

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

<b>APPLICATION BY JOHN PAT</b>	<b>§</b>	<b>BEFORE THE</b>
<b>AND EMMETT LEE GRUMBLES</b>	<b>§</b>	
<b>AND THE LOWER COLORADO</b>	<b>§</b>	
<b>RIVER AUTHORITY</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>TO AMEND CERTIFICATE OF</b>	<b>§</b>	
<b>ADJUDICATION NO. 14-1913</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or commission) respectfully submits this response to the hearing request filed in the application by Jon Pat and Emmett Lee Grumbles and the Lower Colorado River Authority (LCRA) (together, "Applicants") for an amendment to Certificate of Adjudication No. 14-1913. One hearing request was timely received from Roger W. Gilbert. The Executive Director respectfully recommends that the commission deny the hearing request.

**I. Background**

The Applicants have jointly applied for the addition of a diversion point to Certificate of Adjudication No. 14-1913 on the Colorado River downstream from the existing diversion point authorized by that certificate on the San Saba River, and to add an authorization for LCRA to divert the full amount of 270 acre feet of water authorized for diversion by Certificate 14-1913 from that diversion point for storage in the Lometa Reservoir and municipal use within the service area of the Lometa Water System in portions of Lampasas, Mills, San Saba, and Burnet Counties. The application also notes that water within that service area in Lampasas, Mills, and Burnet Counties will be used under an exempt interbasin transfer of water to the Brazos River Basin pursuant to TEX. WATER CODE §11.085(v)(4). All provisions of the proposed amendment are subject to the continued maintenance of a lease agreement between the Applicants which was executed on March 16, 2011. Further, LCRA is required to maintain an accounting plan documenting use of the water from the newly authorized diversion point.

**II. Procedural History**

This application was received May 16, 2011. The application was declared administratively complete on June 26, 2011. Notice for the application was mailed by the Chief Clerk to water rights holders of record in the Colorado River Basin upstream of the proposed diversion point on September 12, 2011. The hearing request period ended on September 30, 2011.

Following the Texas Supreme Court decision in *City of Marshall v. City of Uncertain*, the Commission issued guidance on new standards for public notice in water rights amendment applications in a work session on January 18, 2008. Notice for this

application was given pursuant to guidance provided at the commission's agenda hearing held August 20, 2008.<sup>1</sup>

### **III. Legal Authority**

The following may request a contested case hearing on water rights applications: the commission, the Executive Director, the Applicant, and affected persons when authorized by law. Affected persons are authorized to submit hearing requests for water rights permit applications by TEX. WATER CODE §11.132(a). The commission, on the request of any affected person, shall hold a public hearing on an application to amend a water right permit. Id. The application is subject to the procedures for determining whether a hearing requestor is an affected person and whether a document submitted on an application constitutes a valid request. Those procedures for applications declared administratively complete on or after September 1, 1999 are located at 30 TEX. ADMIN. CODE §§55.250-256.

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. Id. §55.256(a). An interest common to the general public does not constitute a justiciable interest. Id. Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons. Id. §55.256(b).

To determine whether a hearing requestor is an affected person, all relevant factors must be considered, including but 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) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the 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.

Id. §55.256(c).

Sections 55.251(b) and (c) specify that a hearing request must:

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<sup>1</sup> Notice issued pursuant to 30 TEX. ADMIN. CODE §39.421 for the commission meeting to consider this hearing request was not mailed to John Pat and Emmett Lee Grumbles as applicants pursuant to affidavits submitted with the application authorizing LCRA to unilaterally seek the amendment on its behalf and that of Messrs. Grumbles. Those affidavits are attached hereto as Attachment A.

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must strictly comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). Id. §55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (1) complies with the requirements of 30 TEX. ADMIN. CODE §55.251;
- (2) is timely filed; and
- (3) is pursuant to a right to hearing authorized by law.

Id. §55.255(b)(2).

A hearing request is considered timely if it is submitted to the Commission within 30 days after the publication of the notice of application if the commission has not extended the period for hearing requests. Id. §295.171.

#### **IV. Hearing Request**

Mr. Gilbert's hearing request was timely submitted. However, the request does not substantially comply with all technical requirements for hearing requests in 30 TEX. ADMIN. CODE §55.251 in that it does not include a statement explaining the requestor's distance relative to the proposed activity. Id. §55.251(c)(2). The request states concerns generally relating to senior priority calls and subsequent actions taken by the Executive Director of the TCEQ to suspend certain water rights within the San Saba River watershed during the ongoing drought in 2011 and 2012. Specifically, Mr. Gilbert is concerned that the Applicants are seeking this amendment to remove the water right authorized by Certificate of Adjudication 14-1913 from the San Saba River in order to avoid a suspension required by a senior priority call.

