

**TCEQ DOCKET NO. 2012-1195-WR**

**APPLICATION OF** §  
**JOHN PAT GRUMBLES,** § **BEFORE THE TEXAS**  
**EMMETT LEE GRUMBLES, AND** § **COMMISSION ON**  
**LOWER COLORADO RIVER** § **ENVIRONMENTAL QUALITY**  
**AUTHORITY TO AMEND** §  
**CERT. OF ADJ. NO. 14-1913A** §

**LOWER COLORADO RIVER AUTHORITY'S  
RESPONSE TO REQUEST FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

The Lower Colorado River Authority ("LCRA") submits this response to a request made to the Texas Commission on Environmental Quality ("TCEQ") for a contested case hearing on the above-referenced application ("Application"), and would respectfully show the Commissioners the following:

**I. BACKGROUND**

LCRA owns and operates the Lometa Water System, which serves the City of Lometa, and rural areas in Lampasas, Mills, San Saba, and Burnet counties. LCRA relies primarily on Water Rights Permit No. 5715 to supply water to the Lometa Water System; however, in recent years, this permit has proven insufficient to supply the full water needs of the service area. Permit No. 5715, which is subject to significant instream flow restrictions, allows LCRA to pump water from the Colorado River for municipal purposes and store and divert that water from the Lometa Reservoir. In 2006, LCRA was unable to pump from the river during much of the year and the contents of the Lometa Reservoir dropped to 16.5% capacity. Faced with increased concerns about the adequacy of supply, LCRA has engaged in a concerted effort to secure other water rights for potential use within the Lometa Water System. Pursuant to a lease agreement with Joe Rogan Miller, LCRA secured the rights in August 2008 (Certificates of Adjudication No. 14-1891A&B) to supply water from Mr. Miller's senior right to the Lometa Water System. The pending application represents yet another effort by LCRA to secure additional raw water supplies to make the overall supply more reliable for the Lometa Water System. In March 2011, LCRA entered into a lease with John Pat Grumbles and Emmet Lee Grumbles that would allow LCRA to use their senior agricultural water right, Certificate of Adjudication No. 14-1913 (the "Grumbles' right"), to serve the Lometa customers once the amendments requested by this Application are obtained. Unlike the above-mentioned lease with Mr. Miller, which is short-term, LCRA's lease of Certificate of Adjudication No. 14-1913 has a twenty (20) year term and thus provides a reliable long-term supplemental supply for the Lometa Water System.

This application seeks specific amendments to Certificate of Adjudication No. 14-1913 to:

- 1) add a downstream diversion point on the Colorado River and on the perimeter of Lometa Reservoir, which are both authorized by Water Use Permit No. 5715;
- 2) add municipal use as an authorized beneficial use of 270 acre-feet of the water right;
- 3) add authority to impound and store that 270 acre-feet of water in Lometa Reservoir, authorized by Water Use Permit No. 5715;
- 4) divert that 270 acre-feet from the Lometa Reservoir for use within the Lometa System for municipal purposes; and
- 5) authorize the exempt interbasin transfer, pursuant to Texas Water Code § 11.085(v)(1) &/or (v)(4), of that 270 acre-feet for use within the entire service area of the Lometa Water System, which encompasses portions of both the Colorado and Brazos river basins.

The application does not seek an increase in the diversion rate authorized by Certificate of Adjudication No. 14-1913, nor does it seek any increase to the storage capacity of the Lometa Reservoir to store water authorized for diversion under this amendment application.

## **II. PROCEDURAL HISTORY**

LCRA, on behalf of LCRA and John Pat Grumbles and Emmett Lee Grumbles,<sup>1</sup> filed Application No. 14-1913A with TCEQ on May 16, 2011. Following requests by TCEQ staff, additional fees and information were provided on June 2, 2011, June 23, 2011, July 1, 2011, and July 7, 2011. The Application was declared administratively complete and accepted for filing on July 26, 2011.

Notice was issued on September 12, 2011 and mailed to interjacent water right holders of record, which included upstream water rights in the Colorado River Basin. One request for contested case hearing was timely filed on September 23, 2011.

On September 13, 2012, LCRA received notice that the above-referenced matter would be considered by the Commission at the October 17, 2012 agenda. LCRA hereby submits this response to the request made to TCEQ for a contested case hearing on the Application, pursuant to Title 30, Section 55.254 of the Texas Administrative Code.

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<sup>1</sup> LCRA is a joint applicant with the owners of Certificate of Adjudication No. 14-1913, John Pat Grumbles and Emmett Lee Grumbles (“the Grumbles”). The Grumbles have previously granted LCRA the authority to prepare and file all the necessary documents and to take any and all actions required obtain the amendments sought by this Application.

