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November 7, 2011

Ms. Melissa Chao, Acting Chief Clerk
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: SOAH Docket No. 582-10-4184
TCEQ Docket No. 2005-1490-WR
Application of Brazos River Authority for Water Use Permit No. 5851

Dear Chief Clerk:

Enclosed please find one copy of Protestants Comanche County Growers' and Bradley B. Ware's Exceptions to the Proposal for the Decision. The parties on the official mailing list have been served by electronic mail.

Should you have any questions with regards to the enclosed, please do not hesitate to contact me at the above referenced number.

Sincerely,

GWENDOLYN HILL WEBB
ATTORNEY FOR COMANCHE COUNTY GROWERS

Enclosure

SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR

CONCERNING THE	§	BEFORE THE STATE OFFICE
APPLICATION BY THE	§	
BRAZOS RIVER AUTHORITY	§	OF
FOR	§	
WATER USE PERMIT NO. 5851	§	ADMINISTRATIVE HEARINGS

PROTESTANTS COMANCHE COUNTY GROWERS' AND BRADLEY B. WARE'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Texas family farmers and ranchers George Bingham, Frazier Clark by next friend Dusty Jones, and William D. "Dwayne" and Mary L. Carroll by next friend Neil Carroll, collectively referred to as the Comanche County Growers ("CCG"), and Bradley B. Ware ("Ware"), protestants (and sometimes collectively referred to herein as "Protestants") in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality ("TCEQ") and the State Office of Administrative Hearings ("SOAH") regarding the Application for Water Rights Permit No. 5851 by the Brazos River Authority (hereafter "BRA") and respectfully file the following Exceptions to the Proposal for Decision. To that end, Protestants would respectfully state the following:

I. INTRODUCTION

The Administrative Law Judges ("ALJs") timely issued their Proposal for Decision ("PFD") in this case on Monday, November 7, 2011. The 257 page PFD obviously represents the difficult task of reviewing the evidence of record in this case (and even some evidence which was not of record), and reaching the inescapable legal conclusion that the water rights application by Brazos River Authority ("BRA) for Water Use Permit No. 5851 (BRA's Application), should be denied. CCG and Ware recognize the significant effort and ALJ resources in terms of time and legal intellect which are shown in the PFD, and both parties believe that it would be wrong not to validate the incredible efforts of the ALJs in this case. Because of the uniqueness of BRA's Application, and the breadth of the requested appropriation for all water the Brazos River Basin Water Availability

Model ("WAM") could show to be available, the ALJs were presented with many opportunities to review and update the current state of Texas water law under the doctrine of prior appropriation. CCG and Ware find that in many instances and certainly overall, the ALJs rose to the occasion.

At the same time, both CCG and Ware believe that certain aspects of the PFD were inconsistent and irreconcilable with either the record or their treatment of other issues in the case. In the sense that the ALJs recommended denial of BRA's Application for several reasons, but failed to recognize any impairment of existing water rights, vested riparian rights, or provide any relief, at all, for any of the protestants who brought those issues to the ALJs' attention numerous times before, during and after the contested case hearing, is troubling. Additionally, CCG and Ware recognize that the ALJs effort does not present a recommendation for a complete disposition of this contested case; they failed to include an order with specific findings of fact and conclusions of law. And, the ALJs' PFD presents some difficulties for the parties in a case where the parties themselves have already expended significant time, financial and legal resources towards a contested case which should have been reserved for a later date with a complete BRA application under the water code. Such an application should be heard with other competing applications for the available water in the Brazos River Basin. What follows, then, are not CCG's and Ware's exceptions to specific findings of fact and conclusions of law, since none were presented in the PFD, but our exceptions to what we perceive as the ALJs' findings and conclusions within the text of the PFD.

II. CLOSING ARGUMENT AND REPLIES TO CLOSING ARGUMENTS OF CCG AND WARE

Because the ALJs failed to seriously consider, or, as discussed below, give any credence to many of the issues raised in the Closing Argument and Replies to Closing Arguments of CCG and Ware, these arguments are re-urged in these exceptions. For ease of reference to the full content of CCG's and Ware's arguments, the Closing Argument and Replies to Closing Arguments are attached to these Exceptions as Exhibit "A" and Exhibit "B," respectively.

III. CCG'S PENDING APPLICATIONS ARE NOT IRRELEVANT (P. 34)

CCG respectfully disagrees that the pending CCG applications are irrelevant to the pending BRA application. CCG has vigorously sought the consolidation of their applications with BRA's application. We believe that the issues in each application are mutually exclusive because of BRA's request for all unappropriated water within the Brazos River Basin. Such a comprehensive application excludes all other application for water in the Basin. The competing CCG applications are well known to the agency and the Executive Director ("ED") has provided no good reason why he has not completed his review of the CCG applications. Because the individual members of CCG are parties to this case, the issues of mutual exclusivity are appropriate issues to consider and are functionally included within the impairment issue; (of applicants with senior priority dates) and the public welfare issue.

When CCG argued its motion for injunctive relief before Judge Lora Livingston in Travis County District Court, 261st Judicial District, Cause No. D-GN- 001131, *George E. Bingham; Don Frazier Clark; and William D. Carroll v. Texas Commission on Environmental Quality and State Office of Administrative Hearings*, one of her comments that arguably supported her decision to grant the TCEQ's Plea to the Jurisdiction in the CCG suit to enjoin the hearing from proceeding, was that CCG would have the right to fully participate in SOAH Docket No. 582010-4184; TCEQ Docket No. 2005-1490-WR. To fully participate in the hearing, CCG should have been allowed to show how the BRA Application adversely affects all of their administratively cognizable interests under the Texas Water Code ("TWC"). Such interests are not only limited to the impact of BRA's application on their *existing* water rights, but also the impact of BRA's Application on their continuing water needs and pending applications, now held in limbo by the ED. They are entitled to have their issues before the TCEQ as the Commissioners decide BRA's application.

In accordance with the general exceptions discussed above, CCG and Ware except to the specific points of the ALJ's set out below:

PFD, p. 32. The ALJ's refer to An Order Concerning the Application of Bradley B. Ware to Amend Water Use Permit Permit No. 5594, TCEQ Docket No. 2008-0181-WR, SOAH Docket No. 583-08-1698 (Apr. 20, 2010). BBW Ex. 1C.

In both cases, here and in Ware's application for a water right, the SOAH ALJs simply could not resist consideration of both parties' applications, only one of which was before them. In the Ware Order in TCEQ Docket No. 2008-0181-WR, SOAH Docket No. 583-08-1698, which adopted the recommended Order of the ALJ, the ALJ made conclusions regarding this BRA Application which conflict with the recommendations of the ALJs in this application.[1] CCG and Ware note that these actions by the ALJs in considering applications which are not before them demonstrate two things:

(1) Consideration of Protestants' CCG's and Ware's water rights and applications are necessary to the disposition of this case, to the extent that they are protesting parties, and their applications are mutually exclusive, and should have been consolidated as a matter of law; and

(2) It is both inappropriate and unlawful to consider applications which have been specifically ruled and determined not to be before the ALJs. To do so precludes the presentation of evidence in support of the application, and unreasonably prejudices the rights of the applicants to get a fair hearing.

Put more simply, the ALJs simply cannot have it both ways: The evidence does not support consideration of CCG's and Ware's applications if the ALJs—erroneously we believe—refuse to allow the record to be developed as to CCG's and Ware's applications *vis a vis* BRA's application.

[1] In the case of Ware's application, the ALJ recommended and the TCEQ used information from BRA's pending application to *deny* Ware's application. However, in the consideration of the actual BRA application, the CCG pending applications are now concluded to be irrelevant.

PFD, p. 34. The merits of CCG's and Ware's applications are irrelevant in this case, which solely concerns the merits of BRA's applications.

Then, the ALJs went on to discuss the merits of CCG's and Ware's applications, including discussion of available return flows and an incomplete discussion of the applicable priority dates.

IV. THE ASSUMPTION THAT THE CCG AND WARE PARTIES ARE NOT ENTITLED TO PROTECTION BECAUSE THEY DO NOT HAVE A PERPETUAL WATER RIGHT IS WRONG. (P. 35)

First, CCG would argue that their term permits do entitle them to "protection" under 11.134 of the Water Code. Their term permits are appropriations of water that are only limited by a term of years. Until their water rights are extinguished, there is nothing in the Water Code that excludes them (with their senior priority dates) from protection from impairment of the negative impact of a junior application in the same water basin. (TWC, §11.336) Moreover, as an administrative "promise" from the agency for consideration for a perpetual water right when new unappropriated water becomes available, they are entitled to the opportunity to have the agency "make good on the promise." Second, the ALJs' limited vision of what is appropriate under an impact analysis assumes that an adverse impact on an existing water right is the sole relevant analysis to be performed under TWC, §11.134. As discussed above, CCG asserts the statutory value of their competing needs and interests in the Brazos River Basin.

In accordance with the general exceptions discussed above, CCG and Ware except to the specific points of the ALJ's set out below:

PFD, p. 31. The ALJs disagree that approval of BRA's Application would impair their existing senior water rights and vested riparian rights.

CCG and Ware assert that TCEQ has an all encompassing "No Injury Rule," 30 Tex. Admin. Code, §297.45 which protects *existing* water rights from impairment,

even water rights junior to water rights held by an applicant such as BRA. Presumably, the ALJs "do not have the luxury" to ignore this TCEQ rule, to the same extent that they are not empowered to ignore 30 Tex. Admin. Code, §295.7. Neither the Texas Water Code, nor TCEQ rules states that term permits are not considered under the No Injury Rule. Absent a specific reference to controlling law on this point, agency policy statements, including those offered as testimony in this hearing; do not determine the rights of term permit holders under the Texas Water Code. [See, *Slay v. TCEQ*; 03-10-00297-CV(Tex. App.—Austin, 8-31-2011); *Brinkley v. Texas Lottery Comm'n*, 986 SW2d 764, 770 (Tex. App.—Austin 1999)] Moreover, even if CCG water rights as term permit holders were limited as the ALJs discuss, their rights as riparian water rights holders to use water for domestic and livestock purposes are specifically subject to protection under TWC, §11.134.

PFD, p. 34. The merits of CCG's and Ware's applications are irrelevant in this case, which solely concerns the merits of BRA's applications.

See, discussion above. This statement is clearly inconsistent with the ALJs approach to consideration of BRA's application. The ALJs found it necessary to discuss the merits of CCG's and Ware's applications.

PFD, p. 35. CCG and Ware water rights are not entitled to protection.

See, discussion above and TCEQ "No Injury Rule."

PFD, p. 36. Return flows upstream of CCG are only 150 acre-feet per year.

This determination is at odds with the ALJs' conclusion that the amount of water available for appropriation cannot be determined by this application, and, in any case, CCG's applications are not before the ALJs. More importantly, the ALJs make no mention of return flows at Ware's diversion points, which would be more than sufficient to satisfy his requested water right under Permit No. 5594.

PFD, p. 40. CCG applications were filed after BRA.

This ignores the Commission order, which establishes the priority dates of CCG and Ware. More importantly, this determination is legally inconsistent with the ALJs' determination that a complete BRA application has yet to be filed!

V. THE ALJ'S STACY DAM ANALYSIS IS NOT CONTROLLING ON THE TERM PERMIT ISSUE. (P.37)

The ALJ's erroneously conclude that because of their term permits, the individual members of CCG are not "appropriators of water" because of the combination of a misreading of *Lower Colorado River Authority v. Texas Department of Water Resources* (Stacy Dam), 689 S.W.2d 873 (Tex. 1984) and a reliance on non-controlling agency authority. First, the conclusion that the CCG term permits are ***not*** appropriations of water flies in the face of the water rights themselves which ***state*** that they authorize appropriations of water. The justification of a contrary conclusion because of a staff level (ED) practice of evaluating water availability for term permits under Run 3 of the Brazos River WAM as opposed to Run 8 is not controlling. The ED's practice of deciding how term permit holders are considered by the TCEQ WAM is not a codified agency rule that was subjected to formal rulemaking procedures under the Texas APA. The law in Texas is clear: any agency statement that is made outside the formal rulemaking or contested case hearing contexts have no legal affect on the rights of a private person. Staff level "policies" such as, "term permits can only be considered in Run 8 of the WAM" are only dispositive of internal agency management issues. See, *Brinkley v. Texas Lottery Comm.*, 986 SW2d 764, 770 (Tex. App. –Austin 1999), citing *Madden v. Texas Bd. Of Chiropractic Examiners*, 663 SW2d 622, 626-627 (Tex. App. –Austin 1984, writ ref'd n.r.e.). The ED's practices or policies do not amend an order of the agency.

The holding in the *Stacy Dam* case [*Lower Colorado River Authority v. Texas Dept. of Water Resources*, 689 SW2d 873 (Tex. 1984)] was stated by the Texas Supreme Court as follows:

> The Court of Appeals held that the Department [of Water Resources] could find "unappropriated water" even though the existing appropriation permits showed insufficient water to supply the application. The Court reasoned that historical usage statistics showed that the recorded appropriations were not being fully used and were unlikely to be fully used.
>
> We reverse the judgments of the courts below because those courts have misconstrued and misapplied Tex. Water Code Ann. §11.134. We hold that the term "unappropriated water" means the amount of water remaining after taking into account all existing uncancelled permits and filings valued at their recorded levels.
> [*Stacy Dam* Supreme Court Opinion, *id.* at p. 874]

The holding and the discussion presupposed that the only source of water available for new appropriations in over appropriated systems such as the Brazos River Basin, would be a comprehensive cancellation of the unused portions of existing water rights. The reason for granting water rights issued under the *Stacy Dam* case was to preserve the rights of appropriators under term permits to use that new water made available from the cancellation program when it became available, when their permits were considered for renewal, and in order of priority. To consider the Commission order establishing the priority dates of the term appropriations as meaningless is against the very plain language of the Commission order granting those rights.

But, the Commission has never undertaken a comprehensive cancellation program in the Brazos River Basin. And, pursuant to Tex. Water Code, §11.046, it does not have to do so in order to grant applications for new appropriations under the *Stacy Dam* requirement that it must take into account all "existing uncancelled" water rights at their permitted levels. Under Tex. Water Code, §11.042 and §11.046 water is made available for appropriation if it is returned to the stream and not authorized for appropriation by indirect reuse. The *Stacy Dam* case did not foresee this Senate Bill 1 development, but the ALJs must decide this

case based on post-Senate Bill 1 water law. In order to avoid giving effect to the legal rights of CCG and Ware as term permit holders, the ALJs simply ignored the priority date given to the CCG and Ware appropriations and boldly stated that their priority dates were something different—giving them a priority date later than BRA's. Not only that, but the ALJs consideration of the term permits and rights of CCG and Ware is set forth in the PFD before the ALJs even discuss water availability or the legal treatment of return flows, rendering their discussion of CCG's and Ware's term permits logically and legally inconsistent with not only the terms and conditions of the permits themselves, but also with the rest of the discussion on water availability and consideration of return flows.

Apart from flagrant disregard of the priority dates of the term permits, the ALJs also disregard other clues regarding the proper treatment of these term permits, including the plain language on the face of the permits which states as to the CCG permittees:

> WHEREAS, the BRA may petition the Commission to review, amend or cancel any or all of the term water rights located in the area above Proctor Lake should conditions change or new studies or evidence support amendment or cancellation of these water rights. [*Amendment to Certificate of Adjudication No. 12-3580B*, Granted July 12, 1994 (again, pre-Senate Bill 1 changes to TWC, §11.042 and §11.046)]

The Commission could not foresee anything like the Senate Bill 1 changes, which would allow for new appropriations of water which would have been considered appropriated under the *Stacy Dam* decision. Clearly, BRA and the TCEQ staff have performed new studies which they believed showed that BRA could be authorized a permanent water right to use additional water from Lake Proctor with a later priority date. Therefore, CCG and Ware maintain that the new water available for appropriation should be considered for applicants in the order given, not under some other scheme or interpretation which serves the interests of BRA, but ignores the primary reason for the doctrine of prior appropriation: The

investment of appropriators in the scarce water resources, by building facilities and putting water to beneficial use under Commission issued water rights, should be protected in the order of the appropriation. One might easily go to the Constitution of the United States and the Fifth and Fourteenth Amendments thereto, but this Constitutional issue is specified in Chapter 11 of the Texas Water Code, which codifies the doctrine of prior appropriation.

In this contested case, five family farmers, including CCG and Ware, took an active role in the proceedings to protect their continued right to use water in the Brazos River Basin, which heretofore had been limited to terms of years. Not every family farmer in the Brazos River Basin will be affected by the Commission's decision in this case, because most were not participants in this hearing. They received notice, but provided no evidence or legal briefing. So, the ALJs' dismissive take on "term permit holders" regarding water availability, as opposed to a thoughtful consideration of the legal rights of these water rights holders specifically, seems to be an overly generalized approach designed to avoid addressing a simple truth included in the term permits ***at issue in this case,*** which amount to some 2,400 acre-feet of water per annum, a statistically insignificant amount according to the evidence of record and based on the water determined by the Executive Director using the WAM to be available for BRA's use at any point in the Brazos River Basin, including Lake Proctor. CCG and Ware's water rights did not promise them any amount of water in perpetuity, so there is no question that if it continued that no water was available for the indefinite future, they would never be entitled to permanent water rights. But, where, as here, the Texas Commission on Environmental Quality promised them that their water rights would be considered for renewal, based on the water available at that time, ***and subject to their individual earlier priority dates***, it simply defies reason and common sense to suggest that other, later applicants could be entitled to permanent water rights, while the CCG and Ware water rights "have no bearing on this proceeding." CCG and Ware maintain that this approach is patently inconsistent with the analysis which the ALJs provided later in the PFD regarding water availability and consideration of return flows.

