be filed with the Board and its approval obtained before construction. The permit herein granted may be amended in accordance with such changes or alterations.

Construction of the works herein authorized shall be begun within 24 months and shall be prosecuted diligently and continuously and completed within 60 months from date hereof unless otherwise ordered by the Board. Failure to begin and complete such construction within such time limitation shall cause this permit to lapse and be of no further force and effect and will be forfeited forthwith unless an extension of time is applied for by the permittee prior to the applicable date above and granted by the Board.

Within ten days after beginning actual construction of said project, the permittee shall file a statement with the Board showing that such work was begun within the time limit allowed and the extent of the work done, and shall file thereafter monthly statements until final completion showing the progress of such construction.

This permit is granted with the reservation and upon the condition that the permittee will fully comply with the terms, conditions and provisions hereof, by the acceptance of this permit, the permittee agrees to be bound by the enumerated terms, conditions and provisions. Failure on the part of the permittee to comply with such terms, conditions and provisions will subject this permit to forfeiture and cancellation, to which the permittee agrees by acceptance of the permit.

The Board finds and concludes that the granting of this permit as herein recited is not detrimental to the public welfare and that each term, condition and provision herein contained be and is a prerequisite to the granting of this permit and is necessary for the administration of the water resources of this State. It is also expressly provided that the permittee, its successors and assigns, and

16  
any beneficiary hereunder, shall comply with the law and all the rules, regulations and orders of the Board of Water Engineers formulated by it pursuant to law.

GIVEN UNDER THE HAND AND SEAL of the Board of Water Engineers of the State of Texas this the 3rd day of February, 1960.

BOARD OF WATER ENGINEERS

*Durwood Manford*  
Durwood Manford, Chairman

*R. M. Dixon*  
R. M. Dixon, Member

*O. F. Dent*  
O. F. Dent, Member



ATTES

*Ben F. Stone Jr.*  
Ben F. Stone Jr., Secretary

Filed for Record on the 11th day of February A.D., 1960 at 2:06 o'clock P.M.  
Duly Recorded this the 12th day of February A.D., 1960 at 3:30 o'clock P.M.

Instrument No. 39914

J. RAMON JONES, County Clerk  
Tom Green County, Texas  
By *Ralph Timiney* Deputy