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of

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November 18, 2010

Ms. LaDonna Castanuela, MC-105
Office of Chief Clerk
TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY
12100 Park 35 Circle - Bldg. F, 1st Flr
Austin, TX 78753

VIA HAND DELIVERY

RE: SOAH Docket No. 582-10-0292; TCEQ Docket NO. 2009-0185-WR

Dear Ms. Castañuela:

Please file the enclosed original copy of **Protestants' Exceptions to Proposal for Decision** in the papers of the above-referenced matter.

Copies of the enclosed are being provided to those in the attached Service List.

Thank you for your attention to this matter.

Very truly yours,


Glenn Jarvis

GJ:llc

Encl.

xc: Service List
Honorable Sharon Cloninger -via hand delivery
SOAH Clerk - via hand delivery

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November 18, 2010

Hon. Sharon Cloninger
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Rm. 502
Austin, TX 78701

VIA HAND DELIVERY

RE: SOAH Docket No. 582-10-0292; TCEQ Docket No. 2009-0185-WR

Dear Judge Cloninger:

Enclosed please find copy of Protestants' Exceptions to Proposal for Decision filed in the above-referenced matter.

Respectfully submitted,


Glenn Jarvis

GJ:llc

Encl.

xc: TCEQ Docket Clerk- via hand delivery
SOAH Clerk - via hand delivery
Service List
Mr. Van Carson
Mr. A. J. Jones
Mr. Steve Hoelscher
Mr. Stuart Seidel
Mr. Tim Brown
Mr. Tom Massey

“2. Diversion

C. Rate

For the 128.1 acre-feet of water per year authorized at a priority date of July 29, 1914, the maximum diversion rate at Diversion Point 4 is 15.11 cfs in combination with other owners of Diversion Point 1 (Owners of Certificate of Adjudication Nos. 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404). For the 124 acre-feet of water per year authorized at a priority date of October 8, 1931, the maximum diversion rate at Diversion Point 4 is 2.67 cfs.”

3. The ALJ in discussing the ED’s Closing Argument, recognized the ED’s proposal for an additional change to the OPIC’s proposal in this provision which would change the diversion rate at Diversion Point 4 from 2.67 cfs to 3.67 cfs (PFD Pg. 29). The ALJ then found that OPIC’s proposed language with the ED’s suggested modification should be incorporated in the 1298B Draft Amendment (PFD Pg. 29).

4. The ALJ also discussed in the PFD the Protestants request that the final issued version of the Certificate specifically delineate all water rights sharing Diversion Point 1 (the Diversion Point of the South Concho Irrigation Company Canal) (SCIC Canal) as “interjacent” for purposes of the time priority clause (PFD Pg. 30). The ALJ noted that the ED did not object to such a clarification and found that the following language be substituted for Section 3.A. on Page 2 of the 1298B Draft Amendment (PFD Pg. 30):

“The time priority for the right to divert and use the first 128.1 acre-feet of water per year from the diversion point authorized by this amendment is July 29, 1914 except that it is junior in priority to the interjacent water right holders of record between the two existing diversion points and downstream diversion point authorized by this amendment as they existed on the filing date of this amendment, July 7, 2006. Such interjacent owners include all water rights that share diversion point 1.”

5. In the Proposed Order attached to the PFD, the ALJ made the following Findings of Fact:

4. *COA 14-1298 described DP 1 as a point on the north bank of the South Concho River on the perimeter of a 50 acre-foot capacity reservoir located S 85 ° E, 855 feet from the northwest corner of the J. Zerbach Survey 1827, Abstract 4217, near Christoval, Texas, that is also authorized by COA 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404.*
14. *The City shares its maximum diversion rate of 15.11 cfs with the other 20-30 individual water rights owners that are also authorized to use water from the Canal diverted from DP 1.*
84. *Under the 1298B Draft Amendment, the time priority for the right to divert and use the first 128.1 acre-feet of water per year from DP 4 is July 29, 1914, except that it will be junior in priority to the interjacent water right holders of record between DP 1 and DP 4, including the other owners of DP 1, as they existed on June 7, 2006, the date TCEQ staff declared the Application to be administratively complete and filed it with the Chief Clerk.*

100.2.C. Rate

For the 128.1 acre-feet of water per year authorized at a priority date of July 29, 1914, the maximum diversion rate at Diversion Point 4 is 15.11 cfs in combination with other owners of Diversion Point 1 (Owners of Certificates of Adjudication Nos. 14-1280 through 14-1297, 14-1299 through 14-1303, 14-1314, 14-1403, and 14-1404). For the 124 acre-feet of water per year authorized at a priority date of October 8, 1931, the maximum diversion rate at Diversion Point 4 is 3.67 cfs.

101.3.A. Time Priority

The time priority for the right to divert and use the first 128.1 acre-feet of water per year from the diversion point authorized by this amendment is July 29, 1914 except that it is junior in priority to the interjacent water right holders of record between the two existing diversion points and downstream diversion point authorized by this amendment as they existed on the filing date of this amendment, July 7, 2006. Such interjacent owners include all water rights that share diversion point 1.

