

**APPLICATION NO. 5838A**

**APPLICATION OF THE LOWER  
COLORADO RIVER AUTHORITY  
TO AMEND THE LCRA WATER  
MANAGEMENT PLAN**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**REPLY TO LCRA’S RESPONSE  
TO REQUESTS OF GARWOOD IRRIGATION COMPANY  
AND THE LEHRER/LEWIS INTERESTS  
FOR CONTESTED CASE HEARING**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Garwood Irrigation Company (“Garwood”) and the Lehrer/Lewis interests (“Lehrer/Lewis”) submit this reply to the response of the Lower Colorado River Authority (“LCRA”) to their timely requests for a contested case hearing on the above-referenced application of the LCRA to amend its Water Management Plan (“WMP”).

The Executive Director (“ED”) and the Office of Public Interest Counsel (“OPIC”) have concluded that Garwood and Lehrer/Lewis are affected persons with personal justiciable interests in the LCRA WMP application and are entitled to a contested case hearing.<sup>1</sup> LCRA disagrees.

The standard for 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. An interest common to members of the general public does not qualify as a personal justiciable interest.”<sup>2</sup> In their hearing requests, Garwood and Lehrer/Lewis demonstrated that their right to water was affected by LCRA’s WMP application in a manner not common to the general public and, therefore, that they are entitled to a contested case hearing and party status in this proceeding. Unless Garwood and Lehrer/Lewis consent (and they do not), special conditions in a draft order at this stage of the proceedings have no effect whatsoever on affected person or party status. The mere fact that LCRA includes Garwood-specific provisions in its draft order confirms that Garwood and Lehrer/Lewis’s interests are dramatically different from those of the general public.

Garwood and Lehrer/Lewis are affected persons based on their contractual rights to water stemming from two agreements between LCRA and Garwood. Those agreements (collectively, “the Garwood Agreements”) govern LCRA’s supply of water to landowners and irrigators within the Garwood service area. Both Garwood and Lehrer/Lewis have the right to enforce LCRA’s obligations under the Garwood Agreements. Although “the Executive Director would normally

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<sup>1</sup> Executive Director’s Response to Hearing Requests, 2015-1444-WR, at 8, 11; Office of Public Interest Counsel’s Response to Requests for Hearing, 2015-1444-WR, at 15, 18-19.

<sup>2</sup> 30 Tex. Admin. Code § 55.256.

not recommend that a contract holder be considered to be an affected person in a water right hearing,” the Executive Director recommends granting affected person status to water supply contract holders, including Garwood and Lehrer/Lewis, acknowledging that the water rights underlying the LCRA WMP address both firm and interruptible contracts.<sup>3</sup>

Garwood and Lehrer/Lewis’s legal rights are affected by LCRA’s WMP application. Garwood and Lehrer/Lewis demonstrated in their hearing requests, and LCRA does not dispute, that the Garwood Agreements are unlike the water supply contracts governing any other LCRA water customer.<sup>4</sup> LCRA does not oppose the granting of affected person status to some of its water supply customers.<sup>5</sup> And Garwood has even more potential to be affected by the WMP application than other users of LCRA-provided water because of the ongoing dispute between LCRA, on the one hand, and Garwood and Lehrer/Lewis, on the other hand, regarding the correct interpretation of the Garwood Agreements.<sup>6</sup>

As water contract holders, Garwood and Lehrer/Lewis have a clear interest in LCRA’s WMP. The current WMP is lengthy and undoubtedly complicated. It took years to develop and necessitated several emergency orders while details were finalized. It addresses both firm and interruptible contracts. A contested case hearing provides the parties an opportunity to understand both LCRA’s and TCEQ’s interpretations and constructions of the WMP. A full understanding of the WMP’s requirements is particularly important for parties, like Garwood and Lehrer/Lewis, whose interests are impacted by LCRA’s firm water supplies.

Understatement of firm commitments allows LCRA to enter into additional firm commitments that it would otherwise be prohibited from entering into, which would be contrary to the interest of all contract holders because LCRA would then be overcommitting its supply of

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<sup>3</sup> ED’s Response at 7.

