

APPLICATION OF THE LOWER	§	BEFORE THE
COLORADO RIVER AUTHORITY FOR	§	TEXAS COMMISSION ON
EMERGENCY AUTHORIZATION	§	ENVIRONMENTAL QUALITY
	§	

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**BRIEF IN SUPPORT OF MODIFYING THE LCRA EMERGENCY ORDER  
OF THE EXECUTIVE DIRECTOR**

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TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

NOW COME Garwood Irrigation Company (“Garwood”) and the Lehrer/Lewis interests<sup>1</sup> (“Lehrer/Lewis”) and submit this Brief in Support of Modifying the Lower Colorado River Authority (“LCRA”) Emergency Order of the Executive Director (“2015 Emergency Order”).

**INTRODUCTION**

Garwood and Lehrer/Lewis support including three unique provisions related solely to Garwood in the 2015 Emergency Order; these three provisions were included without opposition in virtually identical form in the Commission’s February 27, 2014 “Order affirming in part and modifying in part the Executive Director’s emergency order authorizing the Lower Colorado River Authority to amend its Water Management Plan, Permit No. 5838, pursuant to section 11.139 of the Texas Water Code; TCEQ Docket No. 2014-0124-WR; SOAH Docket No. 582-14-2123,” which was issued to LCRA following a contested case hearing (“the February 2014

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<sup>1</sup> The Lehrer/Lewis interests consist of five distinct ownership interests of lands within the Service Area of LCRA’s Garwood Division: (1) The William Paul Lehrer Residuary Trust, the Gretchen L. McMenimen Residuary Trust, the Nancy Lehrer Boyd Residuary Trust, and the Mary Lehrer Armour Residuary Trust (such residuary trusts were created under the will of William Neal Lehrer admitted to probate in Cause No. 9,227 in the County Court of Colorado County, Texas, and such residuary trusts are together referred to herein as the “Lehrer Trusts”); (2) The Dorothy Lewis Estate Trust (such trust was created under the Last Will and Testament of Dorothy Jane Lehrer Lewis dated October 3, 1983 and First Codicil dated February 12, 2002, and such trust is referred to herein as the “Lewis Trust”); (3) El Seven Ranch, Inc., a Texas corporation; (4) the Lehrer-Lewis 1967 Trusts; and (5) the Lehrer-Lewis Joint Venture. William Neal Lehrer and Dorothy Jane Lehrer Lewis, both deceased, were brother and sister, and their descendants/heirs are the beneficiaries of the Lehrer Trusts, the Lewis Trust, and the Lehrer-Lewis 1967 Trusts, as well as stockholders of El Seven Ranch, Inc.

Emergency Order”).<sup>2</sup> Neither LCRA nor the Executive Director opposes the addition of these provisions (as slightly modified) to the 2015 Emergency Order. Under the circumstances (and consistent with the proceedings associated with the February 2014 Emergency Order), it is unlikely that any interested person would oppose adding these provisions to the 2015 Emergency Order.

## **BACKGROUND**

Garwood owned the independent right to divert and use 168,000 acre-feet of water per year from the run-of-river flow of the Colorado River for the irrigation of 32,000 acres annually within Colorado and Wharton Counties. Garwood’s water right had the earliest priority date of all major water rights in the Colorado River Basin. In 1998, Garwood sold to LCRA its major assets (the Garwood canal system, low water dam on the Colorado River, various lift stations and the major portion of its water right) under a Purchase Agreement dated July 20, 1998 (the “1998 Purchase Agreement”). But Garwood conditioned the transaction on LCRA making numerous conditions and promises—mostly those set forth in Section 7.08 of the Purchase Agreement—for the long-term protection of all landowners and irrigators within the Garwood Irrigation service area (now referred to as LCRA’s “Garwood Irrigation Division” service area). All landowners and irrigators within the service area are explicitly named in the 1998 Purchase Agreement as third-party beneficiaries who have the right to enforce the conditions and promises made by LCRA. One of those conditions is that the terms and conditions of the Agreement between LCRA and Garwood dated December 10, 1987 (the “1987 Agreement”) shall remain in effect (collectively, the “Garwood Agreements”).

LCRA on the one hand, and Garwood and Lehrer/Lewis on the other hand, have a difference of opinion regarding construction of the Garwood Agreements in effect between

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<sup>2</sup> See February 2014 Emergency Order at FOF 77, COL 11, and Ordering Provision 2.

LCRA and Garwood. Garwood and Lehrer/Lewis are **not** asking or expecting the Commission to construe its agreements with LCRA. The Executive Director's staff has not previously reviewed or construed the Garwood Agreements when issuing LCRA emergency relief. Unfortunately, though, the pending consideration of the Executive Director's 2015 Emergency Order, which deals generically with LCRA water supply contracts and issues of firm water and interruptible commitments, has the potential to interfere with the parties' resolution of the contract disputes, an interference neither side seeks.<sup>3</sup> Garwood and Lehrer/Lewis agree that the law is clear,<sup>4</sup> but, out of caution and consistent with the February 2014 Emergency Order, Garwood and Lehrer/Lewis ask that any order entered by the Commission that affirms or modifies the Executive Director's emergency order reflect that, by entering the order, the Commission is not intending to construe the Garwood Agreements. By incorporating the additions in the February 2014 Emergency Order into the 2015 Emergency Order, it would be indisputable that the Commission is neutral with respect to any contract issues in dispute between LCRA and Garwood and Lehrer/Lewis.

### **REQUESTED RELIEF**

The clarification and neutrality Garwood and Lehrer/Lewis seek can be accomplished by adding one conclusion of law, a single finding of fact, and an ordering provision. The

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<sup>3</sup> LCRA confirms in its December 2014 Application for the 2015 Emergency Order that "LCRA would provide interruptible stored water to the Garwood irrigation division and Pierce Ranch, to the extent required by their contracts." See Page 3, LCRA's Brief and Attachments in Support of Application for Emergency Authorization Related to the Water Management Plan Under Texas Water Code §§ 5.501, 11.138 & 11.139 and the Governor's Emergency Disaster Proclamation related to the Drought. This is exactly the finding that was included in the February 2014 Emergency Order.

<sup>4</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.*

conclusion of law would be identical to the conclusion requested by LCRA and supported by Judges Newchurch and Vickery in the February 2014 Emergency Order:

**Conclusion of Law 11**

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.

The single finding of fact and ordering provision would be virtually identical to Finding of Fact 77 and Ordering Provision 2 from the February 2014 Emergency Order, but would remove reference to Pierce Ranch to address Garwood alone. Thus, shown as redlines to the corresponding February 2014 Emergency Order provisions, Garwood and Lehrer/Lewis ask for the following finding and ordering provision:

**Proposed Finding of Fact**

LCRA will also provide interruptible stored water to the Garwood Irrigation Division ~~and Pierce Ranch~~, to the extent required by ~~their~~ its contracts.

**Proposed Ordering Provision**

LCRA may provide interruptible stored water to the Garwood Irrigation Division ~~and Pierce Ranch~~, to the extent required by ~~their~~ its contracts.

**CONCLUSION**

In order to clarify that the Commission does not intend, through its 2015 Emergency Order, to interpret the Garwood Agreements and in order to remain consistent with the February 2014 Emergency Order, Garwood and Lehrer/Lewis respectfully request that, should the Commission affirm or modify the Executive Director's 2015 Emergency Order, the Commission incorporate the proposed modifications to the emergency order and include the finding of fact, conclusion of law, and ordering provision proposed by Garwood and Lehrer/Lewis.

Respectfully Submitted,



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VENTURE