

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

PETITION FOR THE APPOINTMENT	§	BEFORE THE STATE OFFICE
OF A WATERMASTER IN THE	§	
BRAZOS RIVER BASIN FILED BY THE	§	OF
BRAZOS RIVER COALITION	§	
	§	ADMINISTRATIVE HEARINGS
	§	

**ALIGNED PARTIES’ RESPONSE TO EXCEPTIONS TO THE PROPOSAL FOR
DECISION AND PROPOSED ORDER OF THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS**

Gulf Coast Water Authority, The Dow Chemical Company, NRG Power Texas LLC and R.E. Janes Gravel Company (collectively, “Aligned Parties”) respectfully urge the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) to adopt Administrative Law Judges (“ALJs”) William Newchurch and Hunter Burkhalter’s Proposed Order with the minor clarifications noted in the Aligned Parties’ Exceptions.

The Aligned Parties will briefly reply to the exceptions of the other parties, as follows:

- 1. The Commission Unquestionably Has Jurisdiction to Appoint a Watermaster.**

The Bell County Group (“Bell Co. Group”), Brazos Family Farmers and Ranchers (“BFFR”)¹, and the Leonard Trusts take issue with the ALJs’ spot-on determination that the Commission has subject-matter jurisdiction to appoint a watermaster even though some petitioners withdrew from the petition during the course of the hearing. Exceptions filed by

¹ BFFR also makes an argument that the Commission cannot now act because the 25-signature petition is a condition precedent to acting. As explained by the ALJs, this argument is indistinguishable from the subject-matter jurisdiction argument.

these parties are simply a rehashing of unsuccessful arguments; arguments which are wrong as a matter of law and policy. The Aligned Parties thoroughly addressed these arguments in our reply to the motion for summary disposition² and in our closing and reply to closing, and the ALJs addressed and rejected those same arguments both in their ruling on the motion for summary disposition and in their Proposal for Decision (“PFD”). As supported by the positions set out in the foregoing, the Commission unquestionably has subject-matter jurisdiction to appoint a watermaster for the Brazos River basin.

The PFD summarizes the facts, which are not in dispute. On January 7, 2013, a petition signed by 37 water right holders in the basin was filed with the TCEQ Chief Clerk.³ After the Executive Director’s staff reviewed the petition and confirmed that each signature was associated with a certificate of adjudication or a permitted water right in the Brazos River basin,⁴ the Chief Clerk sent notice to each of the petitioners, and to all water right holders in the basin, that the Commission would consider the petition at the Commission’s meeting on February 13, 2013.⁵ At the meeting, no petitioner appeared and asked to be removed from the petition. The Commission considered the petition it *received*, determined that the petition was signed by more than 25 water right holders, and, therefore, referred to the State Office of Administrative Hearings (“SOAH”) for a hearing on whether a watermaster should be appointed.⁶ Specifically, the Commissioners found at the critical point in time that “the Petition filed by the Brazos River Coalition was signed by 25 or more water rights holders on the Brazos River.”⁷

² Aligned Parties’ Response to the Joint Motion for Summary Disposition (September 3, 2013).

³ PFD, Proposed Finding of Fact (“FOF”) No. 1; ED Ex. A.

⁴ ED Ex. A, p. 17 Memorandum from Robin Smith to Commissioners (January 23, 2013).

⁵ Notice of Agenda Setting TCEQ Docket No. 2013-0174-WR (January 29, 2013) (mailed to “water right holders in the Brazos River Basin”).

⁶ Interim Order Concerning the Petition for Appointment of a Watermaster in the Brazos River Basin Filed by the Brazos River Coalition; TCEQ Docket No. 2013-0174-WR (February 19, 2013).

⁷ *Id.*

As argued by the Aligned Parties and the Executive Director, and as determined by the ALJs, under the circumstances of this case, this is the end of the inquiry with regard to the number of petitioners. The Commission *received* a petition signed by more than 25 water right holders in the basin. Under the Water Code, the Commission was then obligated to call and hold a hearing to determine whether a need exists for appointment of a watermaster.⁸ The purpose of the petition is not to give the Commission jurisdiction to appoint a watermaster; the purpose of the petition is to trigger the Commission's statutory obligation to determine whether a watermaster is needed (if the Commission does not trigger that obligation on its own).

The Bell Co. Group, BFFR, and the Leonard Trusts misconstrue the statute and argue that the Commission cannot appoint a watermaster if the number of petitioners does not exceed 24 at the time of the Commission's final order, regardless of whether there is a record before the Commission confirming that a need exists for the appointment of a watermaster. The statute contains no such requirement. Nor does it contain a requirement that the Commission make findings regarding the number of petitioners at the time it directs or denies the appointment of a watermaster.⁹ The Protestants want to create an unprecedented, substantive requirement neither contemplated by the statute, nor workable procedurally.¹⁰

In its exceptions, the Bell Co. Group also misconstrues Commission precedent when it asserts that the Commission's jurisdiction can be affected after an initial petition is

⁸ The statute states "On receiving a petition for appointment of a watermaster . . . the commission shall call and hold a hearing to determine if a need exists for appointment of a watermaster for the river basin or segment of the river basin." Tex. Water Code § 11.452(a).

