

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 4, 2013

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

**RE: CITY OF SAN ANGELO
TCEQ DOCKET NO. 2010-1195-WR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2010-1195-WR

**IN THE MATTER OF THE
APPLICATION BY THE CITY OF
SAN ANGELO FOR CERTIFICATE
OF ADJUDICATION NO. 1337A**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Description of Permit Amendment

The City of San Angelo has applied for an amendment to Certificate of Adjudication No. 14-1337 to add municipal purpose of use, add a downstream diversion point on the Concho River, Colorado River Basin, and to add an additional place of use within San Angelo's service area.

Certificate of Adjudication No. 14-1337 authorizes the maintenance of a dam and reservoir on the Concho River, tributary of the Colorado River, Colorado River Basin impounding 130 acre-feet of water. The Certificate also authorizes the City of San Angelo to divert and use, with a time priority of January 3, 1921, 135 acre-feet of water per year from the Concho River, at a maximum diversion rate of 3.33 cfs (1,500 gpm), for agricultural purposes to irrigate 67.5 acres of land out of a larger tract in Tom Green County.

Applicant seeks to amend Certificate of Adjudication No. 14-1337 to add municipal use to the existing authorization and add the City of San Angelo's service area as an additional place of use. Applicant also seeks to add a diversion point approximately 12.5 miles downstream on the Concho River, located at Latitude 31.532778°N, Longitude 100.201667°W, bearing S 65° W, 450 feet from the southeast corner of the German Emigration Company Survey No. 360, Abstract No. 270, approximately 14.8 miles northeast of San Angelo, Texas in Tom Green County. The zip code for the proposed diversion point is 76861. This is the same point authorized by Certificate of Adjudication No. 14-1357, also owned by the City of San Angelo.

Applicant is not requesting to change the currently authorized diversion rate.

B. Procedural Background

The application and a portion of the required fees were received on August 13, 2007. Additional information and fees were received on September 28, 2007, March 27, 2008, and August 5, 2009. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on August 5, 2009. The Office of Chief Clerk mailed a Notice of Water Rights Application to Amend a Certificate of Adjudication to the 21 interjacent water right holders of record in the Colorado River Basin pursuant to 30 TAC §295.158(c)(2)(E) on September 14, 2009. The hearing request period ended October 5, 2009.

The Commission received timely filed requests for a contested case hearing from Van Carson and AJ Jones. Because the requestors' water rights will not be negatively impacted by the application, OPIC recommends the Commission deny both hearing requests.

II. APPLICABLE LAW

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter.” Further, no person may appropriate any state water or begin construction of any work designed for storage, taking, or diversion of water without first obtaining a permit to make the appropriation. TWC §11.121. Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

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

Section 11.147(d) and (e) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality as well as impacts on fish and wildlife.

All holders of permits, certified filings, and certificates of adjudication must obtain authority from the Commission to alter their water right, including changing the place of use, purpose of use, point of diversion, rate of diversion, and acreage to be irrigated. TWC § 11.122(a). The Commission must approve the requested amendment unless it increases the amount of water to be diverted, the rate at which the water will be diverted, or the requested change would have an adverse impact upon other water rights holders or the environment beyond

that which would occur if the water right holder seeking the amendment fully exercised the existing right. TWC § 11.122(b). *See also* 30 TEX. ADMIN CODE (TAC) § 297.45(b). The burden is on the applicant to prove that the amendment will have no adverse impact to other water right holders or the environment. 30 TAC § 297.45(d).

The Commission's rules prohibit amendments from injuring other appropriators:

An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators.

30 TAC § 297.45(a). Adverse impact to other appropriators includes: (1) the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change, (2) increasing an appropriator's legal obligation to a senior water right holder, and (3) otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time the appropriator's water right was granted. 30 TAC § 297.45(a).