6. The ALJ in the PFD (Pg. 9) noted that the SCIC Canal was managed by the South Concho Irrigation Canal for its 35 members and that the Canal serves other users who take water from the

Canal for domestic and livestock purposes. (Citing in footnote 37 Protestants 1298B PFT Ex. 1 at 1-3; Protestants 1298B PFT Ex. 1-A). The ALJ in Finding of Fact No. 12 also found that water diverted at Diversion Point 1 is available for irrigation use for 20-35 individual water right holders, including the City, by virtue of COA 14-1298 and in Finding No. 14 quoted above, found that the City shares its maximum diversion rate of 15.11 cfs with the other 20-30 individual water right holders that are also authorized to use water from the Canal diverted from Diversion Point 1.

Diversion Point 1 is the gravity diversion of the SCIC Canal on the South Concho River, which has a maximum rate of diversion of 15.11 cfs (6800 gpm), which is currently shared by 35 owners of water rights on the SCIC Canal all sharing Diversion Point 1. The SCIC Canal is managed by the South Concho Irrigation Company for its members. The SCIC Canal also serves other users who take water from the Canal for domestic and livestock purposes (Mr. Seidel, Concho 1298B PFT Exhibit 1, Pgs. 1-3, Concho 1298B PFT Exhibit 1-A). (See Protestants Closing Argument, Pg. 2).

Concho 1298B PFT Ex. 1-A lists the members of SCIC and identifies each of the members water rights and shows that the SCIC Canal serves 35 members who hold rights under various Certificates of Adjudication (account numbers) identified in the Exhibit. If the information in this Exhibit is compared to the language proposed by OPIC set out in PFD Pg. 28 quoted above, and Findings of Fact No. 4, quoted above, it shows that there are more and other water right holders on the Canal who hold rights under Certificates of Adjudication Nos. 14-1300, 14-1301, 14-1302 and 14-1306 who are not identified and specified in OPIC's proposed finding and Finding of Fact No. 4. These are water rights held as shown on Exhibit 1-A by Donald Kothmann, John Gandy, Denny Brown (Bill Brown), and Brex Vinson, respectively.

7. Protestants, upon review of the evidence and with respectful deference to the OPIC, assert that this appears to be an oversight in the identification of the water rights holders on the SCIC Canal. Protestants request that (a) in lieu of citing the specific Certificate of Adjudications owned by those on the SCIC Canal in Findings of Fact No. 4, and Findings of Fact No. 100 subparagraph 2.C. Rate, that similar language as used in Findings of Fact No. 84, Finding of Fact 101(3.A.), and PFD Pg. 30 be used. That is, similar language as "... all water right holders of record sharing DP 1 as they existed on the filing date of this amendment, July 7, 2006. Such owners include all water rights holders that share diversion 1" and (b) Findings of Fact No. 4 and 14 refer generally to "approximately 35" instead of "20-30."

The Findings of Fact to read as follows:

4. *COA 14-1298 described DP 1 as a point on the north bank of the South Concho River on the perimeter of a 50 acre-foot capacity reservoir located S 85 ° E, 855 feet from the northwest corner of the J. Zerbach Survey 1827, Abstract 4217, near Christoval, Texas, that is also authorized by approximately 35 water rights holders, as shown by the records of the Commission as of the filing date of this amendment, July 7, 2006 and includes all water rights that share diversion point 1.*

14. *The City currently shares its maximum diversion rate of 15.11 cfs with the other approximately 35 individual water rights owners that are also authorized to use water from the Canal diverted from DP 1.*

100.2.C. Rate

For the 128.1 acre-feet of water per year authorized at a priority date of July 29, 1914, the maximum diversion rate at Diversion Point 4 is 15.11 cfs in combination with other owners of Diversion Point 1 (Owners of Certificates of Adjudication as they existed on the filing date of this amendment, July 7, 2006). For the 124 acre-feet of water per year authorized at a priority date of October 8, 1931, the maximum diversion rate at Diversion Point 4 is 3.67 cfs.

WHEREFORE, PREMISES CONSIDERED, the Protestants respectfully request the Commission grant their Exception suggesting this oversight and modify the ALJ's PFD Finding of Facts and to grant Protestants such other relief to which they are entitled under the law and the Commission rules.

DATED this 18th day of November, 2010.

Respectfully submitted,

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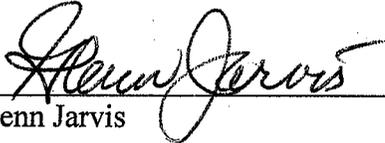


Glenn Jarvis
State Bar No.: 10588000

ATTORNEY FOR CONCHO RIVER BASIN WATER
CONSERVANCY ASSOCIATION; AND
SOUTH CONCHO IRRIGATION COMPANY

Certificate of Service

I hereby certify that on this 18th day of November, 2010, a true and correct copy of the foregoing was sent via facsimile, electronic transmission, or via hand delivery to the persons listed on the attached Service List.



Glenn Jarvis

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: CITY OF SAN ANGELO
SOAH DOCKET NUMBER: 582-10-0292 / 582-10-0293 / 582-10-0294
REFERRING AGENCY CASE: 2009-0185-WR / 2008-1616-WR / 2008-1617-WR

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ SHARON CLONINGER

REPRESENTATIVE / ADDRESS

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