VI. THE ALJS' CONCLUSION THAT CCG DOES NOT HAVE AN EXISTING RIGHT TO RETURN FLOWS IS NOT THE RELEVANT CONCLUSION. (P. 39)

CCG would not argue that its individual members have an existing right to return flows. They view available unappropriated return flows as a suitable alternative source of water that supports their requests for perpetual, or at least long term water rights under TWC, § 11.046. To the extent that the ALJs conclude that return flows are a available for appropriation to third parties, CCG members assert their claim to some of them, based on their earlier (than BRA) priority dates.

VII. THE ALJS' OBSERVATION THAT THE CCG PARTIES FILED THEIR APPLICATIONS *AFTER* BRA'S 2004 APPLICATION IS IRRELEVANT AND INCONSISTENT WITH THEIR OWN LEGAL ANALYSIS IN THE PFD. (P. 40)

First, it is not clear why the ALJs make this observation, since they supposedly conclude that the CCG applications are irrelevant. However, if the CCG applications are to be considered, then the individual priority dates for each CCG member's application—all earlier than BRA's incomplete 2004 application--should be considered. (Also, please refer to the discussion in section V of this pleading.)

VIII. THE ALJS ARE WRONG WHEN THEY ASSERT THAT THE CCG CONTENTION THAT "PUBLIC INTEREST AND WELFARE" INCLUDES WATER FOR FAMILY FARMING IS INCORRECT AND THAT SUCH A POLICY CONSIDERATION SHOULD NOT BE "INJECTED" INTO THE MERITS OF THIS APPLICATION. (P. 109)

Policy matters are appropriate subject matter for contested case hearings. In this case, the policy question of the public welfare is required to be considered under TWC, §11.134(b). Of course, for an agency's determinations to have general applicability to all persons subject to the agency's regulation they should be the subject of formal rulemaking proceedings. This does not mean, however, that the agency should not advance its policy mandates via consistent individual decision making in contested cases. [*Eckert v. Geeslin*, 03-04-00785-CV(Tex.

App.—Austin, 5-14-2009)] Moreover, the sheer breadth of BRA's application in the Brazos River Basin makes its decision in this case have implications for future water uses in the Basin which are ***general*** in nature. Therefore, if the issue is whether the agency will appropriate *all* remaining water in the Brazos River Basin to one water utility, in *one* contested case, the resolution of the issue should include the answer to the question: What will become of Brazos River Basin family farmers who will no longer have right to appropriate State water based on the granting of the BRA Application?

At the same time, the ALJs' reluctance to properly consider the impact of their decision on the family farming Protestants in this case stands in stark contrast to their willingness to take on the ED's policy approach to return flows, unappropriated water and water availability. Clearly, the ALJs felt that the decisions to be made in this case needed to address *some* policy questions not clearly addressed by rule or statute.

In accordance with the general exceptions discussed above, CCG and Ware except to the specific points of the ALJ's set out below:

PFD, p. 106. The ALJs disagreed that public interest and welfare should be "centered on family farmers and their need for water to maintain their farms."

CCG and Ware did not contend that the disposition of this case should hinge solely or even be centered on the need for water for family farms. CCG and Ware simply asserted that water for continued use for family farming is both essential to the Texas economy, and is in accordance with the legal requirement "first in time, first in right." Accordingly, CCG and Ware believe that the ALJs were both legally and logically inconsistent when they agreed on PFD, p. 108 that the public welfare includes several concerns, including "agricultural use of water," but then concluded that agricultural issues should not be a part of their consideration of the public interest.

PFD, p. 109. ALJs conclude, conversely, that public welfare does not include any consideration of the impact of the BRA Application on family farming "beyond the merits of BRA's application."

See the discussion immediately above concerning the consideration of water for agricultural use. This finding or conclusion by the ALJs is therefore confusing and inconsistent.

PFD, p. 112. There is virtually no contrary evidence offered by the other parties to refute BRA's evidence showing that there is a need for additional water supplies in the Brazos River Basin.

But, this is not the test of beneficial use a specific applicant must meet. The test is what ***BRA*** will do to put the water to beneficial use. And, in accordance with the ALJs' findings and conclusions regarding the incompleteness of BRA's Application, the obvious answer to the question as to BRA's proposed appropriation in accordance with the record in this case is: *We have not been told, and therefore we do not know.* Under the doctrine of prior appropriation, it is a given that water is a scarce resource: meaning that demand always exceeds available supply. If the question were only whether there was a demand for additional water, then the question of whether an applicant proposed to put the water to beneficial use would be entirely meaningless. The ALJs are not empowered to render meaningless the legal requirements of the statute. The question here, which remains unanswered, is *how* BRA proposes to put the water to beneficial use? What commitments has BRA made to provide water to which persons, at which locations, and in which amounts? Until those specific questions are answered, the issue of beneficial use cannot be determined.

PFD, p. 115. BRA has offered undisputed, persuasive evidence that its application is in the public interest and not detrimental to it because the Proposed Permit is the least expensive and most readily available new source of water to meet demands in the Brazos River Basin with the least environmental impact.

Because there is no transcript cite to this sweeping declaration, it is impossible to evaluate the basis of this statement, particularly the question of least environmental impact. CCG and Ware are not aware of any evidence of record which would or even could establish the truth of this statement. This conclusion rests on an application that the ALJs found to be *incomplete*; incapable of determining the impact on water rights holders and the environment; and lacking sufficient proof about the amount of available unappropriated water.

IX. PROTESTANTS CCG AND WARE CONTEND THAT A PARTIAL GRANT OF WATER IS NOT A LEGALLY SUPPORTABLE OPTION FOR THE COMMISSION. (VARIOUS PAGES)

Throughout the PFD, the ALJs offer the agency the options of denial of the application; abatement of the appropriation pending the development of a WMP; or a partial grant of the application, ***to wit*** authorization to use water at BRA's four theoretical diversion points. Protestants respectfully contend that the partial grant alternative is not legally supportable. If BRA fails in its burdens of proof to satisfy the required elements of Texas Water Code, §11.134 for ***any*** grant of a water right, it is illogical to conclude that BRA is entitled to a partial grant of *any* water. For example, the ALJs conclude that BRA failed to have a complete application under 30 Tex. Admin. Code, §295.6 because:

(a) The application did not include a rate of diversion (p. 19);
(b) The applicant's two step process for addressing §11.134 requirements is not authorized by Texas' current water rights permitting system (p. 24; and
(c) It did not supply specific "real" diversion points as required by 30 TAC § 295.7 (p. 28)

The inescapable conclusion is that BRA's ***entire application*** should be denied because it is not complete. BRA's application does not suddenly become complete for a portion of the water it seeks to appropriate. Moreover, it is clear that any applicant other than BRA has had its application denied (without a hearing) or returned if the application is incomplete. BRA simply went to hearing on an

incomplete application and failed to satisfy the required proof reserved for a hearing on a *complete* application. It is not entitled to an abatement and remand. Moreover, according to BRA's witnesses, BRA's WMP is months or *years* away from being *filed* with the agency. It is unconscionable to abate this expensive hearing for that long because of *BRA's* choices.

The ALJs appropriately found that BRA's two step, bifurcated extra-statutory proposal would result in an impermissible non-final order if approved by the Commission. Therefore, it is not clear how any ***portion*** of the application would be final. After all, BRA has not proposed a partial WMP for a portion of its proposed appropriation. Its diversion points are hypothetical, its water availability amounts overstated, and even the ED does not know how ***any part*** of what BRA proposes will ***actually*** affect existing water rights holders. There is no legal basis for a partial grant.

There ***is*** danger, however, to existing water rights holders in a partial grant. BRA's two-step scheme was always meant to be an application for a partial grant – it sought ***all*** of the unappropriated water in the Basin in one application and hearing; and then it proposed to justify and explain the granted water right in *another* application and hearing. This process is unfair and unlawful, as the ALJs concluded. It would only be slightly less unfair but no less unlawful if BRA received a portion of what it sought. BRA never sought to use its hypothetical diversion points for any other purpose than to secure a huge water right. In the proposed, future WMP, BRA intended to propose the real diversion point(s) with the right to appropriate the water in hand, already. Giving BRA a partial grant of water would allow it to do the same as what it originally intended to do with simply less of the water in the Brazos River Basin. Equity and law does not favor such a result, nor can such a result be reconciled with the ALJs' analysis expressed throughout their Proposal for Decision.

X. SUMMARY AND CONCLUSIONS

CCG and Ware respectfully request the ALJs grant these exceptions and recommend appropriate changes to the Proposal for Decision to be incorporated into a Final Order denying the BRA Application for the reasons stated herein in addition to the reasons set forth in their Proposal for Decision, issued November 7, 2011.

Respectfully submitted,

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Exhibits:

Closing Arguments of CCG; and
Replies to Closing Arguments of CCG and Ware

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 7th day of November, 2011.

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EXHIBIT A

CLOSING ARGUMENT AND INITIAL POST HEARING BRIEF OF PROTESTANTS COMANCHE COUNTY GROWERS

SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR

CONCERNING THE	§	BEFORE THE STATE OFFICE
	§	
APPLICATION BY THE	§	
	§	OF
BRAZOS RIVER AUTHORITY	§	
	§	ADMINISTRATIVE HEARINGS
FOR	§	
	§	
WATER USE PERMIT NO. 5851	§	

CLOSING ARGUMENT AND INITIAL POST HEARING BRIEF OF PROTESTANTS COMANCHE COUNTY GROWERS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES,

COMES NOW, Texas family farmers and ranchers George Bingham, Frazier Clark by next friend Dusty Jones, and William D. "Dwayne" and Mary L. Carroll by next friend Neil Carroll, collectively referred to as the Comanche County Growers (referred to herein as "Protestants" or "CCG"), protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality ("TCEQ") and the State Office of Administrative Hearings ("SOAH") regarding the Application for Water Rights Permit No. 5851 by the Brazos River Authority (hereafter "BRA" or "The Authority") and respectfully file the following Closing Argument and Initial Post Hearing Brief. To that end, Protestants would respectfully state the following:

I. INTRODUCTION

The parties in this contested case hearing have all agreed that the consideration by the Commission is governed by the TEXAS WATER CODE, specifically Chapter 11, and especially TEXAS WATER CODE, Section 11.134, which states the only conditions under which the Commission may grant a water rights application. The terms and conditions of Chapter 11 and Section 11.134 are not advisory, are independent of the agreements among Applicant and TCEQ staff, and are part of the seamless web of water rights administration legally entrusted by the Texas Legislature to the Commission for the good of all citizens.

In this case, BRA has put up an application which defies consideration under Chapter 11 by the TCEQ staff, protesting parties, and other government entities. Moreover, under oath, BRA official refuse to disclose the details of the water being sought, the locations of diversion and use of the water being sought, and the specific amounts of water which BRA authorizes for specific uses. Even more importantly, BRA refuses to disclose enough particulars about the application to enable the hearing participants and the Honorable Administrative Law Judges to ascertain the impact of the BRA application on existing water rights and vested riparian rights as required by the TEXAS WATER CODE. Instead, Applicant and the Executive Director have suggested a two-step process of contested case adjudication. In one step, BRA will presumably be granted the water it requests in its application materials. In the next contested case hearing, BRA will consider the rights and impacts of other parties and develop a Water Management Plan to protect the public interests in its use of the water it has been granted in the first contested case hearing which the parties have exhausted substantial resources in thus far.

II. TEXAS WATER CODE AND TCEQ RULES AND REQUIREMENTS APPLY TO BRA'S WATER RIGHTS APPLICATIONS AND AMENDMENTS

In this case, the Applicant, the Executive Director, and witnesses for the Texas Parks and Wildlife Department appear to share the conviction that if a proposal is submitted by an "applicant," and the applicant and TCEQ staff can collaborate to draft a permit to address the matters included in the applicant's proposal, then the requirements of TEXAS WATER CODE, Chapter 11 are met. This approach denies the existence of the specific legal requirements of Chapter 11. Although all the parties and the Honorable Administrative Law Judges are aware of the TEXAS WATER CODE requirements as jurisdictional restrictions under TEX. WATER CODE, §11.134, the protesting parties statements showing the inadequacies of the *application* were ignored during the hearing without comment from the Honorable Judges. At the same time, BRA did not even state that its water rights application was complete or met the first requirement of TEX. WATER CODE, §11.134:

(b) The commission shall grant the application only if:

(1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee; . . .

(TEX. WATER CODE, §11.134)

The theoretical and mathematical construct proposed by BRA in its "application" never met the requirements of TEX. WATER CODE, Chapter 11.

Specifically, BRA's application for Systems Operation Permit No. 5851 does not meet the statutory requirements as follows:

1. In the TCEQ form: Application for Permit to Appropriate Public Water, every question is left blank except: 1. The name ("Brazos River Authority") and address of the applicant (without including any name of responsible person or customer identification number); 3.A. States that "Appropriated water will be used as follows: ("SEE ATTACHED SUPPLEMENTAL INFORMATION"); 4.C. A water conservation plan is said to be attached; 4.D. Interbasin transfer is not requested. ("SEE ATTACHED SUPPLEMENTAL INFORMATION"); 4.E. Is this project located within 200 river miles of the coast? The answer is completely unclear, but appears to be _X_ No; 7. Provide information describing how this application addresses a water supply need in a manner consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement. ("SEE ATTACHED SUPPLEMENTAL INFORMATION")

2. The application was signed and notarized on June 14, 2004 by Phil Ford, General Manager/CEO

Supplemental information provided by BRA with the application included:

I. An introduction touting BRA's authority and responsibilities for four reservoirs that it owns and operates for water supply: Possum Kingdom Lake; Lake Granbury; Lake Limestone and Lake Alan Henry; along with contracts with U. S. Army Corps of Engineers (hereafter "USACE"), for storage space in nine multipurpose Federal Reservoirs: Lake Whitney, Lake Waco (now transferred to the City of Waco), Lake Belton, Lake Proctor, Lake Somerville, Lake Stillhouse Hollow, Lake Granger, Lake Georgetown, and Lake Aquilla. BRA mentions that it holds the water right permit for the yet to be constructed Allens Creek Reservoir, along with the Texas Water Development Board, and the City of Houston. Neither the Texas Water Development Board nor the City of Houston was party to this case.

II. Section II.A. was a recitation of BRA's water rights by Certificate of Adjudication Number and name, adding a mention of Certificate of Adjudication No. 5166, referred to as an "Excess Flows Permit." Section II.B. referenced BRA's System Operation Order dated July 23, 1964, amended in 1977 to add Lakes Limestone and Aquilla, again in 1983 to add lake Whitney, and finally to include Possum Kingdom Lake. Section II.C. defined the "Authority's System" as specified water rights mentioned above, the Authority's enabling legislation, the System Operation Order, as amended, as well as unspecified "groundwater, reservoirs, pipelines and other infrastructure owned or operated now or in the future by the Authority."

Most important was Section III. of the BRA application which included a "Summary of Application." Specifically, BRA seeks "a new appropriation of state water for multiple uses, including domestic, municipal, agricultural, mining and other beneficial uses on a firm or interruptible basis in the Brazos River Basin and interbasin transfer authorization pursuant to TEXAS WATER CODE §11.085(v)(3) & (4). Nowhere does BRA's application specify the amount of water to be used for the purposes requested. In fact, BRA and the Executive Director both ignore Commission rules:

RULE §295.5 Amount and Purpose of Diversion and Use

> The total amount of water to be used shall be stated in definite terms, i.e., a definite number of acre-feet annually or, in the case of a seasonal, emergency, or temporary water right application, over the period for which application is made. The purpose or purposes of each use shall be stated in definite terms. If the water is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use water for multiple purposes, the application shall expressly state an annual amount of water to be used for the multiple purposes as well as for each purpose of use. If the amount to be consumptively used is less than the amount to be diverted, both the amount to be diverted and the amount to be consumptively used shall be specified. [Emphasis supplied.]

More importantly, TEXAS WATER CODE, §11.124 states:

> (a) An application to appropriate unappropriated state water [such as this application by BRA] must:
>
> * * * * *
>
> (4) state the nature and purposes of the proposed use or uses and the amount of water to be used for each purpose;
>
> (5) state the location and describe the proposed facilities;
>
> (6) state the time within which the proposed construction is to begin;
>
> (7) state the time required for the application of water to the proposed use or uses: . . .
>
> (TEXAS WATER CODE, §11.124)

BRA's application provided none of that information and yet all the parties except the Executive Director and the Honorable Administrative Law Judges are just supposed to review the various versions of the Draft Permit for Water Use No. 5851 and act as if the Draft Permit No. 5851 itself rather than the application must satisfy the requirements of TEXAS WATER CODE, Chapter 11.

Thankfully, for all the protesting parties whose time has been taken up with consideration of this collaboration between BRA and the Executive Director, the law is clear on what is required not only of the application itself but for the grant of the application. TEXAS WATER CODE, Section 11.134 not only states that the application itself must comply with Chapter 11 of the TEXAS WATER CODE, but it

makes no mention of the possibility of waiver of any of the legal requirements set forth in that section, regardless of the will of the Executive Director or other elected or appointed officials, such as those associated with the Texas Parks and Wildlife Department. In this case, BRA simply elected not to comply with the requirements of Chapter 11, so as to avoid the scrutiny of an application which requests virtually all unappropriated water in the Brazos River Basin without any information about the time, place or manner of water service by "the Authority."

From the outset, the Honorable Administrative Law Judges, should note to the Commissioners that the Application for Permit No. 5851 by BRA does not comply with the TEXAS WATER CODE and the TCEQ rules implementing Chapter 11, found at 30 Tex. Admin. Code, Chapters 295 and 297, so that the very first qualification for granting a water right is not met. In this case of an application so extensive and so devastating to many members of the public with an interest now and in the future regarding Texas water rights, the Judges cannot overlook compliance with the law, which is easily understandable by all, and ignored by the Applicant by choice.