### III. DETERMINATION OF AFFECTED PERSONS

TCEQ rules make clear that a contested case hearing can only be requested by: 1) the TCEQ Commissioners, 2) the TCEQ Executive Director, 3) the Applicant(s), and 4) any “affected person”.<sup>2</sup>

TCEQ’s rules define an “affected person” as one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application.<sup>3</sup> An interest that is common to members of the general public does not qualify as a personal justiciable interest.<sup>4</sup> Accordingly, a request for a contested case hearing must include a brief, but specific, description of the person’s location and distance relative to the activity that is the subject of the Application.<sup>5</sup> In addition, the person must do more than just provide a conclusory statement in the request that he or she will be harmed by the proposed change. The person must describe briefly, but specifically, how and why he or she will be affected by the change proposed in the Application.<sup>6</sup>

When determining whether an individual or entity is an “affected person,” all relevant factors are considered by the Commission, including: 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) the likely impact of the regulated activity on the health, safety, and use of property of the person; and 5) the likely impact of the regulated activity on use of the impacted natural resources by the person.<sup>7</sup> Texas courts interpreting essentially identical language under which TCEQ issues water quality permits<sup>8</sup> have recently confirmed that that the test establishing whether someone is an affected person requires that *each* of three factors must be met:

- (1) An “injury in fact” from the issuance of the permit as proposed — an invasion of a “legally protected interest” that is (a) “concrete and particularized” and (b) “*actual or imminent, not conjectural or hypothetical*”;
- (2) the injury must be “fairly traceable” to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and

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<sup>2</sup> 30 TEX. ADMIN. CODE § 55.251(a).

<sup>3</sup> *Id.* § 55.103.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § 55.251(c).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 55.256(c).

<sup>8</sup> *Compare* 30 TEX. ADMIN. CODE § 55.203(c) & 55.256(c).

- (3) it must be likely, and *not merely speculative*, that the injury will be redressed by a favorable decision on the complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).<sup>9</sup>

#### IV. EVALUATION OF ROGER W. GILBERT'S HEARING REQUEST FOR AMENDMENT TO CERTIFICATE OF OF ADJUDICATION NO. 14-1913

Only one hearing request was filed regarding this Application. As discussed more fully below, the request filed by Roger W. Gilbert fails to state adequate grounds for granting such request.

In Mr. Gilbert's hearing request, he expresses general concerns about the severity of the ongoing drought and its impacts on junior water rights and posits that somehow the pending Application would serve to undermine the Commission's efforts to honor senior priority calls during time of drought. These general concerns do not rise to a cognizable interest as an 'affected person.'<sup>10</sup> Mr. Gilbert's more specific concern appears to be that the requested water rights amendment might allow LCRA or the Grumbles to avoid potential curtailment during times of drought when Mr. Gilbert's water right may still be curtailed. These concerns are entirely speculative and cannot form the basis of granting standing on this Application. Quite simply, whether the amended water right, if granted, may or should be treated any differently under the Commission's new authority to implement drought response is wholly irrelevant to whether Mr. Gilbert is an 'affected person' under the prescribed legal framework for evaluating an application to amend a water right under TEX. WATER CODE § 11.122. Rather, the potential impact to Mr. Gilbert of any decision by the Commission in the future related to the type of curtailment of concern to Mr. Gilbert are more properly raised and addressed in the context of a specific action taken by the Commission under the rules recently adopted by the Commission at 30 TEX. ADMIN. CODE ch. 36, which appropriately provide a separate opportunity for public notice and hearing.<sup>11</sup>

In the context of this pending amendment request, the only relevant question as it pertains to Mr. Gilbert's request for a hearing is whether the amendment has *any* potential to adversely affect Mr. Gilbert's legal rights to divert water under his junior upstream water right. The answer to that question is clearly, "No." Mr. Gilbert's water right, with a 1952 priority date, is located upstream of the Grumbles' senior water right and junior to the Grumbles' right by 20 years.<sup>12</sup> Thus, even absent any amendment, Mr. Gilbert is subject to a senior call by the Grumbles. Mr. Gilbert has offered no relevant fact or circumstance under which the legally cognizable impact of the proposed amendments could have any greater impact on Mr. Gilbert's

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<sup>9</sup> See *City of Waco v Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 802 (Tex. App. — Austin 2011, pet. denied) (emphasis added); see also *Bosque River Coalition v Tex. Comm'n on Envtl. Quality*, 347 S.W.3d 366, 375 (Tex. App. — Austin 2011, pet. denied).

<sup>10</sup> 30 TEX. ADMIN. CODE § 55.103.

<sup>11</sup> *Id.* § 36.8.

<sup>12</sup> For reference, **Attachment A** shows the location of Mr. Gilbert's diversion point, the authorized diversion location for the Grumbles' right, and the location of the requested new diversion point.

ability to exercise his water right than would occur under the full exercise of the Grumbles' right in its current form.<sup>13</sup>

Because Mr. Gilbert's request does not identify any personal justiciable interest that could be adversely affected by granting of this Application, he is not an affected person using any relevant factors, including those enumerated in 30 TEX. ADMIN. CODE § 55.256. Therefore, the hearing request submitted by Roger W. Gilbert should not be granted.

## V. CONCLUSION

Because Mr. Gilbert is not an "affected person," LCRA respectfully requests that his hearing request be denied and that the Application be granted.

Respectfully submitted,

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**ATTORNEY FOR APPLICANT LOWER  
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<sup>13</sup> See TEX. WATER CODE § 11.122(b); see also *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 107 (Tex. 2006) (noting that Legislature intended to impose the full-use restriction on the assessment of adverse impacts on other water rights).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered by hand delivery, facsimile, United States Postal Service, or by email to the persons listed in the attached Mailing List on this, the 21<sup>st</sup> day of September, 2012.

  
Lyn E. Clancy

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