

**SOAH DOCKET NO. 582-13-3040
TCEQ DOCKET NO. 2013-0174-WR**

**PETITION FOR THE APPOINTMENT § BEFORE THE TEXAS COMMISSION
OF A WATERMASTER IN THE §
BRAZOS RIVER BASIN FILED BY § ON ENVIRONMENTAL QUALITY
THE BRAZOS RIVER COALITION §**

BRAZOS RIVER AUTHORITY'S REPLY TO EXCEPTIONS

TO THE HONORABLE COMMISSIONERS:

Based on the Proposal for Decision (PFD) signed December 17, 2013 in the above referenced proceeding, the Brazos River Authority (BRA) files its Reply to the exceptions and briefs filed by several of the other parties. As throughout BRA's direct case presentation and post-hearing briefing in this contested case, BRA takes no position regarding the ultimate issue of whether a watermaster should be appointed for the Brazos River basin. However, given the Administrative Law Judges' (ALJs') recommendation for watermaster appointment, BRA maintains its support for basinwide jurisdiction for any Brazos watermaster, also recommended in the PFD and Proposed Order. In the context of this issue of geographic scope of watermaster jurisdiction, BRA hereby replies to certain exceptions and arguments made by TCEQ's Executive Director, and by the parties aligned in this proceeding as the Upper Brazos Coalition.¹

I. Reply to Exceptions of the Executive Director

Two threshold matters regarding the Executive Director's enumerated exceptions to the Proposed Order warrant consideration in the Commission's evaluation and action on the PFD. First, from the entirety of those exceptions, it appears that the Executive Director is particularly

¹ The Upper Brazos Coalition parties are the City of Abilene, the City of Lubbock, the North Central Texas Municipal Water Authority, the City of Stamford, the West Central Texas Municipal Water District, and the White River Municipal Water District.

concerned with the wording (or even inclusion) of various findings that might be viewed as the basis for criticism of the Executive Director's response to priority calls and his overall enforcement of the priority of Texas surface water rights. In fact, however, the hearing record reflects that the parties in this contested case were virtually uniformly positive in their assessments regarding the Executive Director's enforcement efforts. Based on this record, BRA would suggest that such findings included in the Proposed Order are not intended as criticism of the Executive Director's enforcement program in non-watermaster areas, and should not be interpreted that way.

Second, the Commission should be aware of the historical case context in which the Executive Director now takes the position that the "Upper Basin" – delineated to include all area and water rights above, but not including, Possum Kingdom Lake – should be excluded from watermaster jurisdiction. The Executive Director took this position for the first time in his post-hearing closing argument,² after all discovery had ended, all evidence in the contested case had been admitted, and all opportunities for cross-examination of witnesses had passed. In fact, the Executive Director himself introduced no evidence on the issue of geographic scope generally, or to support his current position on upper basin exclusion; the very summary arguments offered in his post-hearing briefing, and now in his exceptions, are pieced together only from post facto criticism of other parties' evidence and legal argument.

As discussed further below, the Executive Director's arguments accompanying his exceptions to the Proposed Order fail to consider certain critical aspects of the record evidence

² "In sum, the Executive Director sees *ample reasons to question* whether the Upper Basin should be included in the watermaster area if it is created." (ED Arg. at 17) (emphasis added); *see also* ED Exh. Alexander-1, at 7:1-8 (expressly stating no opinion on geographic scope, but referencing the two watermaster cost scenarios analyzed by the TCEQ Executive Director as part of his statutory evaluation of the need for a Brazos watermaster).

relating to the impact of excluding the rest of the upper basin, while including BRA's Possum Kingdom water right within a "lower basin" watermaster program. Additionally, there is no indication that the Executive Director ever considered an alternative partial-basin geographic scope that would exclude Possum Kingdom Lake from a proposed watermaster area, along with the rest of the upper basin that drains into this lake. If the Commission were inclined toward a partial basin watermaster program, *that* delineation would be better justified, for the reasons developed through the hearing record. BRA respectfully submits that the Executive Director's opposition to the PFD's recommendation for basinwide jurisdiction should be evaluated in this larger context.

Turning to the Executive Director's specific exceptions and arguments regarding the Proposed Order's treatment of geographic scope of a Brazos watermaster program, BRA replies to exceptions regarding two aspects of the implications of delineating the watermaster's lower basin to include Possum Kingdom Lake. First (and equally applicable to the Upper Brazos Coalition's exceptions), the reason for exclusion of "upper basin" (above Possum Kingdom) water rights from restrictions under the various recent senior priority calls examined in this case (2009, 2011, 2012, and 2013) must be understood. These upper basin rights were not excluded because there was no need for priority enforcement in that portion of the basin, but rather because BRA's Possum Kingdom water right itself (priority date 1938) is senior to the water right upon which Dow Chemical Company was basing its priority calls. *For this reason*, including those other upper basin rights in suspension or curtailment orders could not possibly result in additional water getting to Dow. Thus, to the extent that the Executive Director or the Upper Brazos Coalition base their support for upper basin exclusion only above Possum Kingdom Lake, this rationale is not well founded.