III. IMPORTANCE OF FAMILY FARMING IN TEXAS

Family farming and ranching in Texas has a long and storied history which is not deserving of the treatment it has received so far in this SOAH contested case hearing. To the contrary, in the priority of water uses, agricultural use is among the most significant, as stated in the Texas Water Code:

> Sec. 11.024. APPROPRIATION: PREFERENCES. In order to conserve and properly utilize state water, the public welfare requires not only recognition of beneficial uses but also a constructive public policy regarding the preferences between these uses, and it is therefore declared to be the public policy of this state that in appropriating state water preference shall be given to the following uses in the order named:
>
> (1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals, it being the public policy of the state and for the benefit of the greatest number of people that in the appropriation of water as herein defined, the appropriation of water for

domestic and municipal uses shall be and remain superior to the rights of the state to appropriate the same for all other purposes;

(2) agricultural uses and industrial uses, which means processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric;

(3) mining and recovery of minerals;

(4) hydroelectric power;

(5) navigation;

(6) recreation and pleasure; and

(7) other beneficial uses.

(Emphasis supplied.)
(Texas Water Code, §11.024)

By law of the Texas Legislature, then, family farming interests exceed those of the municipal and industrial interests favored by BRA and the Executive Director with timely application consideration, orderly permit issuance and perpetual water rights. Considering that the CCG farmers and ranchers are far earlier appropriators, the only basis for the policy of TCEQ cannot be law, but some other criteria which takes water granted to the earlier appropriators and provides it under unlawful policy to later applicants.

An interesting aspect of the contested case hearing on this application was the lack of interest in the impact on family farming in Texas. Nothing can really explain the Applicant's failure to concede the loss of term permits associated with family farming under the BRA application request for 150,538 acre-feet per annum firm water in the Upper Sub-basin, for 144,306 acre-feet per annum firm water in the Central Sub-basin, and for 421,449 acre-feet per annum firm water in the Lower Sub-basin. The legal theory discarding the "first in time, first in right" legal precept of 11.024 seemed best enunciated by staff attorney Robin Smith, who, when questioned by the Administrative Law Judges during the May 3, 2011 prehearing conference regarding striking the testimony regarding water use of the Comanche County Growers stated: "Oh, we can't do that anymore (recognize the priority of term permits), because it is now all based on water rights modeling

under Senate Bill 1." According to the Executive Director, then, the priority dates of the Comanche County Growers have become meaningless in their context as term permits, but there is water available for permanent water rights for new applicants with later priority dates such as BRA.

It is extremely important to consider the impact of granting the BRA application for Permit No. 5851 on term permits. Term permit holders were told that there was insufficient water available for appropriation at the time their applications were under consideration by TCEQ staff, but that their applications would be considered upon filing a renewal application before the expiration of the term of years. Each of the Comanche County Growers has a pending application for a renewal of their water rights permit, and each sought to have their application considered in the contested case hearing on the BRA application. The Administrative Law Judges refused, and, in the absence of an adverse ruling in this case, the District Court Judge Lora Livingston refused to stay the proceedings to allow the Comanche County Growers' applications to be directly referred to SOAH. But, while TCEQ staff claim not to have decided on the recommendations for the small farming applications of the Comanche County Growers, who have complied with the TEXAS WATER CODE requirements, their applications hang in the limbo of the Executive Director's continual and unlimited review. Most importantly, Kathy Alexander, hydrologist for the Executive Director, stated the truth of the matter regarding these applications by Texas family farmers and ranchers included in the cross examination of Ms. Alexander by Ms. Webb:

> Q. And that's really my point. In terms of seniority and water rights, usually that is based on priority date, is it not?
>
> A. Yes.
>
> Q. But you are distinguishing the senior water rights that you're talking about to be limited to perpetual water rights. Correct?
>
> A. Yes.
>
> Q. Okay. On Page 9 of your testimony at Line 1, you have the comment, "This water is only available through BRA's system operation of its reservoirs."

A. Yes.

Q. And in that comment, you don't mean to suggest, do you, that persons who are riparian to a stream that flows with return flows, are not physically capable of diverting those flows for their use?

A. If they had a permit, they could.

(Tr. Alexander 2151:1 – 2153:25)

But this statement is disingenuous and at odds with Ms. Alexander's later testimony for two reasons. First, the statement is simply not true. On Page 29, of her pre-filed testimony, Ms. Alexander states:

"The same water availability model is used to evaluate all applications."

(See Exhibit ED-KA 1, p. 29, Lines 7 and 8)

But later, when asked whether the issue of water availability for the Comanche County Growers is an issue in this case, Ms. Alexander inexplicably replies as follows:

Q. Is the issue of water availability for these term permits relevant to this application?

A. No.

Q. Why not?

A. Term permits are issued to allow a permittee to use water that has been appropriated to another user but is not currently being used. Any term permit is subordinate to senior appropriative rights. This means that a term permit cannot divert water that a permanent water right needs, regardless of their respective priority dates. Term permits are not included in the full authorization WAM that was used to process BRA's application. This is so that they cannot affect permanent water rights. The ED uses a WAM version, known as the Current Conditions WAM or Run 8, to process term applications. The Current Conditions WAM includes current water use and reservoir storage and discharged return

> flows; to the extent those return flows are not committed to other users, to evaluate applications for term permits. New term permits are input into the Current Conditions WAM at their administratively complete date to determine whether appropriated but unused water is still available to satisfy those permits. Because term permits are processed in the Current Conditions WAM and because their use cannot impact a permanent water right, such as that requested by BRA, they are not relevant to the evaluation of the BRA application.
>
> (See Exhibit ED-KA 1, p. 29; 30 lIns. 15-24; 1-12)

Ms. Alexander's analysis ignores the TEXAS WATER CODE, specifically the "As between appropriators, the first in time, is the first in right" principle of the prior appropriation doctrine still included in TEX. WATER CODE, §11.027. According to Ms. Alexander, the principles of Texas water law are strictly reserved for a class of water rights permit holders she refers to as "perpetual water rights holders." Other water rights holders, such as those earlier applicants who were told by the Commission that only term water rights were available, are out of luck because the Commission gave them a water right with a priority date whose recognition is now deemed optional by TCEQ staff.

There was quite a bit of testimony about the consideration of term permits in the water quality modeling efforts of the TCEQ, and much of it reminds one of middle school civics discussions. What if a majority of water rights holders got together and decided that term permit holders were not entitled to the priority given them by law and by Commission order and that, instead, that water could be taken away and given to new applicants, such as BRA. The civics answer is that the law is the law until it is changed and that requirements of Chapter 11 are as stated until the Texas Legislature determines that priority dates of term permits are meaningless as TCEQ and BRA so desire. The high powered engineers for other applicants, none of whom represented family farmers and ranchers, stated the legally contrary position over and over, and faulted CCG's expert Joe Trungale for even considering the existence of CCG existing water rights in his water availability analysis prepared for this case. All the other participating party's engineers stated that earlier priority term permits were not to be considered under TCEQ water availability and modeling rules.

However, David Douglas Dunn of HDR Engineering, Inc., a recognized expert on water availability modeling stated the correct legal position and noted the issue as follows:

> Q Okay. So does that also mean that the water associated with that use [agricultural use by the Comanche County Growers] is not included in the model?
>
> A Correct.
>
> Q And by that I mean -- I mean that those flows, that water that Mr. Bingham was using for agricultural purposes under that permit, for example, that is shown -- that becomes shown as unappropriated water?
>
> A If that -- if that water right was not commented out, it would have an appropriation consistent with its priority date, type of use, annual authorized amount. The fact that it is commented out means that water is appropriated in the model by other water rights.
>
> Q Okay. So appropriate -- appropriated in the model by other water rights. Which other water rights?
>
> A By "which other water rights," you would have to look at the priority date, and you would have to look at how the other water rights around it operate. It's really impossible to tell which other water rights. It would be water rights senior to it, and potentially, if there was water available after water rights senior to it have made their streamflow depletions in the model, then water rights junior to this also. It's as if that water right [of the Comanche County Growers Agricultural users] doesn't exist.
>
> (Explanatory parenthetical expressions added and bold emphasis supplied.)
> (Tr. Dunn 1457:2 – 25)

Therefore, regardless of the priority dates given by law, TCEQ, along with BRA and the modelers who directed and updated the Brazos River Basin Water Availability Model, the water rights of the Comanche County Growers were simply "commented out" according to Mr. Dunn and never considered as existing water rights worthy of any consideration, let alone their senior priority given by Commission Order.

In this case, where the Honorable Administrative Law Judges refused consideration of the pending applications for renewals of the existing CCG water rights, there was significant testimony of TCEQ approvals of applications with later priority dates under certain deals and written agreements between BRA, the TCEQ Executive Director and Commission, and the applicants. Some of these permits have been issued by agreement and by the Commission, some are still pending review by the Executive Director, and the status of others is unknown. What is known is that BRA is no longer protesting these applications. Specifically, BRA agreed to withdraw its protest for the applications shown on the following chart, (*See*, Exhibit CCG-4), none of which involve family farming and ranching:

Date	Agreement
12.21.2010	Gulf Coast Water Authority's Notice of Conditional Withdrawal & Settlement Agreement
09.20.2010	City of Round Rock's Notice of Conditional Withdrawal of Its Protest & Settlement Agreement 9
09.17.2010	Texas Westmoreland Coal Company Settlement Agreement
01.04.2010	City of College Station Settlement Agreement
12.02.2009	City of Bryan Settlement Agreement
05.14.2009	City of Lubbock Settlement Agreement
04.17.2009	Walnut Creek Mining Company Settlement Agreement
04.08.2009	Texas Municipal Power Agency Settlement Agreement
03.31.2008	Luminant Settlement Agreement
09.20.2007	Fort Bend Municipal Water District No. 106 Interlocal Agreement
07.05.2007	Palo Pinto Municipal Water District No.1 and the City of Mineral Wells Interlocal Agreement
08.31.2007	Palo Pinto Municipal Water District No.1 Water Contract
08.31.2007	Palo Pinto Municipal Water District No.1 Withdrawal of the

District's Protest

02.12.2007 Pecan Grove Municipal Water District Interlocal Agreement

06.27.2005 City of Sugarland Interlocal Agreement

02.22.2007 Agreement with the City of Abilene Regarding Reuse

02.22.2007 City of Abilene and West Central Texas Municipal Water District Subordination Agreement

02.22.2007 City of Abilene and West Central Texas Municipal Water District Water Supply Agreement

02.22.2007 City of Abilene and West Central Texas Municipal Water District Payment Agreement

03.10.2005 City of Abilene and West Central Texas Municipal Water District Interlocal Agreement

02.28.2005 City of Waco Memorandum of Understanding

11.02.2004 City of Cleburne Letter of Agreement
+ Exhibits FBR 7a, 7b, and 7c re: Settlement Agreements with Fort Bend LID 11, Fort Bend LID 15, and City of Round Rock

Additionally, the TCEQ staff has apparently applied a different water availability analysis for these applicants, because while some are based on groundwater, some are based on surface water availability which the TCEQ staff insists does not exist for any other than BRA and its agreed upon recipients. Under current TCEQ policy, the water appropriation preferences are simply non-existent and subject to complete disregard.

According to TEX. WATER CODE, §11.141, "DATE OF PRIORITY," When the commission issues a permit, the priority of the appropriation of water and the claimant's right to use the water date from the date of filing of the application. So, while BRA simply has a pending application for virtually all the remaining water in the Brazos River Basin, *it has no priority date*, unlike the Comanche County Growers who do have priority dates for their permits which are clearly senior to BRA's. So, by legal and practical policy, without any Commission rule or Texas Legislative authorization, the Executive Director has conspired with the applicant,

BRA, to develop a means to disregard the priority dates which were given by the Commission to the family farmers and ranchers known as the Comanche County Growers on a term basis, and to take that previously unappropriated water (often in the form of return flows discharged by growing cities and abandoned in the watercourse to again become State water subject to appropriation in accordance with TEX. WATER CODE, §11.046(c)) and provide it on a perpetual basis to BRA. Few government actions seem as unfair and unreasonable and subject to challenge as this undeveloped policy of the TCEQ staff. More importantly, under the pretense of "continued review," the Executive Director's staff is holding back the applications of the Comanche County Growers until the completion of this BRA application, at which time it hopes to be able to tell the farmers that all the available state water has been appropriated.

IV. BRA'S "TWO STEP" PROCESS IS NOT LEGALLY SUPPORTABLE

Generally, the two step process sought by BRA in this case over the objection of the parties raises the question of whether an order approving BRA's application is final and appealable under the extant case law, in consideration of the unambiguous terms and conditions of the TEXAS WATER CODE. BRA seeks the issuance of a permit based on theoretical diversion points, to be followed (perhaps) by an extensive Water Management Plan to be litigated in a subsequent case where details such as specific diversion points are revealed and the actual impact of the permit can be assessed. This two-step process unlawfully separates the issues that the TCEQ is obligated to resolve in *this* hearing and leaves a gaping condition subsequent for the Agency to resolve if it purports to issue the water rights permit. Protestants have argued against the wisdom of such a procedure in this case because of the substantive adverse impact of the water right BRA seeks. However, there is a serious question whether an order that approves BRA's request actually constitutes a definitive order of the Agency; or actually fixes some legal relationship between BRA and other water rights holders and water permit applicants, such as CCG, after the administrative process in this case is completed. Protestants respectfully urge that the requested permit by BRA would not

constitute a final and appealable order, as a matter of law – under the TEXAS WATER CODE.

V. LEGAL REQUIREMENT THAT ADMINISTRATIVE ORDERS BE FINAL AND APPEALABLE

The law in Texas has evolved and been refined over the years, as to what constitutes a final and appealable order since the Texas Court of Appeals first decided the issue. In *Mahon v. Vandygriff*, 578 S.W.2d 144 (Tex. Civ. App. 3 Dist. 1979), the Third Court of Appeals considered, on a *plea to the jurisdiction* filed on behalf of the Savings and Loan Commissioner, the propriety of the Plaintiff Mahon to file a timely Motion for Rehearing to an order of the agency as required by the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. Art 6252-13a (Supp. 1978). The plaintiff had urged that he did file a timely motion to the agency's November 17, 1977 order. However, the Commissioner contended that the actual final order of the agency was issued on December 30, 1977, and that the plaintiff had not filed the motion for rehearing relative to that order. The Commissioner argued that the agency's November 17, 1977 order was not final because the agency's approval of a merger granted by that order "...was contingent upon favorable action by two federal agencies..." (*Vandygriff* at p. 147). Citing *City of Houston v. Turner*, 355 S.W.2d 263 (Tex. Civ. App. 1962, no writ); *Allen v. Crane*, 257 S.W.2d 357 (Tex. Civ. App. 1953, writ ref'd n.r.e.); *Payne v. Texas Water Quality Board*, 483 S.W.2d 63 (Tex. Civ. App. 1972, no writ); and *Moody v. Texas Water Commission*, 373 S.W.2d 793, 797 (Tex. Civ. App. 1963, writ ref'd n.r.e.), the court announced the following standard:

> "For an administrative order to be final there must be nothing left open for future disposition. If a right is made contingent upon the occurrence of some future event, the order is not final."
>
> (*Vandygriff*, at p. 147)

The court cited as a final order the agency's December 30, 1977 order that stated "...that all conditions of the merger approved by the Commissioner's November 17, 1977 order have now been met and (the Commissioner) further

declares that...(the associations) shall be and are reorganized and merged into final surviving association..." (*Supra*, at p. 147) The court concluded that the December 30, 1977 order was final because nothing was left open for disposition.

The *Vandygriff* reasoning was controlling law on the lack of finality of an administrative order until the Texas Supreme Court wrote on the issue in a case with similar facts. In *Texas-New Mexico Power Co. v. Texas Energy Consumers*, 806 S.W.2d 230 (Tex. 1991), the Texas-New Mexico Power Company ("TNP") sought approval from the Public Utility Commission of Texas ("PUC") for a certificate to construct a multi-unit power plant. The PUC approved TNP's application conditioned upon it seeking and obtaining permits from other agencies than the PUC. In this respect, TNP's situation was similar to the applicants in *Vandygriff*, who sought approval of a merger from the Commissioner of Savings and Loan, conditioned upon approval by *other*, Federal agencies. The appellee, Texas Industrial Energy Consumers ("TIEC"), successfully argued *Vandygriff* in the trial court and Court of Appeals, which found that the PUC's permit was not final and appealable because it included an obvious condition subsequent. This time, however, the reasoning in *Vandygriff* was rejected by the Texas Supreme Court:

> "The underlying rationale that 'an administrative order is not final if rights conferred therein are made contingent upon occurrence of some future event' is overbroad. Id. [fn3]"
>
> (*Supra*, at p. 231)

In footnote 3, the Supreme Court specifically *disapproved* the overbroad nature of the following holding of *Mahon v. Vandygriff*: "If a right is made contingent upon the occurrence of some future event, the order is not final." (*Vandygriff*, at p. 147).

The Supreme Court found the potential for litigants like TNP to be caught in a potential "Catch-22" to be particularly distasteful.

> "Prior to receiving this approval [from the PUC], TNP must acquire all the necessary permits from *various governmental agencies*. These entities, however, cannot statutorily issue all permits until construction [of TNP's power plant] has

> begun or is completed..., shuffling citizens in such an endless, inefficient circle *from one agency to the next* in search of permits, licenses, and stamps of approval that cannot be issued until some other office acts represents government at its worst."
>
> (Emphasis supplied.)
> (*Supra*, at p. 232)

In place of the "overbroad" approach of *Vandygriff*, the Supreme Court proposed a more "pragmatic and flexible" approach to evaluate the finality of an agency's order. The Court stated:

> "Although there is no single rule dispositive of all questions of finality, courts should consider the *statutory* and constitutional context in which the agency operates, and should treat as final a decision "Which is definitive, promulgated in a formal manner and with which the agency expects compliance ... Administrative orders are final and appealable if 'they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process'"
>
> (*Supra*, at p. 232)

The Texas Supreme Court's analysis can be summarized as a four prong approach:

1. A final agency order must be definitive.
2. A final agency order must be promulgated in a formal manner
3. A final agency order must be one which the agency issuing the order expects compliance.
4. A final agency order imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.