⁹ The operative provision, Texas Water Code § 11.452(c), which sets out the determinations necessary to support the appoint of a watermaster, does not require a determination that at least 25 water right holders in the basin continue to support such an appointment.

¹⁰ Would you need a hearing on support of petitioners, and a periodic poll throughout the course of the hearing on the merits? Would a Commission order appointing a watermaster become invalid if the number of original petitioners dropped below 25 after adoption of the order but before the appointment of the watermaster?

received.¹¹ In the Concho Watermaster Case, the Commission, *before* concluding that it had received a petition from 25 water right holders satisfying § 11.451 and *before* issuing an Interim Order referring the matter to SOAH, decided to consider at an Agenda whether domestic and livestock (“D&L”) users could count toward the 25 signatures as a matter of statutory construction. But, before the Agenda, a second, free-standing petition that contained 34 signatures from appropriate water right holders was filed,¹² obviating the need to address the D&L question. Contrary to the Bell Co. Group’s position, no signatures were “added” to any petition and all of this occurred before the Commission found that it had received a valid petition and sent the matter to SOAH for a hearing.¹³

The Bell Co. Group also argues that the ALJs’ interpretation of the statute would lead to a theoretically “absurd” result – that the Commission would have jurisdiction to appoint a watermaster even if **all of the parties** advocating a watermaster withdrew support during the course of a hearing. The problem with the Bell Co. Group’s argument is that such a result is not even theoretically possible. If all parties advocating the appointment of a watermaster withdraw from the SOAH proceeding, and the Commission fails to move for the appointment, the Executive Director will not continue to pursue the matter, and it would be dismissed for want of prosecution. The Bell Co. Group also ignores the fact that parties, other than petitioners, may participate in the hearing and advocate for the appointment of watermaster. Likewise, the Commission itself has the authority¹⁴ to call and hold a hearing to determine if a need exists for the appointment of a watermaster, independent of any petition.

¹¹ Bell Co. Group Exceptions p. 9.

¹² Order Appointing a Watermaster for the Concho River Segment, TCEQ Docket No. 2000-0344-WR; SOAH Docket No. 582-02-2130, TCEQ (Aug. 17, 2004) (the “Concho Final Order”) at FOF No. 1.b.

¹³ Concho Final Order at FOF No. 2, 3.

¹⁴ Tex. Water Code § 11.451.

Now that a hearing has been held, the issue for the Commission is not the number of petitioners, but whether there is a need for a watermaster.

After the hearing, the commission *shall make a written determination as to whether a threat exists* to the rights of senior water rights holders in the river basin or segment of the river basin and *shall issue an order either finding that a threat exists and directing appointment of a watermaster or denying appointment of a watermaster.*¹⁵

The ALJs' analysis and reasoning regarding this issue are legally and factually sound and should be adopted by the Commissioners. All the exceptions raised by the Bell Co. Group, BFFR, and the Leonard Trusts should be denied.

2. The Seniority of Water Rights is a Critical Component of Texas Water Law.

A water right is the right to appropriate surface water for beneficial use. The right to divert and use state water is a vested property right of the water right holder.¹⁶ “As between appropriators, the first in time is the first in right.”¹⁷ This is the prior appropriation doctrine.¹⁸ This central tenet of Texas surface water law defines how water is to be allocated in times of shortage (considering other criteria such as need and waste) and is at the heart of Texas' permitting process,¹⁹ its water planning²⁰ and the daily as well as long-term planning decisions made by both planning groups and individual water rights holders in the Brazos River basin.²¹

¹⁵ Tex. Water Code §11.452(c) (emphasis added).

¹⁶ See *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971).

¹⁷ Tex. Water Code § 11.027.

¹⁸ UBC asserts that the PFD is flawed because the ALJs relied on “doctrine” and not “law,” despite this express statutory language – a misguided notion.

¹⁹ Tr. p. 657:3-7 (Alexander). See Tex. Water Code §§ 11.131(a), 11.134(b)(2)(3) (new permit requires that there be unappropriated water and no impairment to existing water rights).

²⁰ GCWA-200 at 18:19-20 (Furnans).