As background, portions of the San Saba watershed have been subject to severe low flow conditions as a result of the ongoing drought of 2011 and 2012. In response to a number of senior priority calls made on the watershed during the summer of 2012, the

Executive Director required certain junior water rights owners on the San Saba River to suspend diverting water so that the senior or superior water users would have flows from which to divert and use water. Mr. Gilbert is a water right owner whose right to divert was suspended under the priority calls.

The water right owned by the Grumbles was not suspended subject to a priority call on the San Saba River because it is downstream of any senior or superior water right owner who placed a call on the river. The furthest downstream senior water right that made a call on the San Saba is approximately 70 river miles upstream from the Grumbles' diversion point. A hydrological analysis shows that despite unprecedented drought conditions in the San Saba watershed in 2011, the lowest reach of the San Saba, where the existing diversion point for Certificate 14-1913 is located, had continuous flow into the Colorado River due to spring flow contributions. In fact, at various points during the drought, 100 percent of the flow in the Colorado River downstream of the confluence of the two rivers came from the San Saba watershed. At no point have the Grumbles been unable to divert water at the existing diversion point because of low flow conditions or suspension under a senior priority call.

Additionally, the first priority call in the San Saba River watershed was received by the Office of the Governor on June 23, 2011, and the first suspension of water rights in the watershed began on August 8, 2011. The lease agreement between the Applicants was executed three months prior to the letter calling for junior water rights to be suspended. Suspensions of water rights in the San Saba River watershed ended on February 7, 2012.

Notwithstanding the applicability of enforcement of senior priority call suspensions, Mr. Gilbert does not appear to have a personal justiciable interest in this application. The request states that the requestor owns Certificate of Adjudication 14-1821 on the San Saba River, approximately six miles east of Menard, Texas. Agency mapping indicates that Mr. Gilbert's diversion point is approximately 95.5 river miles upstream from the original diversion point authorized by Certificate of Adjudication 14-1913. The addition of a diversion point an additional 16 miles downstream could not, as a practicality, impact the hydrologic character of the San Saba River at Mr. Gilbert's location.

During the 82<sup>nd</sup> Regular Session in 2011, the Texas Legislature adopted HB 2694 which added new Section 11.053 to Subchapter B of Chapter 11 of the Texas Water Code which outlines procedures for requesting priority call enforcement, and criteria under which such requests are to be reviewed by the Executive Director and the commission. Applications for amendments to water rights are reviewed under Section 11.122 in Subchapter D relating to Permits to Use State Water. Therefore, the interest claimed by Mr. Gilbert is not one protected by the law under which this application is being considered. *Id.* §55.256(c)(1). Further, given that Mr. Gilbert's location is significantly upstream from the regulated activity proposed for authorization by this amendment, there is no likelihood that Mr. Gilbert's use of his property or the natural resource in question will be impacted. *Id.* §55.256(c)(4)-(5).

## **V. Conclusion and Recommendation**

For the foregoing reasons, the Executive Director respectfully recommends that the Commission deny the hearing request of Roger W. Gilbert and only refer this matter to hearing if it finds, in its discretion, that a hearing would be in the public interest. 30 TEX. ADMIN. CODE §55.255(c).

Respectfully submitted,  
Texas Commission on Environmental Quality

Zak Covar  
Executive Director

Robert Martinez, Director  
Environmental Law Division



By \_\_\_\_\_  
James Aldredge, Staff Attorney  
Environmental Law Division  
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(512) 239-2496  
Representing the Executive Director of the  
Texas Commission on Environmental Quality

**CERTIFICATE OF SERVICE**

I certify that on September 24, 2012, an original and seven copies of the "Executive Director's Response to Hearing Request" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, was electronically filed with the same, and a complete copy was transmitted by electronic mail, facsimile, or United States mail to all persons on the attached mailing list.