The Court's "four prong" approach to judging the finality of an administrative order is the law today. Each case that upholds the finality of an administrative order or rejects the finality of an order follows the *principles* announced by the Supreme Court in *Texas-New Mexico Power*. The Supreme Court was concerned that a simple administrative action, that might be an interlocutory ruling made during the administrative process, should not be

misconstrued as a final action of an agency. Therefore, the *formalities* of the agency have to be observed in the form of a formal hearing, party acknowledgement of the process, or a vote on the application in an open meeting. ***The formalities and definitive action of the agency in fixing the rights of parties was a key element of the Court definition of a "final order."***

As emphasized in the cited passages from *Texas-New Mexico Power*, the Court was particularly frustrated by the conflict of competing government agencies. The Court objected to the circumstance where the final order of one administrative entity could be deemed non-final simply because it acknowledged the subsequent requirements of *another* governmental entity. Therefore, final orders that conditioned application approval on the subsequent compliance with the requirements of another agency or entity did not affect the finality of an order.

However, the single most important standard acknowledged by the Court that defined whether an order was final was the agency's *enabling statutory authority itself*. An agency is, at all times, bound by the statutory structure imposed on it. This is what the Court referred to as "statutory and constitutional context (*Supra* at p. 232)." An administrative order may purport to be formal or definitive, but if it attempts to "rewrite" the statutory framework of its enabling authority, then it is an action that is suspect. After all, it is only logical that a "final order" of an agency that does not definitively answer *all* of the required elements of the enabling authority could not satisfy the fourth prong of the Court's analysis – "*fix* some legal relationship as a consummation of the administrative process."

The cases following *Texas-New Mexico Power* uniformly follow the Court's principles. *State v. PUC*, 840 S.W.2d 650, 654 (Tex. App. – Austin 1992) concerned facts distinguishable from those sought by BRA's application in this docket. The PUC had approved applicant Houston Lighting and Power's request for deferred-accounting treatment for a term of years which ended on November 23, 1989. Issuing *limited* approval, that is subject to future changed circumstances, did not render the order non-final, according to the court. It is the equivalent in this docket to BRA applying for and receiving a *term permit*. The term permits of CCG are also final.

In *Public Utility Council v. PUC*, 843 S.W. 2d 718 (Tex. App. – Austin 1992) the PUC exercised its statutory discretion of *severing* one element of a rate case, so called "prudence issues," from the rest of the rate case matters. There was no challenge by the parties of the *authority* of the PUC to do so. At p. 724 of its opinion, the court described, in detail, how the parties understood and agreed with the severance of the rate case issues during the *six months* of hearing. This is starkly different to the constant challenge by all Protestants in this case to the lawfulness of BRA's so-called "two-step" process in seeking its system permit. Under §155.419(a) of the rules of SOAH, BRA has an independent obligation to demonstrate the legality of its two-step water rights permit proposal, an obligation which it has not undertaken in this case.

Star Houston v. Tx. Dept. of Transportation, 957 S.W.2d 102, 106 (Tex. App. – Austin 1997) followed the holding in *Texas-New Mexico Power*, and the 3rd Court of Appeals simply held that the supposed "final order" of TxDOT was not final. The agency intended for the order to be interim and, in fact ordered the parties to mediation. Certainly, BRA is seeking no order that claims to be "interim" in *this* case.

Gene Hamon Ford v. McDavid Nissan, 997 S.W.2d 298, 309 (Tex. App. – Austin 1999) involved facts similar to *Texas-New Mexico Power* in that the order approving relocation of an automobile dealership was conditioned on the subsequent execution of a lease between the dealership and the manufacturer. The Motor Vehicle Board (which included Stephen P. Webb at the time) simply issued an order within the limits of its statutory authority, but acknowledged that a subsequent private contract was also required in order for the relocation of the car dealership to be finalized.

Texas-New Mexico Power was also cited in the unreported case of *Wawrykow v. Texas State Board of Examiners of Psychologists*, No. 03-03-00692-CV (Tex. App. – Austin 2005) even though the facts of that case are virtually irrelevant to this case. In that case, an unsuccessful litigant before SOAH challenged the breadth of the agency's final order. It was the applicant, not the

agency, who assumed that the agency had not ruled upon an issue in the case (attorney's fees and costs). The Court ruled that the order definitively decided all issues.

The decision in *Kinney County Groundwater Conservation District. v. Boulware*, 238 S.W. 3d 452 (Tex. App. [4th] 2007) involved an unrelated (to this case) section of the TEXAS WATER CODE, but demonstrates Protestant CCG's point about finality of orders as clearly as any other decision guided by *Texas-New Mexico Power*. The Kinney County Groundwater Conservation District issued a permit that was conditional because the *statute* required *expeditious* action on the application even though the District wanted to ensure the applicant installed waterwell flow meters, complied with rules, and paid all fees after it issued the permit. The 4th Court of Appeals noted the time pressure on the District thusly:

> "In reviewing the *statutory context* in which the instant orders were issued, we note the Water Code mandates prompt resolution of permit applicants filed with a ground water district. ("The district shall promptly consider and act on each administratively complete application for a permit or a permit amendment...") Adopting the District's suggestion that finality is achieved only upon the District's actual issuance of a permit would inject indefinite and unnecessary *delay* into a process that the legislature requires to proceed *expeditiously*. ..."
>
> (Emphasis supplied.)
> (*Kinney*, at p. 460)

In short, the directive of the *statute*, which is to expedite the issuance of the permit, controlled the action of the agency.

The court in *Anadarko E&P v. Railroad Commission of Texas*, 03-04-00027-CV (Tex. App. 1-7-2009) cited *Texas-New Mexico Power* in that unreported case, but the decision simply turned on the appellant's mistaken assumption that it was required to file a second Motion for Rehearing. Likewise, in *Austin v. TCEQ*, 303 S.W.3d 379 (Tex. App. [3rd] 2009) the 3rd Court of Appeals discussed *Texas-New Mexico Power* but simply concluded that the agency's denial of a Motion to Overturn the Commission's previous approval of a water pollution abatement plan

did not create a separate right of appeal. Using the fourth prong of *Texas-New Mexico Power* the court reasoned:

> "The Commission's denial of the motions to overturn does not establish any rights or obligations. ... The Commission's decision constitutes merely a refusal to overturn or otherwise *modify* the decision that *did* establish KBDJ's rights and obligations." (Emphasis is the Court's.)
>
> (*Austin v. TCEQ*, at p. 385)

Samaniego v. Keller, 319 S.W.3d 825, 830 (Tex App. [8th] 2010) is a recent decision that discusses finality of orders using the analysis of *Texas-New Mexico Power*, but adds little to the understanding of the Supreme Court's four prong analysis other than to confirm that a final order can be *oral*. Formality of orders that the Supreme Court required in *Texas-New Mexico Power* does not require final and appealable orders to be *written*.

Finally, and as a corollary to the decision in *Samaniego*; *Garrett Operators, Inc. v. Houston*, 01-09-00946-CV (Tex. App. Houston [1st] 5-12-2011) cites *Texas-New Mexico Power* as support for the holding that a written "Stop Work" order that followed a construction site meeting between a billboard company owner and a division manager of the Houston Sign Administration lacks sufficient formality and intent to fix a legal relationship between parties and be considered a final order.

VI. APPLICATION OF *TEXAS NEW MEXICO POWER* TO BRA'S "TWO STEP" PROPOSAL IN SOAH DOCKET NO. 582-10-4184; TCEQ DOCKET NO. 2005-1490-WR

The TCEQ's authority to consider and grant a water right in this case is limited to what is expressly authorized by Chapter 11 of the TEXAS WATER CODE. As with any other applicant for a water right, BRA is required to prove all required elements of Chapter 11 of the TEXAS WATER CODE and the TCEQ is required to consider BRA's application and its proof of all required elements of Chapter 11 in

the same manner as it would for any other applicant for a perpetual water right. The requirements of the Water Code do not discriminate between large applicants and small applicants; simple applications to divert small amounts of water at one diversion point and large complex system applications to divert at multiple diversion points; small farmers and large political subdivisions. Nowhere in the Water Code is there an express or implied provision that BRA or any other applicant can prove *some* of the elements of Chapter 11 in one contested case and then, if successful and *receives water right*, the *remaining* elements of Chapter 11 in another contested case.

Similarly, the TCEQ is not authorized to review the elements of Chapter 11 for large, complex system applications so that some portions of Chapter 11 are resolved in one case and the remaining elements of Chapter 11 are resolved in another case or cases. This legal authority is not conferred upon the TCEQ. Compare the enabling ratemaking authority for the PUC discussed in *Public Utility Council v. PUC*, (*Supra*) cited herein. The PUC exercised its statutory discretion to sever rate case issues between multiple hearings. If the TCEQ issues an order that resolves *some* but not all of the elements of Chapter 11 of the TEXAS WATER CODE, such an order would be, under the *Texas-New Mexico Power* analysis, incomplete, non-final, or simply *ultra vires* as an action in excess of the agency's statutory authority. *UIL v. Southwest Off. Assoc.*, 319 S.W.3d 952 (Tex. App. [3rd] 2010). Most importantly, unlike the PUC, the TCEQ is specifically limited in its ability to issue water rights *only* if all conditions of Chapter 11 are met.

A. TEXAS WATER CODE REQUIREMENTS FOR A WATER RIGHT

The TEXAS WATER CODE imposes specific requirements for an application to divert state water. The most often cited section that is applicable to BRA's application is Section 11.134, which states in pertinent part:

> "Sec. 11.134. ACTION ON APPLICATION. (a) After the hearing, the commission shall make a written decision granting or denying the application. The application may be grated or denied in whole or in part.
>
> (b) *The commission shall grant the application only if:*

(1) *the application conforms to the requirements prescribed by this chapter* and is accompanied by the prescribed fee;

(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 any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and

(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 the conditions warrant waiver of this requirement;

(Emphasis supplied)
(Tex. Water Code §11.134)

The application itself must contain specific information:

Sec. 11.124. APPLICATION FOR PERMIT. (a) An application to appropriate unappropriated state water must:

(1) be in writing and sworn to;

(2) contain the name and post-office address of the applicant;

(3) identify *the source of water supply*

(4) state the nature and purposes of the proposed use or uses and the amount of water to be used for each purpose;

(5) *state the location and describe the proposed facilities*;

(Emphasis supplied)
(Tex. Water Code §11.124)

Sec. 11.125. MAP OR PLAT. (a) The application must be accompanied by a map or plat drawn on tracing linen on a scale not less than one inch equals 2,000 feet.

(b) The map or plat must show substantially:

(1) the location and extent of the proposed facilities;

(2) the location of the headgate, intake, pumping plant, or *point of diversion by course and distance from permanent natural objects or landmarks;*

(Emphasis supplied)
(Tex. Water Code §11.125)

B. IMPACT OF BRA'S THEORETICAL DIVERSION POINTS AND SUBSEQUENT WATER MANAGEMENT PLAN

BRA's application contains no true diversion points as required by §§11.125, 11.124(3)(5), and 11.134(b)(2). The "theoretical" diversion points at the Gulf of Mexico, Richmond, Highbank and Glen Rose do not technically comply with the requirements of the TEXAS WATER CODE. BRA's primary witness on its modeling even acknowledged that "actual operation" would yield a different result from the theoretical diversion points (Tr. Gooche 264:7 – 265:2; 1403:12 – 1404:5). Mr. Gooche acknowledged that the diversion points will be in a water management plan developed years from now (Tr. Gooche 903:11 - 18). The lack of an identified diversion point or points adversely affects the ability to evaluate the impacts of the permit on the flow regime or on other water rights (Tr. Trungale 1216:2 – 1219:22).

The use of theoretical diversion points in BRA's application requires a theoretically perfect operation of BRA's system to produce yields anywhere close to what BRA requests. A respected expert (Dr. Robert Brandes) called BRA's yield prediction "absurd." Particularly at the Richmond theoretical diversion point, the projected yield via the dual simulation modeling that was used in the application, is unrealistic. (Tr. Dunn 1573:10 – 1575:17). Dr. Brandes testified further that in his experience he had never encountered an application where existing demands under upstream water rights were modeled with a diversion point at or near the mouth of the river. Typically (and logically), water demands are modeled at a point in the vicinity of the proposed diversion point (Tr. Brandes 1562:23 – 1563:23). Otherwise, as TCEQ witnesses testified with respect to CCG, there is no way to ascertain the availability of water at a requested diversion point. In order for the TCEQ to be able to assess the viability of BRA's proposal in any

"realistic" manner as to water availability, BRA's proposed water management plan should be assessed at the same time as its theoretical diversion point proposal is assessed (Tr. Wurbs 579:18 – 22). This is, of course, impossible because of BRA's two-step proposal. Therefore, on this point alone, an order that rests on evidence that is bifurcated between hearings over a period of *years* could not be realistically called "definitive" within the meaning of the TEXAS WATER CODE. Even Kathy Alexander should (reluctantly) agree with this analysis. When asked what amount of water BRA would be diverting from the Glen Rose theoretical diversion point, Ms. Alexander admitted that she, "realistically," has no idea how the water at Glen Rose would be used because the water management plan was not yet before the agency (Tr. Alexander 2129:1 – 24). She also admitted that if *different* diversion points are identified in the water management plan case years from now, that instream flows could be impacted *differently* than the Executive Director assumes they will be impacted in this application (Tr. Alexander 2130:11 – 2131:3).

This level of uncertainty begs the question how any order resulting from this docket *could be* considered "definitive" or one that "fixes a legal relationship" under the *Texas-New Mexico Power* analysis applied to the cited sections of the TEXAS WATER CODE. If the diversion points are not identified, then how has BRA complied with §§11.124(3)(5), 11.125(b)(2), and 11.134(b)(1)? If the Executive Director does not *really* know how the theoretical diversion points will line up with the *actual* diversion points that it *may* supply with its water management plan application three years from now, how does the Commission *really* know whether this system permit will actually impair existing water rights or restricted riparian rights [TWC §11.134(b)(3)(B)]; or is not, in its implementation, detrimental to the public welfare [TWC §11.134(b)(3)(C)]? Without diversion points, we do not even know *which* existing water rights holders will be affected more or less than what we know now – so *no* relationship, legal or otherwise, can be considered "fixed". The experts who testified in this hearing, and even the TCEQ *staff*, admit that BRA's proposal is rife with uncertainty, unrealistic theoretical assumptions, and flat out missing elements to its application. It is not clear how the proposal can be granted, lawfully, at all; much less as a final determination of anything other than to establish BRA as the perpetual owner of all present and future water rights in the

Brazos River Basin. *All* water rights applicants would accept the procedure that BRA proposes in this case: "Give us the water now and we will show you how we will use it later".

C. BRA'S ARGUMENT IN SUPPORT OF THE TWO-STEP PROCESS IS LEGALLY FLAWED

BRA has asserted and presumably will continue to argue that there is no way to practically appropriate the water requested in this system permit other than through a two-step process. BRA argues through counsel that a water management plan cannot be developed until there is an actual award of the water right. (Tr. Caroom 1179:14-1179:13) BRA testified that its process of selling water through long term contracts requires a permit hearing to support a single long term contract and upon execution of a contract, the possible placement of a diversion point. (Tr. Caroom 1179:14-1180:3; Brunett 1079:3-1081:8) In providing this argument and testimony BRA is obviously seeking to bring its two-step proposal within the need for the "flexibility" that the Texas Supreme Court discussed in *Texas-New Mexico Power*. The Court stated:

> "A more pragmatic and flexible approach must be employed to evaluate the finality of an agency's order. This requires recognition of the need both to *minimize disruption of the administrative process* and to afford regulated parties and consumers with an opportunity for timely judicial review of actions that affect them."
>
> (Emphasis supplied)
> (*Texas-New Mexico Power* at p. 232)

BRA will, no doubt, cite this passage of the *Texas-New Mexico Power* opinion to the Administrative Law Judges. This passage is often included in the opinions that follow *Texas-New Mexico Power*. However, the portion of the opinion cited in this brief, earlier is just as important, if not more so, than the Court's acknowledgement for the need for administrative pragmatism. An administrative agency cannot operate unfettered. It is limited by the *statutory*

context under which it regulates, which, in this case is specified in Tex. Water Code, §11.134, not the agreement or even convenience of the parties.

In *Texas-New Mexico Power* the Court discussed the insoluble Catch-22 "shuffle" of the applicant between competing agencies that does not exist in this case. Protestants are not trying to contend that the circumstances in *Texas-New Mexico Power* are the *only* facts requiring flexibility in an agency's issuance of a conditioned order. The case law discussed herein certainly shows otherwise. However, BRA has not shown that it cannot sell water and operate unless it is required to file permit applications with the TCEQ, constantly. It has operated for decades and executed 150 long-term contracts according to its senior employees (Tr. Brunett 1051:20-22) without securing 150 permits from the TCEQ. Moreover, nothing prevented BRA from presenting a more concrete application with firm diversion points that exist in reality, an accounting plan and a water management plan to demonstrate how it would use the water it requested. The application may have been more complex and the hearing longer, but the rights of existing water rights holders would have been more fairly adjudicated. Finally, the simple truth is that the TEXAS WATER CODE does not provide for a two-step process. Difficult or not, the law or the rules do not bend for BRA's system operations designs.

The implication that this BRA application for Permit No. 5851 does not represent a case of first impression is intellectually dishonest. The Executive Director's exhibits ED-A, ED-B, ED-D, ED-E, ED-F and ED-G have very limited relevance to the propriety of BRA's two-step proposal and even less materiality. The Executive Director's counsel acknowledged that all exhibits except ED-A were not even the product of contested cases (Tr. Smith 2228:3 - 15). The Irving permit (with which Protestants CCG's counsel are intimately familiar) was a contested case that was remanded by the Travis County District Court for settlement by parties (See, contra, Tr. Smith 2228: 10 - 12). The issue of the two-step process is being challenged in *this* case and judicial review of all aspects of the order that results from this hearing is virtually inevitable. In other words, whatever orders the TCEQ may have issued in unrelated settled dockets do not bind the parties to *this* docket or change applicable Texas law.