²¹ Just recently a Travis County district court applied this statutory language – the prior appropriation doctrine – to invalidate 30 Texas Administrative Code Chapter 36, Suspension or Adjustment of Water Rights During Drought or Emergency, which impermissibly diverged from the doctrine's plain terms. Order on Cross Motions for Summary Judgment, *Texas Farm Bureau, et. al. v. TCEQ*, No. D-1-GN-12-003937 (53rd Dist. Ct., Travis County, June 6, 2013).

The priority date of water rights (the seniority) thus is a key element of the rights that the statute targets for the protection a watermaster can provide.

A watermaster is a legislatively-provided tool for managing water rights consistent with prior appropriation doctrine, beneficial use and other tenets of Texas water law that can be secured by a showing of “threat” to senior water rights and the “need” for a watermaster. As held by the Commission in a Final Order²² and as expressly reiterated by the Commission in a related context in 2012,²³ “threat” to the rights of senior water rights holders as used in Chapter 11, Subchapter I, of the Water Code means a set of circumstances creating the possibility that senior water rights holders may be unable to fully exercise their rights. A threat is not confined to situations in which other people or groups convey an actual intent to harm such rights. Further, “the context of Chapter 11, Subchapter I, of the Water Code does not demand that, before the rights of senior rights holders are threatened, senior water rights holders must make calls for water on junior water rights holders and then junior water rights holders must either fail or refuse to comply with the calls.”²⁴

The Commission’s statutory interpretation of “threat” incorporates consideration of a number of reasonable factors and was overwhelmingly met by the evidence in this case.²⁵ This standard is not “minimal”²⁶ and does not create a “rebuttable presumption” of threat as asserted by Protestants;²⁷ rather, it involves a meaningful evaluation consistent with the common usage of ‘threat’ – meaning conditions indicating impending harm (not harm that has occurred). For example, a single cloud might not ‘threaten’ rain if the cloud is not big enough or dark

²² Concho Final Order, Conclusion of Law (COL) No. 4, 5, 6.

²³ ED-Hooper-7 at 4 (Review under Tex. Water Code § 11.326(g); Exhibit ED-Alexander-1 at 6: 14-23 (Alexander)).

²⁴ Concho Final Order, COL No. 6.

²⁵ PFD at 20-22.

²⁶ Bell Co. Group Exceptions p. 10.

²⁷ UBC Exceptions p. 5.

enough, but a big, dark cloud, preceded by days of heavy rain, most certainly ‘threatens’ rain.²⁸ After allowing for full development of the record and legal argument, the ALJs ruled it is “reasonable and appropriate to interpret the term ‘threat’ consistently with the existing precedent from the Concho River case.”²⁹

Having identified the legal standard, the ALJs evaluated extensive factual and expert evidence showing both the risk of harm to senior water rights and examples of actual harm that inform the multiple factors set out in the Concho Final Order.³⁰ They found overwhelming evidence that “threat” existed in this case. Even if they had decided upon a different legal standard, one that required actual harm (or repeated actual harm) as asserted by the Protestants under various frameworks, the ALJs found that “by almost any measure,” the evidence shows “threat” because, while actual harm is not the statutory standard, there is “ample proof that actual harm has been suffered, and will continue to be suffered, by a number of senior water rights.”³¹

3. The ALJs Adopted the Appropriate Legal Standard for “Threat” to Senior Water Rights.

The Protestants assert certain exceptions to the interpretation of “threat” as adopted by the ALJs, beginning with hyperbolically minimizing the standard. In one example, BFFR twists the ALJs’ words and construe the PFD as suggesting the ALJs literally found this an “easy case.”³² The ALJs said no such thing. On the contrary, the ALJs merely rejected the Protestants “high hurdle” arguments, stating that “appointing a watermaster was never intended

²⁸ See Aligned Parties’ Closing Brief p. 5.

²⁹ PFD p. 20.

³⁰ PFD p. 28-41. No expert disputed the existence of a threat to senior water rights in the Brazos River basin; Mr. Hibbs only disputed the existence of “threat” in the portion of the Basin above Possum Kingdom Reservoir (the “Upper Basin”). Possum Kingdom Reservoir and all downstream tributaries and reaches are referred to herein as the “Lower Basin.”

³¹ PFD p. 39.

³² BFFR Exceptions p. 5 (citing PFD p. 15).

to be an *especially* difficult, or disfavored, thing to do.”³³ Instead, the ALJs decided to follow the Commission’s existing, reasonable standard,³⁴ rather than diverting to an *especially high* standard unsupported by principles of statutory interpretation and virtually impossible to meet without the data available only to a watermaster.

In another example, Upper Brazos Coalition (“UBC”) tries to color the statutory language by asserting that because Texas Water Code § 11.456 delegates to the Commission *the ability* to issue protective orders during Texas Water Code § 11.452 proceedings, this equates to a signal that § 11.452 requires a high hurdle to the appointment of a watermaster. Under some facts, extraordinary relief might be needed while the many-months-long hearing process plays out; that *discretionary* power - not a mandate whatsoever – does not imply anything about the statutory standard for appointment based on the filing of a petition by water right holders.

Some Protestants move on to suggest that following Commission precedent would be unfair because the ALJs denied the Aligned Parties’ Motion for Summary Disposition seeking to establish this legal standard solely as a matter of established precedent prior to the filing of testimony. No Protestant filed their own motion for summary disposition on the legal standard at any point. The ALJs ruled that the Commission’s precedent would not “control” this proceeding *solely as a matter of precedent*, not that the standard would be disregarded, which would have been an arbitrary act.³⁵ The ALJs provided the opportunity for the Protestants to present their arguments about the appropriate legal standards in the full factual context of the Brazos River basin. After full briefing, the Protestants were simply unsuccessful in presenting an alternative standard that would comport with appropriate statutory interpretation and justify a departure

³³ PFD p. 15 (emphasis added).

³⁴ PFD p. 22.

³⁵ “[A]n agency must explain its reasoning when departing from prior norms.” *Oncor Elec. Del. Co., v. PUC*, 406 S.W.3d 253, 267 (Tex. App. – Austin 2013, no pet.) (citing *Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 544-45 (Tex. App. – Austin 2002, pet. denied).

from precedent, notwithstanding any factual differences between the Brazos River basin and the Concho River basin.

The Bell Co. Group takes one final position in its exceptions related to defining threat that warrants a response. It suggests that the Concho Final Order requires that each of the listed considerations in the Concho Final Order be present and proven to a certainty to establish a “threat.”³⁶ The ALJs rightly reject this argument. Read in context, and as determined by the ALJs, the Concho Final Order says that, in times of water shortage, senior water rights are threatened *by each of* the factors specified and those individual risks of harm are collectively considered in determining whether there is a “*set of circumstances* creating the possibility that senior water rights holders may be unable to fully exercise their rights”³⁷ – that is, a statutory “threat” to senior water rights. This is the logical and plain construction of the Concho Final Order.

4. The Evidence Regarding Threat to Senior Water Rights is Sound and Substantial.

The Protestants criticize the Aligned Parties’ recognized experts’ multiple analyses made using available tools and data, such as self-reported water use reports, WAM modeling, and even helicopter surveillance.³⁸ But ironically, their suggested standards for allowing these expert analyses to have any probative force would rely on a level of data that only a watermaster would be able to gather.³⁹ The ALJs properly evaluated the probative force of the admitted evidence.

The Executive Director suggests deleting certain FOFs, specifically FOFs 39, 40, 44, 45, 47, 48, and 49. All of those FOF are supported by the evidentiary record and should be

³⁶ Bell Co. Group Exceptions p. 11-12.

³⁷ Concho Final Order, FOF No. 4.

³⁸ Bell Co. Group Exceptions p. 13-17.

³⁹ See Aligned Parties’ Response to Closing Arguments p. 9-11 for further discussion.

retained. By way of example, FOF 39 states: “In recent years, a number of junior water right holders in the Basin have made out-of-priority diversions or impoundments in violation of the prior appropriation doctrine.” This finding is *first* supported by the Executive Director’s implementation of multiple priority calls in the Brazos River basin, which each operated from the conclusion by the TCEQ that stopping out-of-priority diversions and impoundments⁴⁰ would generate water for the caller. Relying on the priority calls alone, FOFs 39, 45 (first clause), 47, 48 and 49 should be retained without modification. Further, there is evidence of specific out-of-turn diversions and impoundments *during multiple call periods*.⁴¹ In addition, looking beyond the priority calls’ implementation periods and reaches, there is credible evidence provided by qualified experts based on demonstrated needs for water by downstream senior water right holders and upstream junior diversions during those periods of need.⁴²

By these exceptions, the Executive Director seems to focus only on the evidence associated with periods and places outside of the priority calls and takes issue with that additional evidence. The Executive Director then implies that only priority call periods and only water rights located in the geographic areas where priority calls were implemented are relevant to the evaluation of threat to senior water rights.⁴³ But prior appropriation is a statutory requirement⁴⁴ relevant *at all times* and is built into the express terms of *every* water right – even very senior rights like Gulf Coast Water Authority’s 1926 water right state:

⁴⁰ The July 2, 2013 Suspension Order expressly recognized that out-of-turn impoundments were affecting the ability of downstream seniors to take all of their water and required junior impoundments to submit pass through plans showing how such out-of-turn impoundments would be avoided. GCWA Ex. 104.

⁴¹ See PFD p. 33- 34 (Dr. Brandes identified impoundments and junior, self-reported usage during calls); p. 35 (Dr. Furnans identified junior diversions during a 2013 call); Tr. p. 408:23-25; 409:1-2 (Maddux) (no water passed from Leonard Trusts’ reservoir during call period).

⁴² See PFD p. 33-36; Aligned Parties Closing Brief p.11-12, 14-15.

⁴³ The Executive Director points out that its witness testified that “a junior water right taking water out-of-priority would not be enforced as a violation if there was no senior call.” Executive Director’s Exceptions p. 4.

⁴⁴ Tex. Water Code § 11.027.

This certificate of adjudication is issued subject to senior and superior water rights in the Brazos River Basin.⁴⁵

As explained by TCEQ in guidance, this means that junior water right holders should “look downstream” to other water right holders to determine if senior water right holders need the divertable water.⁴⁶ The guidance goes on, saying, “Your goal is to determine how much water is needed, in terms of flow rate, to make water available to all downstream users who are ahead of you in line for the available water. (It is highly unlikely that you will have easy access to all of the information you need to calculate this flow rate.)”⁴⁷ While no party faults upstream junior diverters for the practical reality that they cannot, under present circumstances, know when water is truly available under their water right, there is a difference between enforcement discretion – that there should not be enforcement when a junior water right hold has insufficient information – versus the notion that prior appropriation simply disappears because of this insufficient information.⁴⁸

Thus, the Commission has held that priority calls are not required to show threat,⁴⁹ though they are certainly sound evidence of a threat to senior water rights, and directed staff generally to follow that holding.⁵⁰ The flip side of that, apparently misunderstood by the Executive Director, is that the lack of calls, or TCEQ’s failure to respond to a call, in a particular area is not definitive proof that a threat does not exist. Thus, based on TCEQ’s implementation of multiple priority calls, the analyses performed and testified to by Dr. Brandes and Dr.

⁴⁵ GCWA-102 at 4; *see also, e.g.*, GCWA-102 at 8, 12, 16, 19, DOW 101 at 5; Gavranovic-08; LT-002 at 2; UBC Exhibit 2 at 4, 6, 8, 10, 12, 14, 16.

⁴⁶ GCWA-202 at 11.

⁴⁷ GCWA-202 at 11-12.

⁴⁸ GCWA-200 at 20-6:15; GCWA-200 at 25:8-16; Exhibit DOW 200 at 16:11-20; p.17:19; 31:10-15.

⁴⁹ Concho Final Order, COL No. 6.

⁵⁰ ED-Hooper-7 at 4 (Review under Tex. Water Code § 11.326(g); Exhibit ED-Alexander-1 at 6: 14-23 (Alexander). Priority calls are a sufficient but not necessary condition to establish threat.

Furnans, and other facts in the record, all reasonably credited by the ALJs, the referenced FOFs should be retained.

Lastly, waste was appropriately evaluated by the ALJs in reaching their conclusions. UBC asserts that the ALJs' analysis suggests "diversions should yield to downstream senior or superior needs even if doing so wastes State water."⁵¹ However, this is belied by the ALJs' express recognition that a watermaster's tools help "address the timing of diversions thereby reducing the likelihood of waste."⁵² Further, the ALJs found that "[w]atermasters can deal with shortages in a more nuanced and individualized basis than Regular Staff is able to do with a priority call order, thereby maximizing the use of water *and avoiding waste* while better enforcing the prior appropriation doctrine."⁵³ These conclusions are supported by evidence regarding the data a watermaster has available, such as Declarations of Intent to Divert, and the dedicated focus a watermaster provides.⁵⁴ The proposed order appropriately reflects facts and legal conclusions regarding the threat to senior water rights in the entire Brazos River basin.

5. The ALJs Properly Found a Need for a Watermaster in the Brazos River Basin.

The ALJs determined that the need for a watermaster should be examined further beyond the existence of a threat to senior water rights. To that end, the ALJs thoroughly evaluated the evidence relevant to a variety of standards for "need," including their articulated "desirability" standard, which is a reasonable statutory interpretation.⁵⁵ Notwithstanding this articulated test, the ALJs also expressly found that "the evidence overwhelmingly establishes

⁵¹ UBC Exceptions p. 10.

⁵² PFD p. 46; ALJs' Proposed Order, FOF No. 64.

⁵³ ALJs' Proposed Order FOF No. 69.

⁵⁴ *See e.g.*, PFD p. 28.

⁵⁵ PFD p. 44.

that the benefits of appointing a watermaster will outweigh its costs,”⁵⁶ which also satisfies the Executive Director’s proposed “totality of the circumstances” test.

The Protestants complain that a “want” is not a “need,”⁵⁷ and have previously asserted that the standard should be whether the existence of a watermaster would have changed the outcome of the threat,”⁵⁸ among other things. The ALJs found that because of its dedicated nature and resources, the watermaster would detect and stop violations sooner, increase transparency and communication, and actively manage water resources in a way that is not possible under the present program⁵⁹ – all things that would have an effect on what happens in a shortage. A concise summary of the benefits of a watermaster, as testified to by the Executive Director’s witness, is attached hereto. In short, the proposed order appropriately reflects facts and legal conclusions regarding the need for a watermaster in the Brazos River basin and the Protestants’ exceptions should be denied.