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James Aldredge, Staff Attorney  
Environmental Law Division  
State Bar No. 24058514

**MAILING LIST**  
**JOHN PAT GRUMBLES, EMMETT LEE GRUMBLES, LOWER COLORADO**  
**RIVER AUTHORITY**  
**DOCKET NO. 2012-1195-WR; ADJ 1913A**

FOR THE APPLICANT:

via electronic mail:

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REQUESTER(S):

Roger W. Gilbert  
7906 Rugged Ridge Street  
San Antonio, Texas 78254-2623

## Attachment A

Affidavits of John Pat Grumbles and Emmett Lee Grumbles  
Authorizing LCRA to Pursue Amendment 14-1913A

AFFIDAVIT REGARDING CONSENT TO AMEND  
CERTIFICATE OF ADJUDICATION NO. 14-1913

STATE OF TEXAS       §  
                                  §  
COUNTY OF SAN SABA   §

BEFORE ME, the undersigned authority, on this day personally appeared Emmett Lee Grumbles, a person known by me to be competent and qualified in all respects to make this affidavit, who being by me first duly sworn, stated that:

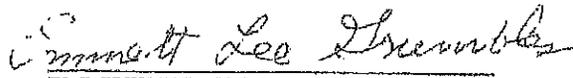
"I am Emmett Lee Grumbles. I am at least 18 years of age and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I am the co-owner of Certificate of Adjudication No. 14-1913. On March 16, 2011, I entered into a Lease of Water Rights ("Lease") whereby I leased to the Lower Colorado River Authority all of my rights and interests in 270 acre-feet of water under Certificate of Adjudication No. 14-1913. The Lease is for a term of twenty (20) years, unless the parties agree in writing to extend the Lease for an additional period of time.

Pursuant to the terms of the Lease, I have agreed to the amendment of Certificate of Adjudication No. 14-1913 to add an additional diversion point downstream, to authorize the storage of water in the Lometa Reservoir, and to add municipal use as an additional authorized use of the water. I have agreed that any amendments to Certificate of Adjudication No. 14-1913 shall remain valid and effective and that, upon the termination of the Lease, any amendments to Certificate of Adjudication No. 14-1913 shall also terminate.

I hereby certify that (i) as of March 16, 2011, Certificate of Adjudication No. 14-1913 has been leased to LCRA in accordance with the terms of the Lease, (ii) I concur with the amendment of Certificate of Adjudication No. 14-1913 under the applicable provisions of Chapter 11 of the Texas Water Code, and (iii) I have granted LCRA the authority to prepare and file all the necessary documents and application to obtain the required amendments to Certificate of Adjudication No. 14-1913 and to take any and all actions required to effectuate the amendments. I have authorized LCRA to pursue the amendments of Certificate of Adjudication No. 14-1913 on my behalf without further involvement from me.

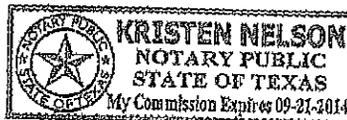
Further affiant saith not."

  
EMMETT LEE GRUMBLES, AFFIANT

SWORN TO AND SUBSCRIBED before me on the 25 day of April, 2011.

  
Notary Public in and for the State of Texas

My Commission Expires:



AFFIDAVIT REGARDING CONSENT TO AMEND  
CERTIFICATE OF ADJUDICATION NO. 14-1913

STATE OF TEXAS       §  
                                  §  
COUNTY OF TRAVIS   §

BEFORE ME, the undersigned authority, on this day personally appeared John Pat Grumbles, a person known by me to be competent and qualified in all respects to make this affidavit, who being by me first duly sworn, stated that:

"I am John Pat Grumbles. I am at least 18 years of age and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I am the co-owner of Certificate of Adjudication No. 14-1913. On March 16, 2011, I entered into a Lease of Water Rights ("Lease") whereby I leased to the Lower Colorado River Authority all of my rights and interests in 270 acre-feet of water under Certificate of Adjudication No. 14-1913. The Lease is for a term of twenty (20) years, unless the parties agree in writing to extend the Lease for an additional period of time.

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I hereby certify that (i) as of March 16, 2011, Certificate of Adjudication No. 14-1913 has been leased to LCRA in accordance with the terms of the Lease, (ii) I concur with the amendment of Certificate of Adjudication No. 14-1913 under the applicable provisions of Chapter 11 of the Texas Water Code, and (iii) I have granted LCRA the authority to prepare and file all the necessary documents and application to obtain the required amendments to Certificate of Adjudication No. 14-1913 and to take any and all actions required to effectuate the amendments. I have authorized LCRA to pursue the amendments of Certificate of Adjudication No. 14-1913 on my behalf without further involvement from me.

Further affiant saith not."

  
JOHN PAT GRUMBLES, AFFIANT

SWORN TO AND SUBSCRIBED before me on the 21<sup>st</sup> day of April, 2011.

  
Notary Public in and for the State of Texas

My Commission Expires: 1-11-14