VII. THE DRAFT PERMITS NO. 5851 FOR BRA ARE NO SUBSTITUTE FOR A LEGALLY COMPLIANT APPLICATION

Before, during and at the close of the hearing, BRA and the Executive Director distributed at least six (6) copies of draft Water Use Permits No. 5851, each with a different level of detail or disagreement among the two parties. At the same time, all the draft permits were virtually unintelligible as grants of water rights because they contained so many conditions to be determined at a later date, such as diversion points, water use and purposes, and they make no sense to a water lawyer as legal documents needed to put water to beneficial use. Just as importantly, if not more so, is the concept that if just the right water use permit can be drafted, then the application can be granted by the Commission. This practical position apparently held by BRA and the Executive Director, is not the law. The Commission must act on the completeness and legal sufficiency of the application itself, not the agreed upon terms and conditions of the water rights some of the parties can compose. If it were just a matter of a satisfactory draft permit, then there would be no need for water availability analysis, the no injury rule, or any specific information on the proposed water use. And, in the final analysis, that collaborative effort in drafting a water right for all the remaining water in the Brazos River Basin has blinded the most essential parties—the Applicant, BRA, and the Executive Director—to the facts of the application itself. According to BRA and the Executive Director, once they agree on a draft permit, everything else, including all the requirements of TEXAS WATER CODE, §11.134, can be left to a later proceeding at the discretion of the Applicant, to be known as a Water Management Plan. The details of such a plan and the public participation involved in such a plan are all at BRA's discretion and are all to be determined later, should the Commission grant the woefully incomplete BRA application for water for unspecified uses and locations.

BRA's attorney attempted to address the shortcomings of the application for Permit No. 5851 by stating that the pre-filed testimony addressed all the requirements of the TEXAS WATER CODE. In the first place, the pre-filed testimony was filed long after the Commission declared the application administratively complete, so that the pre-filed testimony is immaterial in determining whether the

application contained the information required by Chapter 11 of the TEXAS WATER CODE, which it clearly did not, and clearly does not. Secondly, the defects in the application cannot be addressed by limiting the water use permit, as stated above. More importantly, even if a draft permit could—if agreed upon by the parties at least—overcome the deficits of the application, clearly all the parties were unable to do so in this case. So, all the parties to this contested case hearing have essentially wasted their time, while we wait for the real terms and conditions of the water right to be worked out in some water management plan to be developed under unspecified conditions at an unspecified date and time. The pre-filed testimony contains no information on how the Water Management Plan will be developed, what it will contain, and who can participate in developing its constituent parts. Consequently, the dearth of information in the application and subsequently each of the draft Permits No. 5851 fail to meet the legal requirements of Chapter 11, TEXAS WATER CODE, whether you consider the application alone, or consider it along with the pre-filed testimony, and/or some version of the draft Permit No. 5851 offered by the generally agreeing parties: BRA and the Executive Director.

VIII. FAIRNESS

After the completion of contested case hearings, the State Office of Administrative Hearings often sends a survey for participants to complete regarding the fairness of the hearing procedure. Rather than respond to the questions under cover of secrecy or without explanation, Comanche County Growers will express some concern at this time with the fairness with which their concerns were treated by the Honorable Administrative Law Judges. CCG members were the only parties who had their testimony stricken at the request of the applicant and the Executive Director, and without legal explanation by the judges, regarding their pending applications at the TCEQ. Other parties were allowed to discuss at length and without restriction by their Honors, existing water rights, pending applications, and planned future applications, especially in the case of the Applicant. This treatment led the Comanche County Growers to consider that their concerns as family farmers and ranchers were not being taken as seriously as the other parties, even though all parties agreed that water was essential to their livelihood and that they were earlier appropriators than BRA.

According to law, under TEXAS WATER CODE, §11.134, the issues in a water rights case are specifically:

> (b) The commission shall grant the application only if:
>
> * * * * *
>
> (A) is intended for a beneficial use;
>
> (B) does not impair existing water rights or vested riparian rights;
>
> (TEXAS WATER CODE, §11.134)

Accordingly, the Administrative Law Judges' refusal to allow testimony regarding the existing water rights of the term permits of the Comanche County Growers was prejudicial and also unlawful given the legal scope of this case. Finally, the Administrative Law Judges' treatment of the issues of the Comanche County Growers was unreasonable in and of itself and seemed aligned with the parties who opposed CCG and the very livelihood of the family farmers and ranchers in Comanche County, whose interests continue to be disfavored by BRA and TCEQ.

IX. RELIEF REQUESTED

WHEREFORE PREMISES CONSIDERED, Texas Farmers and Ranchers, George Bingham, Frazier Clark by next friend Dusty Jones, and William D. "Dwayne" and Mary L. Carroll by next friend Neil Carroll, collectively referred to as the Comanche County Growers respectfully request the following:

1. Require Applicant to submit an application in compliance with TEXAS WATER CODE, Chapter 11, and implementing Texas Commission on Environmental Quality Rules found at 30 Tex. Admin. Code, Chap. 295 and Chap. 297. The purpose of this requirement is not merely advisory, but to allow all parties to evaluate the request being made, as opposed to the permit drafted, under TEXAS WATER CODE, Chapter 11, especially Section 11.134. Without knowledge of the diversion points, the proposed uses and amount of water which will be put to beneficial use, the modeling experiments of the technical experts in this case are

meaningless intellectual exercises with no reference to the specifics of the potential water use.

2. Specifically require the applicant to identify the location of the diversion points, the uses of water, and the times when and if the water will be put to use and for which purposes. A water grab without specifics is impossible to find "addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or for any area in which the proposed appropriation is located or, in the alternative, describes conditions which warrant a waiver of this requirement.

3. Recognize the importance of water use by traditional family farmers and the proposed impact of this BRA application to obliterate the "first in time, first in right," directive of the prior appropriation system. Address the public interest associated with the loss of livelihood of family farming in the Brazos River Basin for unspecified water uses by later applicants.

4. Assert the importance of the law, "first in time, first in right," of the TCEQ staff developed alternative of granting water rights on any other basis than the priority date of a water right included in a Commission order, including TCEQ staff preferred factors such as administrative completeness, favoritism, amount of investment in water facilities or any other reason not included in the TEXAS WATER CODE, or specifically contrary to the provisions of the prior appropriation doctrine and the TEXAS WATER CODE.

5. Require the TCEQ to eliminate term permits for earlier priority applicants, if perpetual water rights are being issued in a river basin to later applicants; otherwise, TCEQ is simply authorized to take from earlier appropriators to give to later appropriators. And, to the extent Texas water availability models promote such illegal practices; update the models to fairly reflect water availability for all applicants on a first in time, first in right basis, and not any other agreed upon scheme.

6. Require the Texas Commission on Environmental Quality to take responsibility for water rights administration as is required under law. Require the TCEQ to refuse to ratify any water use agreements or contracts based on applications rather than water rights permits, which agreements have the effect of subverting the authority of the TCEQ, and expanding the scope of a contested case hearing beyond the parties participating and subject to cross examination.

7. Refuse to allow the TCEQ to grant a water right to any party to all available unappropriated water without a showing of immediate need for beneficial use.

8. Enforce the no injury rule and ensure that existing water rights holders, including term permit holders who may have been wrongly advised by the TCEQ that no water was available, or whose applications may be held indefinitely under the Executive Director's review until all available state water has been granted.

9. Refuse to accept the myth that only those persons with reservoirs can make beneficial use of return flows. Allow riparian water rights holders with earlier priority dates to make use of return flows on a senior priority basis in the same way other water rights are administered.

10. Before allowing any application for all remaining water in a river basin to go to hearing, require the holding of a mediation or stakeholder's group such that the situation does not arise that the applicant, rather than public participants simply pick and choose who to favor with agreements and who to make foot the bill of participation in a contested case hearing.

11. Ensure that any permit which is issued to BRA is subject to environmental flows considerations and recreational issues discussed by members of the public who make a living using water for recreational purposes, rather than one group of Governor appointees and employees talking to another group of Governor appointees and employees only.

12. Require that the requirements of TEXAS WATER CODE, § 11.134 be met before any water right is granted or any consideration to a Water Management Plan regarding the water right is given.

13. Any other and further relief to which the Texas family farmers and ranchers collectively referred to as Comanche County Growers may show themselves justly entitled, whether in law or in equity.

Respectfully submitted,

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COMANCHE COUNTY GROWERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 29th day of July, 2011.

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EXHIBIT B

POST HEARING REPLY BRIEF OF PROTESTANTS
COMANCHE COUNTY GROWERS AND
BRADLEY B. WARE

SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR

CONCERNING THE	§	BEFORE THE STATE OFFICE
	§	
APPLICATION BY THE	§	
	§	OF
BRAZOS RIVER AUTHORITY	§	
	§	ADMINISTRATIVE HEARINGS
FOR	§	
	§	
WATER USE PERMIT NO. 5851	§	

POST HEARING REPLY BRIEF OF PROTESTANTS COMANCHE COUNTY GROWERS AND BRADLEY B. WARE

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES,

COMES NOW, Texas family farmers and ranchers George Bingham, Frazier Clark by next friend Dusty Jones, William D. "Dwayne" and Mary L. Carroll by next friend Neil Carroll, and Robert Starks, collectively referred to as the Comanche County Growers (referred to herein as "Protestants" or "CCG"), and Bradley B. Ware (referred to herein as "Ware"), of Bell County, Texas on the Lampasas River, all protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality ("Commission" or "TCEQ")[1] and the State Office of Administrative Hearings ("SOAH") regarding the Application for Water Rights Permit No. 5851 by the Brazos River Authority (hereafter "BRA" or "The Authority") and respectfully file the following Post Hearing Reply Brief. To that end, Protestants would respectfully state the following:

I. INTRODUCTION

The testimony and Post Hearing Written Argument of Brazos River Authority in this case demonstrates the evils of closed government. BRA's main

[1] The term "Commission" or "TCEQ" also refers to any of the predecessor agencies of TCEQ, with primary authority to regulate water right.

argument in support of its application appears to be that BRA representatives negotiated a deal with the Executive Director and all other important persons, such that some version of proposed water right Permit No. 5851 should be issued.[2] According to both the Executive Director and the Applicant, the legal requirements of the Texas Water Code, particularly Section 11.134, can all be dealt with at a yet to be scheduled time under unspecified circumstances in connection with a document to be entitled a "Water Management Plan." Meanwhile, Applicant is under no obligation to satisfy during this contested case hearing, the required items for permit issuance, including:

(1) *The conformance of the application to the requirements of Chapter 11.* Applicant and the Executive Director have simply undertaken a water rights modeling initiative using various versions of the Brazos River Basin Water Availability Model ("WAM") to determine the amount of water which may be available at designated and hypothetical (Tr. Alexander p. 2130, lines 3 – 19) control points on the Brazos River, only some of which were made available to the parties in a timely manner.

(2) *The availability of unappropriated water in the source of supply.* Because the BRA application is simply a water rights modeling exercise, it would appear, at first glance, that water is available in the source of supply on a firm or interruptible basis. On review of the evidence, however, it is clear that the source of supply is not simply the designated and hypothetical control points on the Brazos River, but those points and all of BRA's existing authorized diversion points. BRA has already restricted water use and found water shortages and lack of water availability at some of its authorized locations.

(3)(A) *Evidence that the water BRA seeks to appropriate is intended for a beneficial use.* BRA has not provided information on who will be provided water, from which locations and in what amounts. Therefore, as the Executive Director's

[2] CCG and Ware have been provided so many copies of BRA's proposed Permit No. 5851 that we must be forgiven if the numbers cited above do not jibe with whatever BRA and/or the Executive Director are now recommending. The number of drafts and the terms and conditions of the varying drafts were not meant to be comprehensible or unchanging. Every aspect of the terms and conditions of BRA's proposed appropriation was subject to change under the "Water Management Plan."

witness noted, it is impossible to draw any legally supportable conclusions regarding the beneficial use of the water proposed to be appropriated.

(3)(B) *Evidence that the proposed appropriation does not impair existing water rights or vested riparian rights.* As mentioned above, BRA's first approach to the issue of impairment of existing water rights was to fashion its application so that the impacts could not be reasonably evaluated by the parties, nor even by the Executive Director. BRA's second approach to dealing with existing water rights and vested riparian rights was to ignore as many of them as possible, including existing senior water rights associated with term permits, impacts on existing recreational uses, environmental uses and agricultural uses. BRA's third approach to the consideration of the impairment of existing water rights was simply to refuse to acknowledge under oath the amount and breadth or its proposed appropriation. BRA's key witness, Thomas C. Gooch, P.E. continually rebuffed the efforts of parties, including Friends of the Brazos River, CCG, Ware and the Executive Director, and also the Administrative Law Judges, to determine if BRA was in fact requesting, as all Draft Permits No. 5851 state, to divert all of the water available for appropriation in the Brazos River Basin, including all permitted return flows (Tr. Gooch, p. 538, line 15 – p. 542, line 23; Tr. ALJ Newchurch, p. 543, line 18- p. 546, line 19; Tr. Smith, p. 2694, line 16 - p. 2700, line 5). Conversely, BRA witness Brad Brunett was quick to admit that the purpose of the application for proposed water rights Permit No. 5851 was to allow BRA to appropriate return flows. (Tr. Brunett, p. 997, lines 2-3; also Tr. Alexander p. 2211, line 25 – p. 2212, line 20.)[3]

(3)(C) *Whether the proposed appropriation is detrimental to the public welfare.* Obviously, a proposed appropriation of virtually all available water in the form of return flows and up to permitted water-water discharges without information as to beneficial use, harm to existing water rights holders and availability of water at the place of use is on its face detrimental to the public welfare. By definition, granting of an application which does not meet the requirements of Chapter 11 would not only be unlawful, but the granting of

[3] Because of the inconsistencies between the testimony of BRA employees, the Executive Director, the various drafts of proposed water rights Permit No. 5851, Protestants CCG and Ware will simply suggest throughout this reply brief that this contested case hearing involves an application by BRA to appropriate "virtually" all the unappropriated water in the Brazos River Basin, including return flows.

virtually all unappropriated water without a showing of diversion locations, amounts and purposes of use would promote the allocation of extremely scarce resources in a reckless, speculative manner, gambling that the same applicant who refused compliance with the legal requirements of water rights permit applications would somehow properly address legal concerns in a subsequent proceeding. Even the applicant's witness agreed that specific information on an appropriation was necessary to evaluate a proposed water right (Tr. Gooch, p. 473, Line 17 – p. 474, Line 23). Such betting on the management of Texas' water resources is prohibited under Chapter 11, Texas Water Code, even if the Executive Director is prepared to allow it.

(3)(D) *Consideration of applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152.* Brazos River Basin environmental flow standards have not been established, so any compliance BRA offers in this regard is only theoretical.

(3)(E) *Whether the proposed appropriation 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.* There is no evidence of how the proposed appropriation will comply with this requirement, because BRA has not identified the specifics of its proposed appropriation, and the Exectuive Director has not required that BRA's application comply with the simple legal requirements of Texas Water Code, §11.124.

(4) Whether the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Section 11.002(8)(B). Again, there is no evidence on this issue, because BRA has not provided, and the Executive Director has not required, an application which complies with the nominal requirements of Texas Water Code, §11.124, set out below:

> Sec. 11.124. APPLICATION FOR PERMIT. (a) An application to appropriate unappropriated state water must:
>
> (1) be in writing and sworn to;
>
> (2) contain the name and post-office address of the applicant;

(3) identify the source of water supply;

(4) state the nature and purposes of the proposed use or uses and the amount of water to be used for each purpose;

(5) state the location and describe the proposed facilities;

(6) state the time within which the proposed construction is to begin;

(7) state the time required for the application of water to the proposed use or uses; and

(8) contain the name and address of the holder of any lien on:

(A) any water right permit, certified filing, or certificate of adjudication to be granted under the permit for which application is made; or

(B) any land to which that water right permit, certified filing, or certificate of adjudication would be appurtenant.

(b) If the proposed use is irrigation, the application must also contain:

(1) a description of the land proposed to be irrigated; and

(2) an estimate of the total acreage to be irrigated.

[Emphasis supplied.]

No matter how powerful the applicant is, regardless of the nature of its political support, or the acquiescence of the Executive Director, there is no legal authorization within the Texas Water Code for granting an application which does not provide specifics on the amount of water, the specific diversion points, the places, and the purpose(s) of use of the proposed appropriation. There is no BRA exception to the requirements of the Texas Water Code.

II. EXECUTIVE DIRECTOR'S STAFF REVIEW IS NOT DETERMINATIVE OR A FINAL WORD ON WATER RIGHTS APPLICATIONS

In BRA's Written Argument, it asserts, repeatedly, that the Executive Director's Staff had made "determinations" about the propriety of BRA's application, the "two-step process" (undefined in the Texas Water Code or Commission Rules), BRA's theoretical diversion points, etc. in an obvious effort to marginalize the role of not only the parties and SOAH, but also the TCEQ Commissioners in considering and potentially approving BRA's water rights application for Permit No. 5851. In their closing argument, BRA asserts that the

Executive Director determined that, in accordance with its proposed water rights Permit No. 5851, BRA's application meets all the requirements for an application to appropriate unappropriated state water (BRA-WA p. 18). BRA also states that unnamed "TCEQ staff" determined that BRA's application satisfied the Texas Water Code §11.125 as to the location of diversion points (BRA-WA p.20). BRA even emphasizes its agreement with the Executive Director's staff on the terms of a draft permit, implying that the issue of whether *any permit at all* should be issued on this application has been reduced to a question of the terms and conditions of *which* permit draft should be issued (BRA-WA pp. 22-24).