In addition, the Commission may approve an amendment only if it would not be detrimental to the public welfare. 30 TAC § 297.46. The Commission must consider effects on surface water and groundwater quality, groundwater uses, aquatic and wildlife habitat, bays and estuaries, and instream flows necessary to support recreation, navigation, and federally listed species. 30 TAC §§ 297.47, 297.53–297.56. The Commission must include any “condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.” 30 TAC § 297.59(a). Finally,

the amendment also must “meet all other applicable requirements” of TWC Chapter 11. TWC § 11.122(b). *See also City of Marshall v. Uncertain*, 206 S.W.3d 97, 109–111 (Tex. 2006).

A hearing requestor must submit their request in writing within the time period specified in the notice¹ and identify the requestor’s personal justiciable interest affected by the application, specifically noting the “requestor’s location and distance relative to the activity” and “how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public.” 30 TAC §§ 55.251(b)–(d).

An affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.256(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Relevant factors to be considered in determining whether a person is affected include but are not limited to:

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

30 TAC § 55.256(c).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant or the ED, or (2) the request is made by an affected person, timely filed

¹ The time period to request a hearing is generally 30 days from the date of receipt of notice or the date of publication, but the Commission may extend the time allowed for submitting a request. 30 TAC § 295.171.

with the chief clerk, and made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

III. DISCUSSION

The water right at issue in San Angelo's application is No. 1337, with a priority date of 1921. The water rights of each of the requestors is senior to this right. Van Carson owns water right No. 1338, with a priority date of 1914, and AJ Jones owns water right No. 1397, with a priority date of 1914. Diversions under these rights are monitored and priority dates enforced by the Concho River Watermaster.

The Concho River Watermaster Program was established by House Bill 2815, passed in the Regular Session, 79th Legislature, 2005. The Concho River Watermaster Program is responsible for an area that encompasses 8 counties in west Texas, including Tom Green County, the locus of the diversion points at issue in the application. Two field deputies patrol these counties from an office located in San Angelo. Water-right management is based on "run of the river rights." That means the deputies oversee a system of rivers and tributaries and allow diversions as water is available and as it passes individual diversion points. The watermaster program informs individuals and groups as needed concerning water rights and other matters related to availability of surface water. The program responds to complaints and may follow up with enforcement actions if necessary. Deputies also provide services such as measuring reservoirs to insure compliance with state law, and perform Doppler flow measurements on water diversion pipes and may set stream-flow markers to help water-right holders comply with guidelines. The watermaster also documents in a database the amount of water that is authorized and used.

Because the requestors have senior water rights to the right underlying San Angelo's application, they have received—and will continue to receive if the application is approved—water under their permits before San Angelo is allowed to divert under Water Right No. 1337. The Concho River Watermaster will enforce this priority sequence.

OPIC notes that the amendment would make Van Carson an upstream water right holder as to San Angelo's new diversion point, as opposed to his current position as a downstream appropriator. Furthermore, the potential for adverse impact to the requestors is negated by the fact that San Angelo is not seeking to increase their diversion amounts or rates.

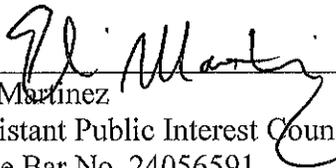
OPIC therefore finds that the requested change would not impact the requestors' equivalent quantity or quality of water available with the full, legal exercise of their existing water rights as they currently exist. The amendment would not result in an increase of the requestors' legal obligation to a senior water right holder, or otherwise substantially affect the continuation of stream conditions as they exist today if their water rights were fully, legally exercised. The requestors are will therefore not be affected under 30 TAC § 55.256, and their requests should not be granted.

IV. CONCLUSION

For the reasons addressed above, OPIC recommends denying the requests for a contested case hearing.

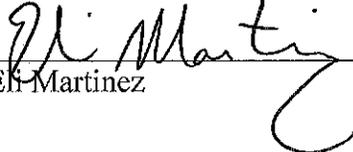
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


Eli Martinez

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