6. The ALJs Correctly Concluded that the Watermaster Should Have Jurisdiction Over the Entire Basin.

Based on the evidence admitted in the hearing, the ALJs determined that the entire Brazos River basin should be placed within the jurisdiction of a watermaster because (1) senior water rights are threatened throughout the basin (including in the Upper Basin); (2) dividing the basin at Possum Kingdom would be inequitable to the Brazos River Authority (“BRA”); and (3) reducing the watermaster’s jurisdiction would substantially reduce the watermaster’s effectiveness. The ALJs’ determination is fully supported by the record evidence. The exceptions filed by the Executive Director and some of the Protestants do not provide sufficient justification to overturn the ALJs’ determination.

⁵⁶ PFD p. 56.

⁵⁷ UBC Exceptions p. 4; BFFR p. 10.

⁵⁸ UBC Closing Argument p. 9.

⁵⁹ PFD p. 56-57.

In this regard, the Executive Director recommends that FOFs 84 through 89 be deleted. The Aligned Parties respectfully disagree. The Executive Director contests the ALJs' finding that the Upper Basin is an integral part of the entire basin "because the Lower Basin can be managed by a watermaster whether or not the Upper Basin is included."⁶⁰ The Executive Director's position misconstrues the appropriate legal standard—whether the area is an "integral part" of the threatened river system,⁶¹ not whether part of the basin "can be managed" without that area.⁶² The evidence in this record demonstrates that the integral parts of the system include the entire basin upstream from the threatened senior water rights (including BRA's Possum Kingdom right and senior rights in the Upper Basin).

The Executive Director also argues that the Upper Basin can be excluded from the watermaster's jurisdiction because the Rio Grande and Concho watermaster jurisdictional areas only partially cover their basins.⁶³ However, those situations are distinguishable from this case. Although a portion of the river basin is excluded from the Concho Watermaster's jurisdiction, the excluded portion is downstream of (and therefore not integral with respect to) the threatened water rights in the Concho River basin. In that case, the Commission determined that the upstream areas were "an integral part of the overall Concho system and should not be deleted from the watermaster's geographical and jurisdictional boundaries."⁶⁴ The lower basin was excluded as a non-integral part of the system because diversions by downstream water rights do not reduce flows to upstream water rights. The Rio Grande Watermaster's jurisdictional area also does not support limiting the geographic scope of the watermaster program in this case. The

⁶⁰ ED's Exceptions p. 6 (Exception to FOF 84).

⁶¹ Concho Final Order, FOF 13.

⁶² The Executive Director's test provides no meaningful basis for determining how to separate, for regulatory purposes, a hydrologically integrates river system.. What level of degradation in management would the Executive Director allow? What differentiates a "little" threat from an actionable threat?

⁶³ ED's Exceptions p. 6 (Exception to FOF 84).

⁶⁴ Concho Final Order, FOF 13.

Rio Grande Watermaster is a situation inapposite to the matter before the TCEQ because the Rio Grande River is subject to two interstate compacts and an international treaty. A large portion of the Rio Grande River is not even subject to the prior appropriation doctrine.

The Executive Director disputes that dividing the Brazos River Basin at Possum Kingdom would be inequitable to BRA, which owns the water right authorizing the impoundment. Surprisingly, the Executive Director disputes the unquestionable hydrologic fact that Possum Kingdom is entirely dependent on water flows from the Upper Basin. The Aligned Parties showed that, if the Upper Basin were excluded from the jurisdiction of the watermaster, impoundments in Possum Kingdom would be reduced by as much as 100,000 acre-feet.⁶⁵ The Executive Director's exceptions to FOF 86 and 87⁶⁶ do not acknowledge the evidence proving the negative impacts that excluding the Upper Basin from the watermaster's jurisdiction could have on Possum Kingdom Reservoir.

The Executive Director criticizes the results of Dr. Brandes' models and excepts to FOF 45 regarding threats in the Upper Basin. However, the Executive Director has failed to state any clear reasoning for rejecting the models, and has demonstrated a misunderstanding of the cutoff model that may explain his misinterpretation of its results.⁶⁷ Likewise, UBC takes exception that the cutoff model is "absurd" and not justifiable evidence of Upper Basin impacts on the Lower Basin in FOF 78,⁶⁸ but does not provide any counterevidence to support their opinion. These parties ignore the fact that Dr. Brandes thoroughly explained how the procedure

⁶⁵ Exhibit AP-7.

⁶⁶ ED's Exceptions p. 6-7.

⁶⁷ ED's Closing Argument p. 15 (The Executive Director stated that the cutoff model shows "would happen to the reliabilities of the respective water rights if the Upper Basin were to use strict natural priority and then the Lower Basin use the prior appropriation system.").

⁶⁸ See Exhibit AP-4.

he used avoided the problems that the Executive Director surmised to exist in Dr. Brandes' analyses and explained why the cutoff model is an appropriate tool for the issues he addressed.⁶⁹

Finally, the Executive Director contests the ALJs' finding that appointing a watermaster for the entire basin would be more efficient than only appointing a watermaster for the Lower Basin. The only argument offered by the Executive Director is that there are other water programs that do not include the entire basin. This argument is unpersuasive for the reasons stated previously. The Concho River Watermaster has jurisdiction over all portions of the basin upstream of the threatened senior water rights. Extending jurisdiction downstream from the threatened water rights would not improve the efficiency or effectiveness of the watermaster program. The Rio Grande Watermaster is an entirely unique situation, that cannot stand as precedent for any other watermaster program in the state. Additionally, the Executive Director's own witness, Dr. Alexander, testified as to a plethora of benefits that a watermaster program has over TCEQ enforcement,⁷⁰ many of which will make a full-basin program more efficient.

One of the benefits of a watermaster program is that the watermaster has a continuous management role over the water rights within the watermaster area; however, priority enforcement by the TCEQ in a non-watermaster area is not exercised until a call or complaint has been evaluated and a call order or other directive has been formally issued. If the Upper Basin is ultimately in a non-watermaster area, its characteristics of being "flashy" and having water rights predominately based on storage will mean that most of the water may already be stored in a junior priority reservoir by the time the Executive Director responds to a senior priority call. Once the water is permissibly stored in a reservoir, it is not subject to being

⁶⁹ Tr. 815:7 – 819:1 (Brandes).

⁷⁰ Exhibit AP-4 (Attachment A); Tr. p. 668-674 (Alexander).

required to be released to a downstream senior water right holder.⁷¹ Conversely, a watermaster (with jurisdiction over the Upper Basin) would be able to evaluate daily conditions and require a junior reservoir owner to pass water to downstream senior water rights in accordance with priority and without waste.

UBC's exceptions on the issue of geographic scope are based on its mischaracterization of the ALJs' analysis. UBC misstates the PFD by claiming that the "ALJs conclude that these two calls [the D&L calls in the Upper Basin] – futile as they were – prove that a watermaster is needed in the Upper Basin,"⁷² and that failing to split the basin will somehow lead to "waste." The problem with UBC's exceptions is that the ALJs do not conclude that the two D&L calls alone prove that a watermaster is needed in the Upper Basin.⁷³

In their PFD, the ALJs cite to copious evidence provided by both BRA and the Aligned Parties supporting full-basin jurisdiction, including: 1) testimony from BRA's witness, Mr. Brunett, that any watermaster program should cover the entire basin to "protect BRA's Possum Kingdom water right,"⁷⁴ to have "administrative efficiency,"⁷⁵ and to keep BRA from "paying a substantial amount of money for the watermaster program without receiving the benefits of the program for its Possum Kingdom rights",⁷⁶ 2) expert witness testimony from Dr. Brandes "that the entire Basin should be governed by a watermaster",⁷⁷ 3) a map provided by Dr. Brandes showing that other watermaster programs in Texas have "precipitation totals similar"⁷⁸

⁷¹ Tr. 534:16-18 ("Once stored, it's the impounders right to use it as they see fit within the four corners of their permit.") (Hibbs).

⁷² UBC Exceptions p. 7.

⁷³ UBC cites pages 40 and 41 of the PFD as support for its conclusion. These pages, which address the issue of threat and not geographic scope, contain no mention of the two futile D&L calls. The ALJs' analysis of geographic scope is on pages 66 through 68 of the PFD. This analysis does not reference or rely on the D&L calls.

⁷⁴ PFD at 61.

⁷⁵ PFD at 62.

⁷⁶ *Id.*

⁷⁷ PFD at 63.

⁷⁸ *Id.*

to the Upper Basin, 4) the results from Dr. Brandes' cutoff model that "'clearly demonstrate' that the entire Basin should be included within the watermaster's jurisdiction",⁷⁹ 5) Dr. Brandes' analysis of "the relative priorities of water rights in the Basin," which demonstrated that "the watermaster's effectiveness at protecting senior rights would be significantly limited",⁸⁰ 6) the testimony of Janes Gravel, which is located in the Upper Basin, that "the jurisdiction of the watermaster should include the Upper Basin",⁸¹ and 7) expert witness testimony from Dr. Furnans that "the entire Basin should be placed under the jurisdiction of a watermaster."⁸² The ALJs determined that all of this evidence, not just the two Upper Basin futile calls, proved that the appropriate geographic scope for the watermaster program should be the entire Brazos basin.

Moreover, priority calls, deemed futile or not, are still senior calls that arise from the threat to senior water rights during times of shortage. UBC attempts to diminish the two Upper Basin priority calls as insignificant because of their futility, but ignores the inherent nature of calls being made as evidence in support of the need for a watermaster program in that area. Whether a particular call is futile is determined on a case-by-case basis,⁸³ and as of a particular moment in time. That those calls were determined to be futile at the time does not mean all future calls will forever be futile; these calls add to the probative evidence on threat to senior water rights in the Upper Basin.

UBC also attempts to diminish the evidence provided by Janes Gravel. Janes Gravel, located in the Upper Basin, provided extensive testimony and evidence that the geographic scope of the watermaster program should include the Upper Basin. UBC's exceptions rely on facts taken grossly out of context. For example, UBC claims Janes Gravel

⁷⁹ PFD at 64.

⁸⁰ *Id.*

⁸¹ PFD at 65.

⁸² *Id.*

⁸³ Janes 100 at Janes 5 77:18-79:14 (Ramos Deposition Testimony).

was able to fully exercise its water right in 2011, and that Janes Gravel “has always been able to divert all the water it needed to support its enterprise.”⁸⁴ However, UBC omits the important fact that while Janes Gravel has been able to stay in operation with its current water supply, it was not because it could divert its full water right. To the contrary, Janes Gravel has routinely been forced to recycle water it manages to divert to the fullest extent possible in order to continue operations since it could not divert its full water right.⁸⁵ Further, Janes Gravel’s water use reports clearly establish that it rarely, if ever, has been able to divert its full water right.⁸⁶

UBC’s claim that Janes has never complained about water use activity or made a priority call is irrelevant and misleading. Priority calls and complaints are not prerequisites to finding threat or need. Janes Gravel has challenged UBC member the City of Lubbock’s water use by opposing its attempts to further appropriate water in the Brazos River basin. That case currently remains in district court litigation.⁸⁷

The ALJs were presented with an abundance of technical and testimonial evidence supporting a full-basin watermaster program and correctly determined that the Upper Basin should be included in the watermaster’s jurisdiction.

7. Conclusion

For these forgoing reasons, the Aligned Parties respectfully urge the Commission to adopt the ALJs’ Proposed Order with the minor clarifications noted in the Aligned Parties’ Exceptions.

⁸⁴ UBC Exceptions p. 8.

⁸⁵ Janes 100 at 9:13-17 (Janes Prefiled Testimony).

⁸⁶ Janes 100 at Janes 2 (Janes Gravel’s Water Use Reports).

⁸⁷ Cause No. D-1-GN-13-000150-CV; *R.E. Janes Gravel Company v. Texas Commission on Environmental Quality et al*; in the 345th Judicial District Court of Travis County, Texas; Janes 100 at 12:10 - 13:2 (Janes Prefiled Testimony).

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ATTACHMENT

**SUMMARY OF BENEFITS
OF A WATERMASTER**

(Compared to no watermaster)

1. Real time data on diversions, not otherwise available to TCEQ staff, and real time directives to junior water rights (Depo. at 23; ED-Alexander-1 p. 16 at l. 13 and 22-25)
2. Actual diversion data, not otherwise available to TCEQ staff (Depo. Exhibit 5 at p. 10; ED-Alexander-1 p.16 at l. 13)
3. Measured diversions (Depo. Exhibit 5 at p. 10)
4. More frequent field investigations (Depo. at 24; ED-Alexander-1 p. 16 at l. 4)
5. Dedicated full time TCEQ employees
6. More people on the River (Depo. at 24)
7. Potentially better estimation of domestic & livestock withdrawals (ED-Alexander-1 p. 16 at l. 15-16)
8. More active role in day-to-day management of water rights (ED-Alexander-1 p. 16 at l. 20-21)
9. Anticipate a shortage before it reaches a crisis point (Depo. at 59)
10. More information about smaller reservoirs (ED-Alexander-1 p. 16 at l. 16-17)
11. More efficiently address timing of diversions thereby reducing the likelihood of waste (ED-Alexander-1 p. 16 at l. 18-20)
12. More responsive and quicker to respond to changing stream flow conditions (ED-Alexander-1 p. 16 at l. 25-26)
13. Ability to cut off control works (Depo. Exhibit 5 at p. 3)
14. Enforce non-interference with released water purchased from storage
15. More aware of drought conditions as they develop (Depo. at 114)
16. Wouldn't wait for a priority call to act (Depo. at 128-129)
17. Potentially reduce workload to TCEQ water and OCE staff so they are free to return to normal duties