<sup>4</sup> For instance, as a condition of its sale to LCRA, Garwood insisted on including terms and conditions in the 1998 Purchase Agreement that today govern LCRA’s supply of water to landowners and irrigators within the Garwood service area. Among other things, those terms and conditions specify that the 1987 Agreement “shall remain in full force and effect, and LCRA shall continue to honor the terms of the [1987] Agreement.” And, although the 1998 Agreement states that “[t]he supply of stored water for Garwood’s Service Area shall be interruptible,” the sentence does not end there; it goes on as follows: “The supply of stored water for irrigation within Garwood’s Service Area shall be interruptible, **but only if and to the extent provided in the LCRA Agreement,...**” thereby granting to Garwood and all landowners and irrigators within the Garwood Service Area a “most favored nations” status. (Emphasis added). Clearly, the Garwood Agreements cannot be pigeonholed into simply commitments of “interruptible” water, which LCRA attempts to do. To the contrary, the Garwood Agreements should be considered to be “firm,” subject **only** to the conditions set forth in the agreements. This conclusion is confirmed by the final judgment and decree dated April 20, 1988 adjudicating LCRA’s rights to the Highland Lakes. Finding 25(e) adopted by the court for the adjudication of LCRA’s rights in Lakes Travis and Buchanan (Permits Nos. 1260 and 1259, respectively) provides as follows:

- (e) Each commitment by LCRA to supply water under Permits Nos. 1260 or 1259 shall be considered to be on a firm, uninterruptible basis unless the contract, resolution or special condition defining such commitment specifically provides that such commitment “is subject to interruption or curtailment.”

<sup>5</sup> See LCRA Response to Requests for Contested Case Hearing, Docket No. 2015-1444-WR, Application No. 5838, at 17.

<sup>6</sup> ED’s Response at 8 (“it is disputed whether the 1987 Agreement and 1998 Purchase Agreement are for firm or interruptible water”).

water. Furthermore, the proposed amendments to the WMP will “directly impact” both firm and interruptible water customers by setting new curtailment levels.<sup>7</sup> The Commission therefore need not address at this time the details of the competing contract interpretations to find that Garwood and Lehrer/Lewis have justiciable interests that are “affected by the application.”<sup>8</sup>

LCRA insists that two findings of fact and a conclusion of law in the Draft Revised Order negate Garwood’s justiciable interest in the application.<sup>9</sup> But the Draft Revised Order neither destroys affected person status nor addresses Garwood’s fundamental concern: how will the LCRA WMP application impact water availability under the Garwood Agreements? LCRA points to the following Draft Revised Order provisions:

**Finding of Fact 17.r:** Interruptible stored water may be available in the Garwood irrigation operation for storage levels lower than indicated in the curtailment curves based on prior contracts between Garwood and LCRA.

**Finding of Fact 36:** LCRA and Garwood Irrigation Company are parties to a 1987 Agreement and a 1998 Purchase Agreement, which agreements relate to the supply of water by LCRA in the Garwood irrigation district.

**Conclusion of Law 2:** By entering this order, the Commission is not construing in any way either the 1987 Agreement or the 1998 Purchase Agreement between LCRA and Garwood Irrigation Company. Nothing in this Order or the WMP approved by this Order shall be considered or construed in any way to support one construction or another of the 1987 Agreement and the 1998 Purchase Agreement between LCRA and Garwood Irrigation Company. Garwood Operations will be provided Interruptible Stored Water consistent with the Garwood Purchase Agreement. Proposed Water Management Plan, p. 4-8.

These findings and conclusions are similar—not identical—to ones Garwood agreed to during LCRA’s repeated requests for temporary, emergency relief from the 2010 WMP.<sup>10</sup> The Emergency Orders stated: “LCRA may provide interruptible stored water to the Garwood Irrigation Division and Pierce Ranch, to the extent required by their contracts.”<sup>11</sup> But the Draft Revised Order changes this and embeds into the WMP LCRA’s incorrect interpretation of the Garwood Agreements: “Garwood Operations will be provided Interruptible Stored Water

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<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.*

<sup>9</sup> LCRA Response at 8.

<sup>10</sup> TCEQ Order affirming, with modification, an Emergency Order granted by the Executive Director to the Lower Colorado River Authority amending the 2010 Water Management Plan; TCEQ Docket No. 2015-0817-WR (July 10, 2015) (adding Finding of Fact 77: “LCRA’s request notes that LCRA would provide interruptible stored water to the Garwood Irrigation Division and Pierce Ranch, to the extent required by their contracts,” Conclusion of Law 4: “By entering this order, the Commission is not construing in any way either the 1987 Agreement or the 1998 Purchase Agreement between LCRA and Garwood Irrigation Company. Nothing in this Order shall be considered or construed in any way to support one construction or another of the 1987 Agreement and the 1998 Purchase Agreement between LCRA and Garwood Irrigation Company,” and Ordering Provision 2: “LCRA may provide interruptible stored water to the Garwood Irrigation Division and Pierce Ranch, to the extent required by their contracts.”).

<sup>11</sup> *Id.* at Ordering Provision 2.

consistent with the Garwood Purchase Agreement.” In addition, LCRA refuses to recognize that temporary measures Garwood approved to modify LCRA’s previous WMP, on an emergency basis, do not keep its application for a new WMP from affecting Garwood’s justiciable interests in a way not common to the general public. For instance, Finding of Fact 17.r, stating that Garwood will receive water “based on prior contracts between Garwood and LCRA,” does not explain whether LCRA will account for stored water committed to Garwood as “firm” water, as required by the Garwood Agreements, or whether LCRA will attempt to curtail that supply of stored water in any way inconsistent with how it treats other firm commitments of water used for irrigation, or whether LCRA will otherwise persist in its incorrect interpretation.

Finally, Garwood and Lehrer/Lewis satisfy additional “relevant factors” that “shall be considered” in determining affected person status.<sup>12</sup> Garwood and Lehrer/Lewis demonstrated both above and in their hearing requests that “a reasonable relationship exists between the interest claimed and the activity regulated.”<sup>13</sup> Specifically, as a condition of its sale to LCRA, Garwood insisted on including terms and conditions in the 1998 Purchase Agreement that today govern LCRA’s supply of water to landowners and irrigators within the Garwood service area. Additionally, pursuant to the express terms of the 1998 Purchase Agreement, landowners and irrigators within the Garwood service area are named third-party beneficiaries that have the right to enforce the obligations of LCRA. Garwood and Lehrer/Lewis’ water interests link inextricably with LCRA’s water management practices, which are governed by the WMP. LCRA’s proposed WMP will directly impact water available to Garwood and Lehrer/Lewis under the Garwood Agreements.

Garwood and Lehrer/Lewis have a right to water from LCRA under the Garwood Agreements. The LCRA WMP application affects that interest, as the ED acknowledged, because the WMP application impacts all LCRA firm and interruptible water contract holders. Additionally, the Lehrer/Lewis Interests have a right to be supplied water for irrigation by LCRA solely because they own lands within a defined irrigation service area of a water right now owned by LCRA. The personal justiciable interests Garwood and Lehrer/Lewis have demonstrated do not dissolve upon the insertion of a few findings in a draft order, at this stage of the proceedings. For these and other reasons articulated above and in the requests for contested case hearing, Garwood and Lehrer/Lewis are affected persons.

Garwood and Lehrer/Lewis are **not** asking or expecting the Commission to construe its agreements with LCRA. The Executive Director’s staff have made it clear that they were not attempting to construe them; Garwood and Lehrer/Lewis (and we believe LCRA representatives) agree that position is correct under law.<sup>14</sup> Nevertheless, the different constructions asserted by

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<sup>12</sup> 30 Tex. Admin. Code § 55.256(c).

<sup>13</sup> *Id.* at § 55.256(c)(3).

<sup>14</sup> Garwood and Lehrer/Lewis are aware of no express grant of authority to the Commission to interpret contracts between private parties. Unlike courts, “there is no presumption that administrative agencies are authorized to resolve disputes. Rather, they may exercise only those powers the law, in clear and express statutory language, confers upon them.” *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). Moreover, contractual interpretation is “inherently judicial in nature.” *In re Cano Petroleum, Inc.*, 277 S.W.3d 470 (Tex. App.—Amarillo 2009, no pet.). When an action is inherently judicial, a court “retains jurisdiction to determine the controversy” in the absence of an explicit statute granting exclusive jurisdiction to the administrative agency. *Id.*

LCRA, on the one hand, and Garwood and Lehrer/Lewis, on the other hand, and the alternate consequences based on those constructions, affect LCRA's firm water supply and should be of interest to the Commission in considering the WMP.

Garwood and Lehrer/Lewis respectfully request that the Commission hold a contested case hearing on LCRA's application and that Garwood and Lehrer/Lewis be admitted as parties.

Respectfully submitted,

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