BRA boldly declares that there are only two substantive areas of legal concern regarding its application: (1) The return flow issue; and (2) The treatment of Allens Creek Reservoir. The reason for these assertions and implications is obvious – BRA wants to elevate the Executive Director's review and recommendations on its application to determinations that need no further evaluation for legal or technical sufficiency. The Commissioners' signatures, under BRA's view, should amount to more than a "rubber stamp" on the Executive Director's determination. Without diminishing the importance of the Executive Director's participation in the water rights application process, Protestants would remind BRA that *nothing* about its application has been *determined* until the TCEQ Commissioners consider the application and issue an order. The Executive Director can only make recommendations that the appointed Commissioners can accept or reject. Presumably, the Commissioners and the Administrative Law Judges will be open to contrary views of the applicable law and the evidence apart from those attributed to the Executive Director or BRA. BRA certainly seeks a different interpretation of the law and evidence regarding return flows and Allens Creek Reservoir. Protestants CCG and Ware would contend that the Executive Director is likewise wrong on other legal issues as well.

BRA seems to have overstated its agreement with the Executive Director in this case. Protestant CCG cited testimony of Kathy Alexander in their Closing Argument indicating her uncertainty that impacts of BRA's proposed water rights Permit No. 5851 could, *in reality* be resolved before a subsequent Water Management Plan contested case hearing. However, there are other examples of conflict between BRA and the Executive Director to be noted.

1. Kathy Alexander acknowledged uncertainties regarding how BRA's existing excess flow permit, which is based on multiple known diversion points, would be reconciled with the theoretical diversion points proposed in BRA's proposed water rights Permit No. 5851 (Tr. Alexander p. 2085, line 1 – p. 2094, line 25). She acknowledged that a proposed subsequent Water Management Plan case could change the application authorized by the BRA's proposed water rights Permit No. 5851 case, but did not know how much or in what ways.

2. Kathy Alexander acknowledged that the permit requested to be issued in BRA's proposed water rights Permit No. 5851 could have adverse impacts on instream flows (Tr. Alexander p. 2097, line 1 – p. 2102, line 25).

3. Kathy Alexander testified that BRA's proposed water rights Permit No. 5851 has the potential to affect river flows in the Brazos and to adversely impact senior and superior water rights. (Tr. Alexander p. 2165, line 1 – p. 2166, line 25). Ways to mitigate these potential impacts could not be determined in this hearing and would be reserved for another case regarding the Water Management Plan.

III. BRA's LEGAL ANALYSIS OF ADMINISTRATIVE FINALITY

BRA offered only a summary legal analysis of the finality of any TCEQ order that would result in the issuance of Permit No. 5851 from this docket. While Protestants CCG and Ware expect that BRA will provide a more comprehensive discussion about the supposed finality of the requested permit in its reply brief, there is little in its Post Hearing Written Argument to which Protestants CCG and Ware can respond. As expected, BRA cites *Texas-New Mexico Power Co. v. Texas Indus. Energy Consumers*, 806 S.W.2d 230 (Tex. 1991) as controlling authority. BRA's citation of *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 843 S.W.2d 718 (Tex. App. – Austin 1993, writ denied) was also expected, though it omits the important distinguishing elements of that case that limit its application to this water rights hearing. Certainly BRA's noting that the order of the PUC "had *res judicata* effect" (BRA-WA, p. 27) was not relevant. *Any* final order would be *res judicata*

only as to issues for which it resolved. BRA's reference to extensive hearings and the voluminous transcript of the PUC hearing was not meaningful.

BRA's brief discussion of the applicable law on administrative finality serves only to evoke the inherent contradiction between asserting that Permit No. 5851 would "fix" any rights between parties and the actual reality of the BRA proposed appropriation. This docket does not even fix BRA's diversion points. BRA openly calls its four diversion points "Theoretical" and that they are used in a "hypothetical" manner for modeling purposes (BRA-WA p. 28).Yet the Executive Director concludes that BRA met the general application requirement for diversion points simply because Glen Rose, Highbank, Richmond and the Gulf of Mexico actually exist as points in the real world. The exchange between Kathy Alexander and the attorney for Friends of the Brazos on the theoretical diversion points highlights the disjunction. Ms. Perales wanted Ms. Alexander to admit that BRA's diversion points were only theoretical. Ms. Alexander persisted that they were real points that could be modeled (Tr. Alexander p. 2136, line 22 – p. 2139, line 19). Ms. Alexander's attempt to qualify her testimony that the Water Management Plan case could change the points was immaterial. It is one thing for an applicant to file an honest proposal that *could* change with time or implementation; but it is quite another to propose a "place holder" application that *has to change* because it is unrealistic and is only proposed as a device to secure a permit.

In short, there is not even a "meeting of the minds" between BRA and the Executive Director on how to characterize its diversion points. Surely, BRA wants *res judicata* to safely protect the water right it expects to obtain from this application. However, because §§11.125 and 11.134 require more that "place holder" proof by water rights applicants, such *res judicata* is not deserved. The truth is imbedded in the first sentence of the first full paragraph on page 28 of BRA's written argument:

> "...the two-step process is the only way for the Commission to *appropriately and fully act* on BRA's System Operation Permit..."
>
> (BRA-WA p.28)

In other words, if the Commission issues a water right based on this current contested case hearing - only the "first step" of a "required" two-step process - it would be acting neither "appropriately" nor "fully" on BRA's System Operation Permit application, according to BRA's legal analysis.

IV. AVAILABILITY OF STREAMFLOWS AND RETURN FLOWS TO RIPARIAN WATER RIGHTS HOLDERS

One justification the Executive Director offers in support of granting virtually all remaining return flows in the Brazos River Basin to BRA is that BRA is the only party who can use this water because of its substantial reservoir system. However, even BRA witnesses admitted that no storage was necessary to allow a riparian water user such a Bradley B. Ware to use routinely discharged return flows which flowed by his riparian property on the way to BRA's storage facilities. Brad Brunett stated:

> Q[4] And doesn't the -- doesn't the use of return flows under the systems operation, doesn't that also require the use of the existing storage facilities already permitted?
>
> A I don't know that -- I don't know that I would agree with that.
>
> Q Okay. And you wouldn't agree with it because you don't think it matters whether you store it or whether you don't, that that water is available regardless of storage?
>
> A Yes, ma'am.
>
> (Tr. Brunett p. 1031, line 2 – 12)

V. THERE IS SIGNIFICANT ANTI-AGRICULTURAL BIAS IN THE EXECUTIVE DIRECTOR'S ANALYSIS AND BRA'S PROPOSED APPROPRIATION

In a number of aspects, both BRA and the Executive Director have assumed a preference for other uses other than existing agricultural uses throughout this proceeding. Agricultural and industrial uses (in that order) are the most preferred

[4] Cross examination in this excerpt performed by Attorney for Protestants CCG and Ware - Gwendolyn Hill Webb

uses of water after the domestic and municipal use necessary for sustaining human and animal life. Both BRA and the Executive Director have assumed an anti-agricultural bias in the consideration of this application as detailed below.

(1) Both BRA and the Executive Director agree that agricultural water users who were granted term permits should have their water rights terminated in favor of BRA's use of virtually all State water available for appropriation (Tr. Gooch, p. 465, line 6 – p. 467, line 15).

(2) While BRA proposes to appropriate a maximum amount of 670,000 acre-feet in non-firm water as measured at the Gulf of Mexico[5], it notified agricultural users, including those in the Lake Proctor watershed back on March 20, 2002, that there is not significant water available for appropriation and that agricultural water use must be reduced (See, BRA Exhs. 87, 88, and 89; Tr. Brunett p. 2270, line 3 – p. 2273, line 13). Yet, BRA has notified new potential water users, such as the developers of the Comanche Peak power plant, that water will be available for their new proposed appropriation if this permit is granted. BRA cited "no need" for further communications regarding additional water for agricultural users (Tr. Brunett p. 2308, line 25 – p. 2309, line 20).

(3) To BRA witnesses' knowledge, none of the agreements reached with water users which required BRA to withdraw its protests of their applications involved existing agricultural water users. In fact, BRA's witness stated that it was BRA's policy not to oppose municipalities' use of return flows, even if those return flows were not based on groundwater and were based on water provided by BRA. BRA witnesses revealed no such policy regarding not the new appropriation, but the continued use of water by family farmers and ranchers in the Brazos River Basin. And, according to BRA witnesses, if proposed water rights Permit No. 5851 is granted, not only will the "theoretical" diversion points be used

[5] CCG and Ware have been provided so many copies of BRA's proposed Permit No. 5851, that we must be forgiven if the numbers cited above do not jibe with whatever BRA and/or the Executive Director are now recommending. The number of drafts and the terms and conditions of the varying drafts were not meant to be comprehensible or unchanging. Every aspect of the terms and conditions of BRA's proposed appropriation was subject to change under the "Water Management Plan."

(possibly), but BRA will satisfy senior water rights from any of its authorized appropriations; including Lake Proctor, return flows, or additional yet to be defined diversion points (Tr. Brunett, p. 2309, lines 3 – 9).

(4) BRA's attorney's state that Travis County District Court Judge Lora Livingston sustained the plea to the jurisdiction argued on behalf of the Texas Commission of Environmental Quality by Assistant Attorney General Linda Secord. BRA's attorneys conveniently omit the fact that Judge Livingston repeatedly stated that CCG and Ware were afforded the opportunity to actively participate in this hearing, and had no evidence that agricultural issues would not receive a fair hearing. Webb & Webb agreed that, at the time of the hearing (May 11, 2011), no fault could be found with the SOAH proceedings. The acknowledgment, that the SOAH hearing to which CCG and Ware were parties was ongoing with no ruling was a factor in the Judge's granting of the plea to the jurisdiction. CCG and Ware continue to hold out hope that the importance of the continuation of agricultural water users will be recognized by SOAH in this case.

(5) BRA attorneys state: "It is uncontroverted that BRA may not divert and use water until the Water Management Plan is adopted through a contested case hearing." This irrelevant observation completely misses the point of water rights hearings. Once a right to appropriate virtually all the remaining State water available for appropriation has been granted, then other water rights are subject to denial on the basis of lack of water available for appropriation. So, the fact that BRA and the Executive Director agree that BRA can "corner the market" on available water while everyone waits for details on the specifics of beneficial use, at the same time other applicants with specific and detailed plans submitted in accordance with the Texas Water Code are denied,works a true injustice and is antithetical to the development of agriculture in Texas.

(6) Agricultural users were not offered any of the normal options associated with policy development as to water use in the Brazos River Basin. As mentioned above, BRA developed a policy for water use which only applied to municipal water users. More importantly, BRA, the Executive Director, and even Texas Parks and Wildlife Department (whose employees testified not for their own state agency but on behalf of the applicant) developed their approach to the allocation of virtually all available Brazos River Basin resources behind closed doors with no involvement by interested persons and existing water users. In fact, the Executive Director continues to be unwilling to consider any viewpoint of any party in this proceeding other than itself and BRA.

As a result of the anti-agricultural bias of this proceeding, Protestants CCG and Ware are deprived of any of the regulatory certainty associated with existing water law, and deprived of the value of water to them as a property right in accordance with Texas Water Code, Section 11.001 and the orders of the Commission issuing their water rights and assigning priority dates. Agricultural use of water allows for the perfection of water rights as against all except senior water rights holders, not junior applicants, such as BRA.

VI. FAMILY FARMERS AND RANCHERS INCLUDING THE COMANCHE COUNTY GROWERS AND BRADLEY B. WARE ARE IMPORTANT TO THIS PROCEEDING

BRA devoted little effort in its Written Argument to addressing the positions of Protestant CCG and Ware because of its mistaken legal assumption that the issue of water needs of competing applicants is irrelevant to any issue in this case. The convenient assumption that only existing water rights holders with perpetual water rights in a water rights hearing provide relevant evidence worth considering, misreads the breadth of the statutory inquiry imposed by §11.134 of the Texas Water Code. Section 11.134(b)(3)(B) certainly obligates the Commission to consider the impact on existing water rights holders. Therefore, Protestants such as Dow Chemical who present evidence of the potential adverse impact of BRA's Proposed Permit No. 5851 are necessary parties to this case and any other water

rights application in the Brazos River Basin. However, §11.134(b)(3)(c) is just as relevant to the Commission's review of a water rights application.

The Legislature wisely intended for the Commission to take a more comprehensive approach to water rights permitting than merely to be a referee to conflicts between competing permit interests, public and/or private. In other words, an applicant may *not* adversely impact existing rights; may be authorized to appropriate water intended for beneficial use; and may be considerate of environmental flow standards, but may still be detrimental to the public welfare. The Texas Supreme Court's decision in *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006) is controlling authority for multiple issues in this case. However, one of the most important holdings in that case is that the TCEQ is not authorized to review water rights applications in such a way as to render certain provisions of the Texas Water Code meaningless. It serves BRA's interests, only, to simply brush aside the interests of the protesting family farmers who are trying to be heard on their concerns that they may be *permanently* foreclosed from access to state water. After all, in BRA's view, they are simply term permit holders and term permit holders have nothing to offer in a water rights application. However, the Legislature directed the commission to take a broader view of "public welfare" than BRA suggests. As the trier of *all pertinent facts*, the Administrative Law Judges are obliged to consider evidence that satisfies *all* portions of the applicable statute, not simply the portions that BRA recognizes as pertinent.

Moreover, BRA's position that term permit holders are an irrelevant consideration under §11.134(b)(3)(B) is not supported by the record, evidence, or the law. BRA cannot show that a term permit is not a water right. Lost in BRA or the Executive Director's overreliance on a "second class" status of term permit holders is the simple truth that a term permit is a right to appropriate state water that is limited only by an indefinite (subject to duration of the application process) term of years. Simple review of Protestants CCG's and Ware's permits in this record confirms this fact. BRA provides no legal support for its assertion that the Commission is *not* obligated to consider the rights of term permit holders in this hearing. The record shows in the testimony of Kathy Alexander that the Executive Director's hydrology analysis included *no consideration* for term permits (Tr. Alexander p. 2157, line 25 – p. 2158, line 2); that the Executive Director's draft

permit sought to protect senior water rights holders of perpetual water rights only (Tr. Alexander p. 2151, line 18 – p. 2152, line 16); and that available return flows produced using the Brazos WAM, however they are to be determined, were not modeled to satisfy the needs of term permit holders (Tr. Alexander p. 2164, line 13 – p. 2165, line 22). What is not clearly stated or legally buttressed is the reason for the Executive Director's failure to consider the existing water rights of term permit holders. BRA's bold statement in its Written Argument that term permit holders are "not entitled" to the unappropriated return flows being considered in this application (BRA-WA p. 47) would appear to be at odds with the Executive Director's position regarding the granting of term permits in the first place. Ms. Alexander acknowledged that water availability for term permits in Run 8 of the Executive Director's dual simulation was based, in part, on *unappropriated water*, including return flows (Tr. Alexander p. 2163, line 7 – p. 2164, line 5). These are the very same flows, in addition to others, which the Executive Director now proposes to take from Protestants CCG and Ware and authorize for use by BRA.

There exists a bigger issue in the question of public welfare, which involves the impact of BRA's application on future water rights in the Brazos River Basin. BRA has filed a unique proposal in which it seeks, through a unique two-step process, to appropriate virtually all remaining unappropriated water in the Brazos River Basin before BRA even *defines* the appropriation in accordance with Tex. Water Code §11.124 in a separate application and hearing to be held at some unspecified time. Because BRA's stated need for *all* of the water is to satisfy its generalized projected needs into the year 2060, some of the "beneficial use" evidence required by §11.134(b)(3)(A) is for *future* need, rather than present day or even near future needs. For such a comprehensive proposal to be fairly evaluated, it would seem obvious to evaluate the wisdom of removing from the Basin available water from applicants such as the four farmers (CCG and Ware) who are struggling to maintain their family farms in drought conditions *today*. BRA did not state that any of the CCG group or Mr. Ware are among the potential customers for water that the Authority states that it has waiting for approval of BRA's Proposed water rights Permit No. 5851 even though BRA recognized a water shortage in the Lake Proctor watershed (Brunett, See, BRA Exhs. 86-89, although BRA Exh. 14, "Anticipated Water Shortages for Brazos River Basin Counties, states: 'No Shortage Anticipated' for Comanche County."). If the

Protestants CCG and Ware are not projected to be BRA's *customers*, then what provision does the TCEQ propose for family farms that require small appropriations simply to maintain their crops and herds? BRA would argue that the question has no relevance in this hearing. Because Protestants CCG are pending applicants who are awaiting apparently terminal "review" by the Executive Director, their modest applications that are *known on this record* should not be disregarded in SOAH's "detrimental to the public welfare" analysis under Tex. Water Code §11.134(b)(3)(c).

BRA's narrow view of what constitutes "public welfare" must not control the recommendations of the Administrative Law Judges. The direct evidence presented on behalf of Protestants CCG and Ware is no less relevant to issues of "public welfare" than are questions of environmental flows; water for parks and wildlife, recreational use of the Basin, or any other beneficial use of water. In fact, agricultural use is among the highest uses to be considered in statewide water resources management (See, Tex. Water Code §11.024). Agricultural use of available water by small farmers going forward *if* BRA is granted all remaining unappropriated water in the Basin has to be considered, seriously. The water needs of Protestants CCG and Ware, to the extent that such testimony was not unfairly *stricken* as irrelevant, are considerably more concrete than the questions of how, when, where, how much, and for what purpose BRA proposes to use virtually all of the remaining unappropriated water in the Brazos River Basin, that were answered by the evidence *in the record* in this case. The parties were told repeatedly to wait for the "real details" in the Water Management Plan Case for BRA, but the impact on CCG and Ware of not having any water to appropriate after this case in known on this record. BRA was quick to note that the court granted TCEQ's plea to the jurisdiction in *Bingham v. Texas Commission on Environmental Quality*, No. D-1-GN-11-0031 (261st Dist. Ct., Travis County, Tex. May 20, 2011). However, what BRA did not say is that during the oral argument of the request for injunction, Judge Lora Livingston stated, more than once, that Protestants CCG and Ware had opportunity to state their case in *this hearing*. Counsel for CCG and Ware expressed skepticism to Judge Livingston that such participation without abatement and consolidation of applications would be meaningful. It was BRA's counsel, among others, that assured Judge Livingston that CCG's and Mr. Ware's participation *would* be meaningful.