Second, BRA believes that Findings of Fact Nos. 86 and 87, directly addressing the effects on BRA and its water rights of excluding the upper basin except for Possum Kingdom Lake, are correct. The Executive Director recommends that these findings be deleted, or that they “state that BRA will be benefitted by a watermaster in the Lower Basin.” (ED Exc. at 7). He seems to argue that BRA, by paying a full allocation of watermaster expenses relating to its Possum Kingdom water right,³ would receive the same benefit as other lower basin reservoirs. This is simply not the case, however, because BRA will receive *no protection* against upstream junior diversions of inflows that it might be entitled to, unless it makes its own priority call that the Executive Director (as distinct from the watermaster) must then enforce. (*See generally* BRA Exh. 1 (Brunett prefiled), at 18:19 – 21:20). Although the Executive Director seems unconcerned with this dual approach to water rights administration and enforcement within the same basin, from BRA’s perspective it is wasteful and inefficient, where BRA would be paying Possum Kingdom’s full share of annual cost for watermaster protection. The Executive Director’s reliance on the existence of BRA subordination agreements with certain other upper basin water rights is also misplaced, as support for the lower basin delineation the Executive Director now advocates. (ED Exc. at 7). BRA does have a limited number of such agreements with other water right holders, but this limited subordination of BRA’s Possum Kingdom water right cannot justify requiring BRA effectively to give up its senior priority in Possum Kingdom Lake as against all the other junior rights in the upper basin.

³ As established through BRA’s uncontroverted evidence, its Possum Kingdom water right is by far the largest and most senior of BRA’s various reservoir water rights in the Brazos River basin. (BRA Exh. 1 (Brunett prefiled) at 21:1-4; BRA Exh. 4). Based on the diversion and storage rights authorized under that Certificate of Adjudication No. 12-5155, a substantial portion of BRA’s overall annual watermaster cost allocation would be based on its Possum Kingdom water right. (BRA Exh. 1 (Brunett prefiled) at 21:4-20).

II. Reply to Brief of the Upper Brazos Coalition

In addition to BRA's general disagreement with the Upper Brazos Coalition's position on basin delineation for watermaster jurisdiction, one legal argument now advanced by the Coalition is particularly troublesome and must be addressed. In the Coalition's critique of the ALJs' analysis, these parties argue that the requirement that surface water rights must be put to beneficial use (or non-waste) "trumps the priority of a water right in all instances." (UBC Exc. at 9-10). They characterize the prohibition against "waste" as a "dormant legal condition" to all Brazos basin water rights, then suggest that evidence of upper basin water right holders' efforts to avoid waste, or of the futility of a particular priority call as a form of waste avoidance, argues against the ALJs' findings and conclusions regarding threat to senior water rights.

Ironically, couched within an argument that the ALJs relied on "doctrine" but not Texas water law (UBC Exc. at 8-9), the Coalition cites no authority for the remarkable proposition that beneficial use⁴ (including non-waste) absolutely trumps priority, within Texas' prior appropriation doctrine. It is certainly true that the seniority of a water right does not allow any right holder to waste water, and that a right holder's beneficial use is one parameter of the scope of appropriative water rights.⁵ However, the Upper Brazos Coalition here spins that out to the extreme, and legally unsupportable, argument that the greater efficiency of allowing upper basin water to be used in the upper basin, without the losses involved in moving it downstream when needed by senior rights in the lower basin, should always take precedence over the seniority of

⁴ Chapter 11 of the Texas Water Code defines "beneficial use" to mean "use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water." TEX. WATER CODE § 11.002(4). Reducing the loss or waste of water is included among various aspects of water conservation. Cf. TEX. WATER CODE § 11.002(8)(B) (definition of "conservation"); § 11.134(b)(4) (requirement that water rights applicants demonstrate reasonable diligence to avoid waste and achieve water conservation).

⁵ See generally TEX. WATER CODE § 11.025.

those lower basin rights. This might be a convenient, and highly localized, way to justify the Coalition parties' own exemption from watermaster (or perhaps even the Executive Director's) administration of priority rights. Texas water law, however, includes no such provision that would convert the requirement of beneficial use, or any resulting TCEQ application of that principle in water rights administration, into a requirement of (relatively more) efficient use.⁶ The Upper Brazos Coalition's argument for such a "waste trumps priority" principle must be rejected, and provides no basis to challenge the ALJs' recommendation for basinwide watermaster jurisdiction in this case.

III. Conclusion

For the foregoing reasons, BRA respectfully submits that the PFD and Proposed Order drafted by the ALJs correctly synthesize the record evidence on the referred issue of geographic scope in this contested case proceeding – expert hydrology, as well as the equities and the comparative efficiencies related to full-basin and lower-basin-only scenarios, establish that the jurisdiction of any appointed Brazos watermaster should encompass the entire Brazos River basin. Alternatively, should the Commission consider that some upper-lower basin division is appropriate, and justifies exclusion from watermaster jurisdiction, that division should be delineated to include BRA's Possum Kingdom water right as part of the excluded upper basin.

Respectfully submitted,

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⁶ *Cf. City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955) (approving the city's transportation of artesian well water along 118 miles of surface watercourses to its diversion point, even though at times as much as two-thirds to three-fourths of the original supply was lost in transit due to evaporation, seepage, and transportation).

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CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that on this 16th day of January, 2014 a true and correct copy of the above and foregoing BRA's Reply to Exceptions was forwarded via e-mail or facsimile to the parties on the attached Service List.


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