VII. TERM PERMITS DO NOT CEASE TO EXIST BY AGREEMENT OF THE PARTIES

Mathematical modeling of water available for appropriation became an art with the enactment of Senate Bill 1, as discussed below. In this case, all engineers were quick to point out that the Brazos River Basin Water Availability Model used a variety of "runs" or different inputs and assumptions for different purposes. For example, according to Kathy Alexander, "The availability of water is—for term permits is based on Run 8." (Tr. Alexander, p. 2162, Lines 10-22) But, Ms. Alexander went on to state that return flows allocated to BRA with a priority date of October 2004 were not considered in the satisfaction of the existing senior water rights of term permit holders CCG and Ware, and allocated return flows on a priority basis only to perpetual permits whose terms and conditions included a specific reliance on return flows, rather than allocating the return flows on a complete first in time, first in right basis as mandated by Texas Water Code, Section 11.027. Other water availability model runs, including current, updated or modified versions of Run 3 are used to analyze water availability for perpetual water rights. (Tr. Dunn, p. 1450, Line 3 –p. 1451, Line 9.) Other than custom and agreement of the engineers (whose clients benefit from the practice) and the Executive Director, there is no legal justification for limiting access to surface water available for appropriation under Run 3 versus Run 8. As discussed below, nowhere in the Texas Water Code does it state that water rights applicants for perpetual water rights or for return flows are is entitled to a full consideration of State water available for appropriation, while term permit holders with earlier priority dates are not entitled to a full and equal consideration of water availability.

House Bill 1788, authored by Rep. Jack Harris, et. al of Brazoria County during the 70th Regular Session of the Texas Legislature, enacted Texas Water Code, Section 11.1381, which became effective on September 1, 1987. The terms and conditions of Tex. Water Code, §11.1381, set forth below, have not changed since its original enactment:

> Sec. 11.1381 TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue

permits for a term of years for use of state water to which a senior water right has not been perfected.

(b) The commission shall refuse to grant an application for a permit under this section if the commission finds that there is a substantial likelihood that the issuance of the permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources of the area.

(c) The commission shall refuse to grant an application for a term permit if the holder of the senior appropriative water right can demonstrate that the issuance of the term permit would prohibit the senior appropriative water right holder from beneficially using the senior rights during the term of the term permit. Such demonstration will be made using reasonable projections based on accepted methods.

(d) A permit issued under this section is subordinate to any senior appropriative water rights.

Added by Acts 1987, 70th Leg., ch. 405, Sec. 1, eff. Sept. 1, 1987.

The legislative history of Section 11.1381 is attached hereto as Exhibit "A" to shed more light on the purpose and legislative intent behind the authorization for term permits. The following is an excerpt from the Bill Analysis included in the attached legislative history:

BILL ANALYSIS

Background

The Supreme Court of Texas held that the Texas Water Commission, in issuing permits to use state (surface) water, must consider existing permits at their full face value and cannot grant the right to the same water to more than one party. This decision has restricted the use of term permits for state water. A term permit is a permit for a term of years.

Purpose of the Bill

This bill would allow the Texas Water Commission to issue term permits for the use of state water.

Subsequently, in Senate Bill 1, as mentioned above, the Texas Legislature authorized the Commission to authorize the use and reuse of return flows, that is, water which was used under a water use permit for its authorized purpose and then returned to a watercourse. As mentioned above, the impact of Senate Bill 1 was to

make more water available for appropriation in the form of return flows. As a matter of law, the effect of Senate Bill 1 is exactly the opposite of what BRA and the Executive Director now argue as a basis for failing to consider the existing water rights of senior water rights holders who were issued term permits. Where once the Texas Supreme Court and the state legislature had provided that a water right had to be recognized to the full extent of the paper permit, as if all water authorized would be consumed and none returned to the watercourse, Senate Bill 1 authorizes the Commission to consider that water returned to the watercourse, even if it was initially authorized for use under an existing permit, as surplus water, "subject to appropriation by others, unless expressly provided otherwise in the permit" (See, Texas Water Code, §11.046(c). None of the term permits at issue in this case now held by CCG members or previously held by Bradley B. Ware, contained any provision which precluded the use of the return flows which are at issue in this contested case hearing. To the contrary, CCG and Ware are entitled to consideration of their use of return flows in order of the priority given them by the Commission, which is far earlier than the current BRA application was even conceived, much less filed or subject to administrative completeness. The mythology that BRA and the Executive Director continue to assert regarding the meaningless of time priority as to term permits under the current water rights modeling schemes is as baseless as claims that Chapter 11 of the Texas Water Code has no specific rules which require the identification of diversion, amount, purpose(s) and place of use of a proposed appropriation in a water rights application.

Yet, BRA and the Executive Director continue to suggest that Senate Bill 1, whose primary purpose was to institute the regional water planning process and to provide for statewide water conservation and drought contingencies (among other matters), is the basis for elimination of term permits. The position of BRA and the Executive Director, obviously developed in concert, is patently insupportable when reviewing the legal history of term permits and the Texas Water Code. The text of Senate Bill 1 from the 75th Regular Session of the Texas Legislature is largely concerned with the initiation of a "bottom up," meaning regionally directed, water planning process in accordance with designated regions. At the same time the regional planning process was established, the Texas Water Code was amended to

add additional provisions to Section 11.046, with the changes shown below in their original legislative format:

> SECTION 2.07. Section 11.046, Water Code, is amended to read as follows:
>
> Sec. 11.046. RETURN SURPLUS [~~UNUSED~~] WATER. (a) A person who takes or diverts water from a watercourse or [~~running~~] stream for the purposes authorized by this code shall conduct surplus water back to the watercourse or stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so.
>
> (b) In granting an application for a water right, the commission may include conditions in the water right providing for the return of surplus water, in a specific amount or percentage of water diverted, and the return point on a watercourse or stream as necessary to protect senior downstream permits, certified filings, or certificates of adjudication or to provide flows for instream uses or bays and estuaries.
>
> (c) Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used and reused by the holder of a permit, certified filing, or certificate of adjudication for the purposes and locations of use provided in the permit, certified filing, or certificate of adjudication. **Once water has been diverted under a permit, certified filing, or certificate of adjudication and then returned to a watercourse or stream *[as BRA has done under its existing permits]*, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.**
>
> (d) Water appropriated under a permit, certified filing, or certificate of adjudication which is recirculated within a reservoir for cooling purposes shall not be considered to be surplus for purposes of this chapter.
>
> [Parenthetical explanation and emphasis supplied.]

There is nothing in this section of the Texas Water Code, amended under Senate Bill 1, to support the Executive Director's contentions, as supported by BRA and other water rights modelers, that term permits lose access to unappropriated water newly made available under Texas Water Code, Section 11.046, on the basis of priority, and lose all status as "existing water rights holders," for the convenience of applicants the Executive Director chooses to support.

There is also nothing in TCEQ rules which supports any aberration of the "first in time, first in right" recognition of the priority of water rights, including those of term permit holders. There is, however, a TCEQ "no injury" rule which reads as follows and also does not exclude term permit holders:

30 Texas Admin. Code, §297.45: "No Injury" Rule

(a) The granting of an application for a new water right or an amended water right shall not cause an adverse impact to an existing water right as provided by this section. 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. **For the purposes of this section, adverse impact to another appropriator includes: 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; increasing an appropriator's legal obligation to a senior water right holder; or 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 of the appropriator's water right was granted.**

(b) Subject to meeting all other applicable requirements for an application to amend an existing water right, an amendment to a water right, except for the increase in the appropriative amount or diversion rate, shall be approved as provided by Texas Water Code §11.122(b) if the requested change will not cause such adverse impact on other water right holders or the environment of the stream of greater magnitude than under circumstances in which the water right being sought for amendment was fully exercised according to its terms and conditions as they existed prior to the amendment.

(c) If it is determined that a proposed amendment for a change in the diversion point may adversely affect existing water rights, the amendment, if approved, shall be subordinate only to such affected water rights and the amended water right shall otherwise retain its priority date.

(d) The burden of proving that no adverse impact to other water right holders or the environment will result from the approval of the application is on the applicant.

(e) In granting an application, the commission may direct that stream flow restrictions, return flows, and other conditions and restrictions be placed in the permit being issued to protect senior water rights. [Emphasis supplied.]

Under the new law of Senate Bill 1, the return flows which were originally "borrowed" return flows from senior appropriators become subject to new appropriation by others without any term limitation. In fact, appropriation of the return flows now lawfully available under Senate Bill 1 is exactly what BRA purports to accomplish in it proposed Permit No. 5851, just without any regard to the rights of existing senior permit holders.

More importantly, as the record establishes, Run 7 of the Brazos River Basin water availability model, upon which the Protestants' water rights were issued by the Commission, included return flows. Now, the Executive Director and BRA propose to appropriate those return flows, plus return flows which are permitted but are not yet discharged, to BRA. Both BRA and the Executive Director simply overlook the priority dates given CCG and Ware and state that those priority dates are meaningless. Again, not only does that approach go against the plain words on the face of the Commission's orders, the water rights permits of CCG and the former water rights permit of Ware, but there is no legal support for that approach. The whole point of term permits having time limitations was to allow the Commission to review water availability periodically and fairly, not to suggest that once someone had been granted a term permit with a priority date, the Commission could place available water in the hands of other applicants while keeping the term permit renewal applications "under the Executive Director's continued review." During the hearing, it was clear from the testimony of Kathy Alexander under questioning by the BRA attorney that the Executive Director already had made some significant decisions regarding the CCG and Ware applications and was simply not willing to release them for consideration concurrently with the BRA application.

During the injunction hearing, it was clear that the Assistant Attorney General for TCEQ had limited knowledge regarding Texas water rights as she opined that small applicants such as CCG and Ware were only entitled to small

amounts of water for short term permits, while larger water suppliers such as BRA were entitled to perpetual water rights for large amounts of water. Apparently, the TCEQ had not informed its representative of water rights as property rights and the all important prior appropriation doctrine of "first in time, first in right," which governs Texas water law. All CCG and Ware are asking is that the honorable Administrative Law Judges honor the law as it actually exists in the Texas Water Code, not the self-serving or convenient advocacy of BRA and the Executive Director, respectively.

VIII. SATISFACTION OF THE PUBLIC INTEREST IN CONTINUED AGRICULTURAL WATER USE

Protestants CCG and Ware propose a modest recommendation to the Administrative Law Judges which would satisfy the "public interests" needs of agricultural water users enunciated herein, which causes virtually no harm to BRA: Express reservation of some of the water for which a need is shown for pending applications for water rights by existing water weight holders with earlier priority dates, be they term permits or otherwise. BRA and the Executive Director recognize the validity of the dual simulation WAM modeling to show water availability, including present and future return flows. BRA's proposal is to take virtually all unappropriated state water that is available, because the computation of available water and "need" (BRA says it "needs" all of it) is largely a mathematical exercise; a simple mathematical reservation for available water in the form of a partial denial of BRA's application in the public's interest is recommended by CCG and Ware. Despite BRA and the Executive Director's confidence in the Brazos WAM's accuracy, the developer of the original program was much more candid. Dr. Ralph Wurbs admitted that the Brazos WAM, as a model, contains numerous approximations (Tr. Wurbs p. 577, lines11-17). Dr. Wurbs even opined that the rate of error in the Brazos WAM could be as little as 2 percent and as much as 20 percent. (Tr. Wurbs p. 645, line 25 – p. 646, line 25). Taking Dr. Wurbs on his word, this means that, using BRA's application for 294,844 ac.ft. in the Upper Sub-basin and Central Sub-basin alone, there is 5,896.9 ac.ft to 58,968.8 ac.ft. of water available within the Brazos WAM's margin of error. Even a modest reservation of 6,000 acre-sqft. for future Upper and Central Sub-basin applications could not "realistically" undermine the proposal BRA has

set forth in this hearing and is in excess of the combined request of the CCG Protestants.

No doubt, BRA and the Executive Director would argue that such a reservation of a relatively miniscule amount of water is too imprecise and has too many unanswered questions, such as what sub-basin, at what diversion points, and in what quantities. Those questions remain now about *BRA's application*, weeks after the hearing. Perhaps the Commission could simply grant new perpetual water rights or renew pending term permits to the CCG applicant and resolve such questions in a consolidated Water Management Plan case when BRA files its water management plan with the agency.

VII. RELIEF REQUESTED

WHEREFORE PREMISES CONSIDERED, Texas Farmers and Ranchers, George Bingham, Frazier Clark by next friend Dusty Jones, William D. "Dwayne" and Mary L. Carroll by next friend Neil Carroll, and Robert Starks collectively referred to as the Comanche County Growers respectfully request the following:

1. Deny BRA's application for Systems Operation Permit No. 5851based on its non-compliance with Texas Water Code, Chapter 11, and existing Commission rules.

2. Require Applicant, if it wishes to obtain a new right to appropriate state water, to submit an application in compliance with TEXAS WATER CODE, Chapter 11, and implementing Texas Commission on Environmental Quality Rules found at 30 Tex. Admin. Code, Chap. 295 and Chap. 297. The purpose of this requirement is not merely advisory, but to allow all parties to evaluate the request being made, as opposed to the permit drafted, under TEXAS WATER CODE, Chapter 11, especially Section 11.134. Without knowledge of the diversion points, the proposed uses and amount of water which will be put to beneficial use, the modeling experiments of the technical experts in this case are meaningless intellectual exercises with no reference to the specifics of the potential water use.

3. Specifically require the applicant to satisfy Texas Water Code §11.124, Application for Permit, and, specifically, identify the location of the diversion points, the uses of water, the places of use, and the times when and if the water will be put to use and for which purposes. A water grab without specifics is impossible to find "addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or for any area in which the proposed appropriation is located or, in the alternative, describes conditions which warrant a waiver of this requirement.

4. Recognize the importance of water use by traditional family farmers and the proposed impact of this BRA application to obliterate the "first in time, first in right," directive of the prior appropriation system. Address the public interest associated with the loss of livelihood of family farming in the Brazos River Basin for unspecified water uses by later applicants. Also, require compliance with the No Injury Rule, 30 TAC, §297.45.

5. Assert the importance of the law, "first in time, first in right," of the TCEQ staff developed alternative of granting water rights on any other basis than the priority date of a water right included in a Commission order, including TCEQ staff preferred factors such as administrative completeness, favoritism, amount of investment in water facilities or any other reason not included in the TEXAS WATER CODE, or specifically contrary to the provisions of the prior appropriation doctrine and the TEXAS WATER CODE.

6. Require the TCEQ to eliminate term permits for earlier priority applicants, if perpetual water rights are being issued in a river basin to later applicants; otherwise, TCEQ is simply authorized to take from earlier appropriators to give to later appropriators. And, to the extent Texas water availability models promote such illegal practices; update the models to fairly reflect water availability for all applicants on a first in time, first in right basis, and not any other agreed upon scheme.

7. Refuse to allow the TCEQ to grant a water right to any party to "virtually" all available unappropriated water without a showing of immediate need for beneficial use.

8. Refuse to accept the myth that only those persons with reservoirs can make beneficial use of return flows. Allow riparian water rights holders such as Bradley B. Ware with earlier priority dates to make use of return flows on a senior priority basis in the same way other water rights are administered.

9. Before allowing any application for all remaining water in a river basin to go to hearing, require the holding of a mediation or stakeholder's group such that the situation does not arise that the applicant, rather than public participants simply pick and choose who to favor with agreements and who to make foot the bill of participation in a contested case hearing.

10. Any other and further relief to which the Texas family farmers and ranchers collectively referred to as Comanche County Growers and Bradley B. Ware may show themselves justly entitled, whether in law or in equity, including the specific reservation of a reasonable, or at least a modicum, amount of water for continued use for agricultural purposes by existing senior water rights holders who operate farms and ranches for their livelihood and to the benefit of the economy of this great state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 19th day of August, 2011.

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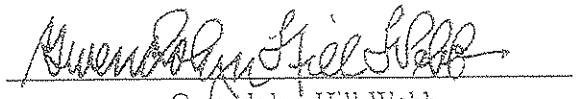

Gwendolyn Hill Webb

1987 MAR 19 PM 3:40
HOUSE OF REPRESENTATIVES

I certify that the attached is a true and correct copy of H.B. 1738, which was filed of record on MAR 12 1987 and referred to the committee on Natural Resources

Betty Murray
Chief Clerk of the House

FILED MAR 12 1987

By [signature] H.B. No. 1738

A BILL TO BE ENTITLED

AN ACT

relating to the issuance of term permits for water rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Water Code, is amended by adding Section 11.1381 to read as follows:

Sec. 11.1381. TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue permits for a term of years for use of state water to which a senior water right has not been perfected.

(b) The commission shall refuse to grant an application for a permit under this section if the commission finds that there is a substantial likelihood that the issuance of the permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources of the area.

(c) A permit issued under this section is subordinate to any senior appropriative water rights.

SECTION 2. Subsection (d), Section 11.146, Water Code, is amended to read as follows:

(d) Except as provided by Section 11.1381 of this code, if [If] a permit has been issued for the use of water, the water is not subject to a new appropriation until the permit has been cancelled in whole or part as provided by this section.

SECTION 3. Section 11.124, Water Code, is amended by adding Subsection (c) to read as follows:

(c) If the application is for a term permit, the application form used must also state that on expiration of a term permit the applicant does not have an automatic right to renew the permit.

SECTION 4. This Act takes effect September 1, 1987.

SECTION 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

HOUSE COMMITTEE REPORT

1st. Printing

APR 21 AM 10 59
HOUSE OF REPRESENTATIVES

By Harris of Brazoria, et al. H.B. No. 1788

A BILL TO BE ENTITLED

AN ACT

relating to the issuance of term permits for water rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Water Code, is amended by adding Section 11.1381 to read as follows:

Sec. 11.1381. TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue permits for a term of years for use of state water to which a senior water right has not been perfected.

(b) The commission shall refuse to grant an application for a permit under this section if the commission finds that there is a substantial likelihood that the issuance of the permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources of the area.

(c) A permit issued under this section is subordinate to any senior appropriative water rights.

SECTION 2. Subsection (e), Section 11.146, Water Code, is amended to read as follows:

(e) Except as provided by Section 11.1381 of this code, if [If] a permit has been issued for the use of water, the water is not subject to a new appropriation until the permit has been cancelled in whole or part as provided by this section.

SECTION 3. Section 11.134, Water Code, is amended by adding Subsection (c) to read as follows:

(c) If the application is for a term permit, the application form used must also state that on expiration of a term permit the applicant does not have an automatic right to renew the permit.

SECTION 4. This Act takes effect September 1, 1987.

SECTION 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

H.B. No. 1788

COMMITTEE AMENDMENT NO. 1

Amend HB 1788 in the following manner:

1. Section 11.1301. TERM PERMITS. Subsection (c) should be changed to Subsection (d). (Renumber Subsection (c) to (d)):

2. Section 11.1301. TERM PERMITS. Subsection (c) should be reworded to read as follows: (Adding a new Subsection (c)):

"The commission shall refuse to grant an application for a term permit if the holder of the senior appropriative water right can demonstrate that the issuance of the term permit would prohibit the senior appropriative water right holder from beneficially using the senior rights during the term of the term permit. Such demonstration will be made using reasonable projections based on accepted methods."

Yost

COMMITTEE REPORT

4-15-87
(date)

The Honorable Gib Lewis
Speaker of the House of Representatives

Sir:

We, your COMMITTEE ON NATURAL RESOURCES,

to whom was referred HB 1788 (measure) have had the same under consideration and beg to report back with the recommendation that it

[ ] do pass, without amendment.
[X] do pass, with amendment(s).
[ ] do pass and be not printed; a Complete Committee Substitute is recommended in lieu of the original measure.

A fiscal note was requested. [X] yes [ ] no An actuarial analysis was requested. [ ] yes [X] no

An author's fiscal statement was requested. [ ] yes [X] no

The Committee recommends that this measure be placed on the [X] Consent [ ] Calendar.

This measure [ ] proposes new law. [X] amends existing law.

House Sponsor of Senate Measure

The measure was reported from Committee by the following vote.

	AYE	NAY	PNV	ABSENT
Smith, T., Ch.	X			
Harris, J., V.C.	X			X
Johnson, C., C.B.D.				
Hammond	X			
Hoffheimer	X			X
Russell				
Shelley	X			X
Toomey				
Yost	X			

Total
6 aye
0 nay
0 present, not voting
3 absent

CHAIRMAN

COMMITTEE COORDINATOR

HB 1788
By: Jack Harris

Committee on
Natural Resources

BILL ANALYSIS

Background

The Supreme Court of Texas held that the Texas Water Commission, in issuing permits to use state (surface) water, must consider existing permits at their full face value and cannot grant the right to the same water to more than one party. This decision has restricted the use of term permits for state water. A term permit is a permit for a term of years.

Purpose of the Bill

This bill would allow the Texas Water Commission to issue term permits for use of state water.

Section by Section Analysis

SECTION 1. Amends Chapter 11, Water Code, by adding Section 11.1381, which provides that the Commission may issue permits for a term of years for certain state water and with certain restrictions. Also provides that a term permit is subordinate to any senior appropriative water rights.

SECTION 2. Amends Section 11.146, Water Code, to make a conforming amendment.

SECTION 3. Amends Section 11.124, Water Code, to provide that an application for a term permit must state that there is not an automatic right to renew.

SECTION 4. Effective date is September 1, 1987.

SECTION 5. Emergency clause.

Rulemaking Authority

Although this bill does not grant rulemaking authority per se, it is the opinion of this committee that the Texas Water Commission may have to promulgate rules regarding the issuance of term permits.

Summary of Committee Action

Public notice was posted in accordance to the rules and a public hearing was held on Wednesday, April 15, 1987.

On Wednesday, April 15, 1987, the full committee voted to report HB 1788 to the House as amended with a recommendation that it do pass by a record vote of 6 ayes, zero nays and zero present, not voting.

The committee voted to place HB 1788 on the Consent Calendar by a record vote of 7 ayes and zero nays.

The following person served as a resource witness on HB 1788:

Larry Soward, Executive Director
Texas Water Commission

Analysis of Committee Amendment No. 1

Provides that the Commission shall refuse to grant a term permit if the holder of senior appropriative rights would be prohibited from using those rights.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE

March 20, 1987

TO: Honorable Terral Smith, Chair
Committee on Natural Resources
House of Representatives
Austin, Texas

In Re: House Bill No. 1788
By: Craddick, J. Harris

FROM: Jim Oliver, Director

In response to your request for a Fiscal Note on House Bill No. 1788 (relating to the issuance of term permits for water rights) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Source: LBB Staff: JO, HES, JHH, AF

70FHB1788

4

COMMITTEE AMENDMENT NO. 1 By: [signature]

Amend HB 1788 in the following manner:

1. Section 11.1381. TERM PERMITS. subsection (c) should be changed to subsection (d). (renumber Subsection (c) to (d):

2. Section 11.1381. TERM PERMITS. subsection (c) should be reworded to read as follows: (adding a new subsection (c):

"The commission shall refuse to grant an application for a term permit if the holder of the senior appropriative water right can demonstrate that the issuance of the term permit would prohibit the senior appropriative water right holder from beneficially using the senior rights during the term of the term permit. Such demonstration will be made using reasonable projections based on accepted methods."

ADOPTED

APR 30 1987

Betty Murray
Chief Clerk
House of Representatives

HOUSE ENGROSSMENT

By Harris of Brazoria, et al. H.B. No. 1788

A BILL TO BE ENTITLED

AN ACT

relating to the issuance of term permits for water rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Water Code, is amended by adding Section 11.1381 to read as follows:

Sec. 11.1381. TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue permits for a term of years for use of state water to which a senior water right has not been perfected.

(b) The commission shall refuse to grant an application for a permit under this section if the commission finds that there is a substantial likelihood that the issuance of the permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources of the area.

(c) The commission shall refuse to grant an application for a term permit if the holder of the senior appropriative water right can demonstrate that the issuance of the term permit would prohibit the senior appropriative water right holder from beneficially using the senior rights during the term of the term permit. Such demonstration will be made using reasonable projections based on accepted methods.

(d) A permit issued under this section is subordinate to any

senior appropriative water rights.

SECTION 2. Subsection (e), Section 11.146, Water Code, is amended to read as follows:

(e) Except as provided by Section 11.1381 of this code, if [If] a permit has been issued for the use of water, the water is not subject to a new appropriation until the permit has been cancelled in whole or part as provided by this section.

SECTION 3. Section 11.124, Water Code, is amended by adding Subsection (c) to read as follows:

(c) If the application is for a term permit, the application form used must also state that on expiration of a term permit the applicant does not have an automatic right to renew the permit.

SECTION 4. This Act takes effect September 1, 1987.

SECTION 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

LEGISLATIVE BUDGET BOARD

Austin, Texas

FISCAL NOTE

March 20, 1987

TO: Honorable Terral Smith, Chair
Committee on Natural Resources
House of Representatives
Austin, Texas

In Re: House Bill No. 1788
By: Craddick, J. Harris

FROM: Jim Oliver, Director

In response to your request for a fiscal Note on House Bill No. 1788 (relating to the issuance of term permits for water rights) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Source: LBB Staff: JO, HES, JRH, AF

By: Harris of Brazoria, et al. (Senate Sponsor-Brown) H.B. No. 1788
(In the Senate - Received from the House May 1, 1987; May 4, 1987, read first time and referred to Committee on Natural Resources; May 14, 1987, reported favorably by the following vote: Yeas 8, Nays 0; May 14, 1987, sent to printer.)

COMMITTEE VOTE

	Yea	Nay	PNV	Absent
Santiesteban	X			
Montford				X
Armbrister	X			
Brown	X			
Lyon				X
Sarpalius				X
Sims	X			
Tejeda				X
Uribe	X			
Whitsitt				X
Zaffirini	X			

A BILL TO BE ENTITLED
AN ACT

relating to the issuance of term permits for water rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Water Code, is amended by adding Section 11.1381 to read as follows:

Sec. 11.1381. TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue permits for a term of years for use of state water to which a senior water right has not been perfected.

(b) The commission shall refuse to grant an application for a permit under this section if the commission finds that there is a substantial likelihood that the issuance of the permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources of the area.

(c) The commission shall refuse to grant an application for a term permit if the holder of the senior appropriative water right can demonstrate that the issuance of the term permit would prohibit the senior appropriative water right holder from beneficially using the senior rights during the term of the term permit. Such demonstration will be made using reasonable projections based on accepted methods.

(d) A permit issued under this section is subordinate to any senior appropriative water rights.

SECTION 2. Subsection (e), Section 11.146, Water Code, is amended to read as follows:

(e) Except as provided by Section 11.1381 of this code, if [If] a permit has been issued for the use of water, the water is not subject to a new appropriation until the permit has been cancelled in whole or part as provided by this section.

SECTION 3. Section 11.124, Water Code, is amended by adding Subsection (e) to read as follows:

(e) If the application is for a term permit, the application form used must also state that on expiration of a term permit the applicant does not have an automatic right to renew the permit.

SECTION 4. This Act takes effect September 1, 1987.

SECTION 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

H.B. No. 1788

Austin, Texas
May 14, 1987

Hon. William P. Hobby
President of the Senate

Sir:

We, your Committee on Natural Resources to which was referred H.B. No. 1788, have had the same under consideration, and I am instructed to report it back to the Senate with the recommendation that it do pass and be printed.

Santiesteban, Chairman

SENATE FAVORABLE COMMITTEE REPORT

Lt. Governor William P. Hobby
President of the Senate

5/14 3:20
(date)/(time)

Sir:

We, your Committee on NATURAL RESOURCES to which was referred HB 1788 (measure) by J. Davis (sponsor) have on 5/13 (hearing date), 1987 had the same under consideration and I am instructed to report it back with the recommendation (s) that it

(✓) do pass and be printed

( ) do pass and be ordered not printed

( ) and is recommended for placement on the Local and Uncontested Bills Calendar.

A fiscal note was requested. (✓) yes ( ) no

A revised fiscal note was requested. ( ) yes (✓) no

An actuarial analysis was requested. ( ) yes (✓) no

Considered by subcommittee. ( ) yes (✓) no

Senate Sponsor of House Measure Brown

The measure was reported from Committee by the following vote:

	YEA	NAY	PNV	ABSENT
Santiesteban, Chairman				✓
Montford, Vice Chairman	✓			
Armbrister	✓			
Brown				✓
Lyon				✓
Sarpalius	✓			
Sims				✓
Tejeda	✓			
Uribe				✓
Wildmire	✓			
Zaffirini				
TOTAL VOTES	6	0	0	5

COMMITTEE CLERK

CHAIRMAN

Paperclip the original and one copy of this form to the original bill and retain one copy for your file.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE

May 8, 1987

TO: Honorable H. Tati Santiesteban, Chairman
Committee on Natural Resources
Senate Chamber
Austin, Texas

In Re: House Bill No. 1788, as engrossed
By: J. Harris, et al.

FROM: Jim Oliver, Director

In response to your request for a Fiscal Note on House Bill No. 1788, as engrossed (relating to the issuance of term permits for water rights) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Source: LBB Staff: JO, HES, JHH, BL

70FHB1788ae

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE

March 20, 1987

TO: Honorable Turral Smith, Chair
Committee on Natural Resources
House of Representatives
Austin, Texas

In Re: House Bill No. 1788
By: Craddick, J. Harris

FROM: Jim Oliver, Director

In response to your request for a Fiscal Note on House Bill No. 1788 (relating to the issuance of term permits for water rights) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Source: LBB Staff: JO, HES, JHH, AI

70FHB1788

F

ENROLLED

H.B. No. 1768

AN ACT

relating to the issuance of term permits for water rights.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Water Code, is amended by adding Section 11.1381 to read as follows:

Sec. 11.1381. TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue permits for a term of years for use of state water to which a senior water right has not been perfected.

(b) The commission shall refuse to grant an application for a permit under this section if the commission finds that there is a substantial likelihood that the issuance of the permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources of the area.

(c) The commission shall refuse to grant an application for a term permit if the holder of the senior appropriative water right can demonstrate that the issuance of the term permit would prohibit the senior appropriative water right holder from beneficially using the senior rights during the term of the term permit. Such demonstration will be made using reasonable projections based on accepted methods.

(d) A permit issued under this section is subordinate to any

senior appropriative water rights.

SECTION 2. Subsection (e), Section 11.146, Water Code, is amended to read as follows:

(e) Except as provided by Section 11.1381 of this code, if [If] a permit has been issued for the use of water, the water is not subject to a new appropriation until the permit has been cancelled in whole or part as provided by this section.

SECTION 3. Section 11.124, Water Code, is amended by adding Subsection (e) to read as follows:

(e) If the application is for a term permit, the application form used must also state that on expiration of a term permit the applicant does not have an automatic right to renew the permit.

SECTION 4. This Act takes effect September 1, 1987.

SECTION 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

H. B. No. 1788

Speaker of the House

Chief Clerk of the House

Secretary of the Senate

President of the Senate

I certify that H.B. No. 1788 was passed by the House on April 30, 1987, by a non-record vote.

I certify that H.B. No. 1788 was passed by the Senate on May 21, 1987, by a vive-voce vote.

APPROVED: _____

Date

Governor

H. B. No. 1788

By [signature]

A BILL TO BE ENTITLED

AN ACT

Relating to the issuance of term permits for water rights.

MAR 12 1987 — 1. Filed with the Chief Clerk.

MAR 19 1987 — 2. Read first time and Referred to Committee on Natural Resources

APR 15 1987 — 3. Reported ___ favorably (as amended) (~~as substituted~~) and sent to Printer at 3:47 pm APR 18 1987

APR 21 1987 — 4. Printed and distributed at 10:59 am

APR 22 1987 — 5. Sent to Committee on Calendar at 10:59 am

APR 30 1987 — 6. Read second time (amended) passed to third reading (~~failed~~) by (Non-Record Vote) (Record Vote of ___ yeas, ___ nays, and ___ present, not voting).

_____ — 7. Motion to reconsider and table the vote by which H.B. _____ was ordered engrossed prevailed (failed) by a (Non-Record Vote) (Record Vote of ___ yeas, ___ nays and ___ present, not voting).

_____ — 8. Constitutional Rule requiring bills to be read on three several days suspended (failed to suspend) by a four-fifths vote of ___ yeas, ___ nays, and ___ present, not voting.

APR 30 1987 — 9. Read third time (amended); finally passed (~~failed~~) by (Non-Record Vote) (Record Vote of ___ yeas, ___ nays, and ___ present, not voting).

_____ — 10. Caption ordered amended to conform to body of bill.

_____ — 11. Motion to reconsider and table the vote by which H. B. _____ was finally passed prevailed (failed) by a (Non-Record Vote) (Record Vote of ___ yeas, ___ nays, and ___ present, not voting).

APR 30 1987 — 12. Ordered Engrossed at 12:46 pm

MAY 1 1987 — 13. Engrossed.

MAY 1 1987 — 14. Returned to Chief Clerk at 7:41 am

MAY 1 1987 — 15. Sent to Senate.

[signature]
Chief Clerk of the House

MAY 1 1987 — 16. Received from the House

MAY 4 1987 — 17. Read, referred to Committee on NATURAL RESOURCES

MAY 14 1987 — 18. Reported favorably

_____ — 19. Reported adversely, with favorable Committee Substitute; Committee Substitute read first time.

_____ — 20. Ordered not printed.

MAY 21 1987 — 21. Regular order of business suspended by unanimous (~~a vice-vote~~) consent (~~___ yeas~~)

22. To permit consideration, reading and passage, Senate and Constitutional Rules suspended by vote of _____ yeas, _____ nays.

MAY 21 1987 23. Read second time _____ passed to third reading by: (a viva voce vote) (_____ yeas, _____ nays.)

MAY 21 1987 24. Caption ordered amended to conform to body of bill.

MAY 21 1987 25. Senate and Constitutional 3-Day Rules suspended by vote of 29 yeas, 1 nays to place bill on third reading and final passage.

MAY 21 1987 26. Read third time and passed by (a viva voce vote) (_____ yeas, _____ nays.)

OTHER ACTION: OTHER ACTION:

Betty King
Secretary of the Senate

5-21-87 27. Returned to the House.

MAY 21 1987 28. Received from the Senate ~~(with the Senate)~~

_____ 29. House (Concurred) (Refused to Concur) in Senate (Amendments) (Substitute) by a (Non-Record Vote) (Record Vote of _____ yeas, _____ nays, _____ present, not voting).

_____ 30. Conference Committee Ordered.

_____ 31. Conference Committee Report Adopted (Rejected) by a (Non-Record Vote) (Record Vote of _____ yeas, _____ nays, and _____ present, not voting).

MAY 21 1987 32. Ordered Enrolled at 1:48 pm

NR

President of the Senate

Speaker of the House

I certify that H.B. No. 1788 (1) was passed by the House on April 30 (2), 1987, by a non-record vote.

Chief Clerk of the House

I certify that H.B. No. 1788 was passed by the Senate on May 21 (3), 1987, by a viva-voce vote.

Secretary of the Senate

APPROVED:

Date

Governor

Preparation: 'A/CT26: