

**SOAH Docket No. 582-13-3040  
TCEQ Docket No. 2013-0174-WR**

**IN RE: BRAZOS RIVER COALITION'S  
PETITION FOR THE APPOINTMENT  
OF A WATERMASTER IN THE  
BRAZOS RIVER BASIN**



**EXCEPTIONS TO THE PROPOSAL FOR DECISION  
FILED BY BELL COUNTY WCID #1, THE CITY OF HARKER HEIGHTS, THE CITY OF  
BELTON, THE CITY OF KILLEEN, AND THE CITY OF COPPERAS COVE**

COMES NOW, Bell County WCID #1 and its customers the City of Harker Heights, the City of Belton, the City of Killeen, and the City of Copperas Cove (collectively, “The Bell County Group”), and files these Exceptions to the Proposal for Decision for the above-referenced case (“PFD”), and would respectfully show as follows:

For convenience Bell County Group’s exceptions are divided and discussed as follows: (A) jurisdictional exceptions (Exceptions 1-3), (B) exceptions relating to threat (Exceptions 4-10), and (C) exceptions related to need (Exceptions 10-11). These exceptions are listed below and arguments supporting these exceptions are discussed in the body of this pleading:

Exception 1: Proposed Finding of Fact 10 or Proposed Finding of Fact 11 should be modified, or a new Finding of Fact should be added, that states that as of the date of the issuance of the PFD, which is prior to the appointment of a watermaster, there are less than 25 Petitioners seeking appointment of a watermaster in this matter.

Exception 2: Proposed Conclusion of Law Nos. 2 and 3 should be deleted and replaced with the following: Although the Commission initially had jurisdiction to consider the Petition, because of the withdrawal of 21 of the original Petitioners (resulting in only 15 current petitioners), pursuant to Texas Water Code § 11.451, the Commission may not now “authorize the executive director to appoint a watermaster” for the Brazos River Basin.

Exception 3: Proposed Ordering Provisions 1 and 2 should be deleted and replaced with a provision that dismisses this case for lack of jurisdiction.

Exception 4: Proposed Finding of Fact No. 45 is a Conclusion of Law and should be deleted as a Finding of Fact.

Exception 5: The record does not support Proposed Finding of Fact No. 45 and it should be deleted.

Exception 6: The record does not support Proposed Finding of Fact No. 47 and it should be deleted.

Exception 7: The record does not support Proposed Finding of Fact No. 48 and it should be deleted.

Exception 8: The record does not support Proposed Finding of Fact No. 49 and it should be deleted.

Exception 9: The record does not support Proposed Conclusion of Law No. 9 and it should conclude that there has been no showing of a threat.

Exception 10: Proposed Ordering Provisions 1 and 2 should be deleted and replaced with a provision that dismisses this case because no threat has been shown.

Exception 11: The record does not support Proposed Conclusion of Law No. 10 and it should conclude that there has been no showing that there is a need for a watermaster.

Exception 12: Ordering Provisions 1 and 2 should be deleted and replaced with a provision that dismisses this case because no need for a watermaster has been shown.

## I

### **JURISDICTIONAL EXCEPTIONS**

#### **(EXCEPTIONS 1 -3)**

### **THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CURRENTLY LACKS THE JURISDICTION TO APPOINT A WATERMASTER**

With respect to the exceptions concerning jurisdiction (Exceptions 1, 2, and 3), the record is clear that as of this date, there are not 25 Petitioners for a watermaster. Absent 25 Petitioners, pursuant to Texas Water Code § 11.451, the Commission may not now “authorize the executive director to appoint a watermaster” for the Brazos River Basin.

The lack of jurisdiction is a fundamental error and may be raised at any time.<sup>1</sup> If the thing that grants jurisdiction disappears, then jurisdiction disappears with it.<sup>2</sup>

**A. THE PRE-REQUISITE FOR APPOINTING A WATERMASTER IS MISSING**

Section 11.451 of the Texas Water Code (“Section 11.451”) provides as follows:

“COMMISSION AUTHORITY. On petition of 25 or more holders of water rights in a river basin or segment of a river basin or on its own motion the commission may authorize the executive director to appoint a Watermaster for a river basin or segment of a river basin if the commission finds that the rights of senior water rights holders in the basin or segment of the basin are threatened.”

This section, entitled “COMMISSION AUTHORITY” defines the limited circumstances pursuant to which the Commission has the statutory authority to authorize the Executive Director to appoint a watermaster. Absent such a Petition, and absent the Commission making its own motion, the Commission lacks the authority to appoint a watermaster.

In this case, the statutorily required Petition underlying the Commission’s assumption of jurisdiction and referral of this matter for a contested case hearing does not have the requisite twenty-five (25) Petitioners. This circumstance requires dismissal for at least three reasons:

a) a statutory prerequisite to action by the Commission is absent; b) jurisdiction is lacking in the Commission to appoint a Watermaster absent compliance with the statute; and c) any adoption of the PFD in this docketed matter would now amount to an inappropriate advisory opinion under the present statutory and jurisdictional circumstances.

As seen in Proposed Finding of Fact No. 9, twenty-one of the original Petitioners withdrew from the Petition. This left fewer than 25 Petitioners on the Petition. Therefore, the

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<sup>1</sup> *Sivley v. Sivley*, 972 S.W.2d 850, 855 (Tex. App. – Tyler 1998, no pet.).

<sup>2</sup> For example, federal district courts routinely lose jurisdiction over ancillary state claims if the federal claim conferring jurisdiction is dismissed before trial. See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Petition underlying this docketed matter is not sponsored by 25 or more holders of water rights in the Brazos River Basin.

**B. ABSENT A VALID PETITION OR MOTION MADE BY THE COMMISSION – NEITHER OF WHICH EXISTS HERE – TEXAS WATER CODE § 11.451 DOES NOT ALLOW THE APPOINTMENT OF A WATERMASTER**

It is a well-established principle that, as an administrative agency, the Commission “may exercise only those powers that the Legislature confers upon it in clear and express language, and cannot erect and exercise what, in reality, amounts to a new or additional power for the purpose of administrative expediency.”<sup>3</sup> Nor may the Commission “contravene specific statutory language, run counter to the general objectives of the statute, or impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.”<sup>4</sup>

In this case, the Commission is limited to the express powers granted by Section 11.451. Section 11.451 authorizes the Executive Director to appoint a watermaster for the Brazos River Basin only under two circumstances: (1) on the approved motion of the agency’s three appointed Commissioners, or (2) on the petition of 25 or more holders of water rights in the Brazos River Basin. Either one of these statutory prerequisites is a condition precedent that must exist when the Commission authorizes the Executive Director to appoint a watermaster for the Brazos River Basin.

The Commission had the opportunity to make its own distinct motion for the appointment of a watermaster for the Brazos River Basin. The Commissioners chose not to do so when considering the previously referenced Petition. The evidence shows that this docketed

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<sup>3</sup> *Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377 (Tex. 2005).

<sup>4</sup> *CenterPoint Energy Entex v. Railroad Comm'n*, 208 S.W.3d 608, 616 (Tex. App. Austin 2006, pet. dism'd).

proceeding was called by the Commissioners based solely on the purported existence of a petition of 25 or more holders of water rights.<sup>5</sup>

The Commission has not yet “authorized” the executive director to appoint a watermaster for the Brazos River Basin. If it adopts the PFD, then it will authorize such appointment. Therefore, the critical moment in time for when 25 Petitioners must exist is at the time of the authorization by the Commission, or adoption of the PFD. Because a valid Petition does not exist, the statutory condition required for the Commissioners to authorize the Executive Director to appoint a watermaster in this matter does not exist.

The absence of a petition of 25 or more holders of water rights in the Brazos River Basin deprives the Commission of jurisdiction in this matter. Absent such a petition, the Commission lacks the jurisdiction to authorize the Executive Director to appoint a Watermaster. Accordingly, the adoption of the PFD in this matter would be in the nature of an advisory opinion.

**C. SECTION 11.452 DOES NOT ALLOW THE APPOINTMENT OF A WATERMASTER**

Texas Water Code § 11.452 (“Section 11.452”) does not negate the analysis regarding Section 11.451. Unlike Section 11.451, which defines and circumscribes the authority of the Commission, Section 11.452 merely describes the procedures that are to take place within the framework of that authority.

Section 11.451 establishes the statutory conditions for authorizing the executive director to appoint a watermaster and are jurisdictional. If those statutory conditions do not exist – as they do not exist in this case – then the procedures for conducting hearings as set-forth in Section 11.452 do not somehow vest the Commission with jurisdiction to conduct a hearing. Such a

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<sup>5</sup>TCEQ Interim Order dated February 19, 2013 at 1 (SOAH Docket 582-13-3040).

result would obligate the current movants and other stakeholders in the Brazos River Basin to protectively participate in an evidentiary proceeding that has been rendered moot.

#### **D. THE PLAIN LANGUAGE OF THE STATUTE MANDATES DISMISSAL**

Sections 11.451 and 11.452 address two separate issues. Section 11.451 addresses the authority of the Commission to appoint a watermaster. Section 11.452 addresses the procedures for establishing a watermaster. The authority provision, or the jurisdictional provision – Section 11.451 – is clear and unambiguous. It defines the conditions upon which the Commission “may authorize the executive director to appoint a Watermaster.” According to the Code Construction Act, the word “may . . . creates discretionary authority or grants permission or a power . . . .” Tex. Gov’t Code Ann. § 311.016(1). Applying the plain language of the statute, therefore, “[o]n petition of 25 or more holders of water rights in a river basin or segment of a river basin or on its own motion” the Commission is granted the permission or power to “authorize the executive director to appoint a Watermaster.” The failure of the petition in this case deprives the Commission of the power and authority to direct the appointment of a watermaster.

In addition, when construing a statute the entire statute is presumed to be effective and the court should not read a portion of the statute to be useless or a nullity.<sup>6</sup> A court must give effect to all words of a statute and not treat any language as surplusage.<sup>7</sup> A position that 11.452 conveys ongoing jurisdiction would effectively render Section 11.451 a nullity. If it were true

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<sup>6</sup> See *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); see also TEX. GOV’T CODE ANN. § 311.021(2); *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 (Tex. 2010); *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010); *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *Phillips v. Bramlett*, 288 S.W.3d 876, 880–81 (Tex. 2009); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006); *Cities of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442–43 (Tex. 2002).

<sup>7</sup> *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89–90 (Tex. 2001); *Tex. Workers’ Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); *Abrams v. Jones*, 35 S.W.3d 620, 625 (Tex. 2000); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

that once a Petition is filed, all of the procedures of 11.452 occur regardless of what happens to that Petition, Section 11.451 would not be necessary because Section 11.452 by itself contains all the language that could accomplish that result. In order to not render Section 11.451 surplusage, it must have a meaning separate and distinct from Section 11.452.

The ALJ's describe the word "On" as used in the statute as "a function word to indicate a time frame during which something takes place." PFD at 12. The PFD ignores, however, the fact that the statute in this case specifically describes the "something" that is authorized. The "something" described by Section 11.451 is not the issuance of notice or the commencement of a contested case hearing, it is the authorization by the Commission of the appointment of a watermaster. Unlike any example identified in the PFD, this statute describes the event that relates to the word "On." That event is still to come – therefore, the Petition must be in existence.

Finally, to the extent the statute is ambiguous, the Commission should consider headings and subtitles to aid in determining the legislative intent in resolving the ambiguity.<sup>8</sup> In this case, the subtitle for Section 11.451 is "COMMISSION AUTHORITY" whereas the subtitle for Section 11.452 is "PROCEDURE FOR DETERMINATION." The legislature clearly intended for Section 11.451 to define the jurisdiction or authority to appoint a watermaster and 11.452 to define the procedure.

**1. The Position that Jurisdiction Cannot Be Lost is Not Consistent with the Plain Language of the Statute and Violates Principles of Statutory Construction**

The PFD concludes that once jurisdiction is conferred, it cannot be lost. This presumption is not supported by the plain language of Sections 11.451 and 11.452. Rather, an agency may exercise only those powers the law, in clear and express statutory language, confers

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<sup>8</sup> *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 307–08 (Tex. 2010); *see also Hartford Ins. Co. v. Crain*, 246 S.W.3d 374, 378 (Tex. App.—Austin 2008, pet. denied).

upon it.<sup>9</sup> There is no clear expression in the statute that provides for continued jurisdiction once the Commission no longer has the requisite number of petitioners. Further, courts will not imply additional authority to agencies, nor may agencies create for themselves any excess powers.<sup>10</sup> Arguably, asserting that the Commission retains jurisdiction when the condition precedent for appointing a watermaster is no longer satisfied, is an agency-created excess power that should be rejected as being outside the statutory intent. Further, because the Legislature did not include a provision allowing for the Commission's continued jurisdiction with less than 25 petitioners, the Commission may presume that the Legislature's omission was intended to limit the TCEQ's jurisdiction.<sup>11</sup>

The lack of jurisdiction is a fundamental error and may be raised at any time.<sup>12</sup> If the thing that grants jurisdiction disappears, then jurisdiction disappears with it.<sup>13</sup>

Finally, where an application of the plain language of a statute leads to absurd results, the court will not force a literal interpretation.<sup>14</sup> Potentially, never recognizing that jurisdiction can be lost would allow the Commission to appoint a watermaster if the petitions were originally greater than twenty-five, but as a result of petitioner withdrawals subsequently dropped to zero. Most would agree this is a consequence that would constitute an absurdity.<sup>15</sup>

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<sup>9</sup> *Subaru of Am. v. David McDavid Nissan*, 84 S.W.3d 212, 220 (Tex. 2002).

<sup>10</sup> *Id.*

<sup>11</sup> *Cameron v. Terrell & Garrett*, 618 S.W.2d 535, 540 (Tex. 1981) (every word excluded from a statute must be presumed to have been excluded for a purpose).

<sup>12</sup> *Sivley v. Sivley*, 972 S.W.2d 850, 855 (Tex. App. – Tyler 1998, no pet.).

<sup>13</sup> For example, federal district courts routinely lose jurisdiction over ancillary state claims if the federal claim conferring jurisdiction is dismissed before trial. See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

<sup>14</sup> *Chavez v. City of San Antonio ex rel. City Pub. Serv. Bd. of San Antonio*, 21 S.W.3d 435, 440 (Tex. App. 2000).

<sup>15</sup> Although an agency's interpretation of statute it administers is entitled to serious consideration if the interpretation is reasonable and does not contradict plain language of statute, such interpretation does not bind courts. *Firemen's Pension Comm'n v. Jones*, 939 S.W.2d 730 (Tex. App. 1997, reh'g overruled). Thus, the ALJ is not bound by the Agency's notion of "permanent jurisdiction", and is free to apply an interpretation that would not result in absurdity and comports with the Legislature's intent for Section 11.451.

## **2. The Concho River Experience**

The PFD concludes that a change in the number of Petitioners can't affect Commission jurisdiction -- that initial jurisdiction provides the Commission with ongoing jurisdiction.

Prior application of Texas Water Code § 11.451, however, negates this assertion. The Concho River case illustrates that jurisdiction can be affected after the initial petition is submitted. The City of San Angelo in the Concho River Basin watermaster matter disputed whether or not certain petitioners were water rights holders according to the statute. *See City of San Angelo v. Texas Natural Res. Conservation Comm'n*, 92 S.W.3d 624, 628 (Tex. App. 2002). Resolution of this dispute was integral in meeting the 25-petitioner threshold in Section 11.451. According Augustus L. Campbell, Texas Watermasters: A Legal History and Analysis of Surface Water Rights Enforcement, 7 Tex. Tech Admin. L.J. 143, 162 (2006), in the end, this dispute between the City and the Commission became moot when thirty-four additional paper rights holders, whose eligibility was not in dispute, submitted a petition. (citing TNRCC Docket No. 2000-0344-WR at 2). In that case, a question about jurisdiction was resolved by the addition of new Petitioners. The Commission accepted new Petitioners after the original Petition had been entered. If new Petitioners can be added, they can also be lost. In this case, they were lost.

### **E. EXCEPTIONS 1-3 SHOULD BE SUSTAINED**

Based on the foregoing analysis, the Bell County Groups' Exceptions 1-3 should be sustained.

**II**  
**EXCEPTIONS RELATING TO THREAT**  
**(EXCEPTIONS 4-10)**

**A. ADOPTION OF THE CONCHO RIVER PROCEEDING DEFINITION OF THREAT RENDERS THE QUESTION OF THREAT MEANINGLESS AND SHOULD BE REJECTED**

The ALJs reject the argument that the definition from the Concho River case is so minimal as to be meaningless, such that every basin in the state would qualify as threatened. PFD at 22. The ALJ's own analysis, however proves that this is indeed the case. The ALJs identify three methods by which the prior appropriation doctrine may be enforced: (1) the honor system, (2) by regular TCEQ staff, or (3) with a watermaster. PFD at 25-28.

The ALJs conclude that "the honor system cannot protect senior water rights in a basin where many water rights have been granted." PFD at 26. The ALJs conclude, therefore, the reliance on the honor system will always result in a threat.

With respect to the enforcement by regular TCEQ staff, the ALJs point to such enforcement as evidence itself of a threat. PFD at 39-40 ("Those [priority] calls constitute concrete evidence of actual harm resulting from a set of circumstances that threaten senior water rights"). In other words, according to the ALJs, if the regular TCEQ staff option is utilized, there is, in fact, a threat.

The dismissal of the honor system as a viable option, and the use of TCEQ's process of evidence of a threat leads to the circular reasoning – if a senior water right holder invokes TCEQ's process by issuing a priority call, then a threat exists. The result is that the only time there is not a threat in a basin is when a watermaster is in place.

Throughout the PFD the ALJs indicate that it is the absence of a watermaster that gives rise to a threat. Proposed Finding of Fact 50 illustrates this position – according to the ALJs, “[u]nder the current regime for managing water rights in the Basin without a watermaster, senior water right holders in low flow years cannot fully and reliably divert or impound the amounts of water to which they are legally entitled under their water rights, even though junior water right holders are able to divert or impound water.”

The statute could have said a watermaster may be appointed if priority calls were issued. It did not. The statute could have said that a watermaster may be appointed in basins where there are no watermasters. It did not.

The statute required a finding of a “threat.” Such a finding has not been shown. Therefore, the Bell County Group’s Exception Nos. 4, 5, 9, and 10 should be sustained.

**B. EVEN IF THE CONCHO RIVER PROCEEDING DEFINITION OF THREAT IS ADOPTED, THE PFD DOES NOT APPROPRIATELY ADOPT THAT DEFINITION**

The PFD adopts the definition of “Threat” from the Concho River proceeding. PFD at 20. Within that definition, however, the PFD acknowledges that the following sentence exists:

Specifically, in time of water shortage, the rights of senior water rights holders in the basin are threatened by the situation of less available water than appropriated water rights; the disregard of prior appropriation by junior water rights holders; the storage of water; **and** the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.

PFD at 17 (emphasis added).

Reading the words after the term “Specifically,” there are four factors separated by semi-colons that all must be present. That these factors must all be present is evident from the use of

the word “and” bolded above. The PFD, however, ignore this all-important word and simply conclude that the use of “and” instead of “or” was “if anything, the product of inartful wording.” PFD at 22.

The only reason to construe “and” as an “or” would be if the effect of the failure to do so would be to wholly thwart the purpose of the thing being interpreted. *Bustillos v. Jacobs*, 190 S.W.3d 728, 735 (Tex. App.—San Antonio 2005, no pet.); *see also Board of Ins. Comm’rs v. Guardian Life Ins. Co. of Tex.*, 180 S.W.2d 906, 908 (Tex. 1944) (noting that replacing “and” with an “or” is “never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.”); *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 69-70 (Tex. 2008) (rejecting the use of “or” for “and”); *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 30 (Tex. 1978); *Bayou Pipeline Corp.*, 568 S.W.2d at 125 (rejecting the use of “or” for “and”); *Guardian Life Ins. Co.*, 180 S.W.2d at 908–09 (rejecting the use of “or” for “and”).

Because the ALJs inappropriately changed the “and” to “or” and attributed such a change to “inartful wording,” requires that Bell County Group’s Exception Nos. 5, 9, and 10 should be granted, or at a minimum the Commission should remand matter for evaluation under the appropriate standard.

### **C. FINDINGS OF FACT ARE SEPARATE FROM CONCLUSIONS OF LAW**

Proposed Finding of Fact No. 45 is a conclusion of law (like Proposed Conclusion of Law No. 10) because it makes a conclusion that a legal standard is satisfied. It is not a factual finding, and should be deleted.

Therefore, Bell County Group's Exception No. 4 should be sustained.

**D. PROPOSED FINDING OF FACT NOS. 47 AND 49 (DIREGARD OF PRIOR APPROPRIATION AND EXCESS USE OF WATER) ARE NOT SUPPORTED BY THE EVIDENCE IN THE RECORD**

The ALJs proposed findings that in times of shortage, senior water right holders in the Basin are threatened by the disregard of prior appropriation by junior water right holders and by the use of water in excess to that which other water right holders are entitled. Because these are two of the factors required to be found in the definition of "threat" adopted from the Concho River Proceeding, the question of whether this finding is valid is critical.

At page 41 of the PFD, the ALJs do not dispute Mr. Hibb's contention that there is no evidence of "systematic disregard of the law by diverters . . . ." Instead, the ALJs say that is not what is needed to prove threat. That is, however, precisely what Finding of fact No. 47 and 49 state.

There is no dispute that there have been drought conditions in the basin. Proving drought conditions, however, is not the same as proving a "threat" by the hands of junior water right holders.

As part of their analysis in reaching Proposed Finding of Fact Nos. 47 and 49, the ALJs addressed testimony of Dr. Brandeis, Dr. Furnans, and Mr. Janes. These are each discussed below.

**1. Dr. Brandeis**

First, the ALJs relied on Dr. Brandeis' "natural priority" analysis. By Dr. Brandeis' own admission, however, the natural priority analysis is not reality.<sup>16</sup> *Hearing Transcript*, Vol. II,

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<sup>16</sup> Dr. Brandes also recognizes the inherent limitations in the model he ran. Specifically, the WAM model does not account for BRA's credit system, does not account for the storage that Dow has, and does not account for BRA's ability to charge system diversions against any of its system reservoir permits. *Hearing Transcript*, Vol. II, 341:9-16 (testimony of Brandes).

357:11-14 (testimony of Brandes). Perhaps Mr. Langford put it best when he said “[t]here is a difference between water in theory and water in real life . . . .” *Langford Direct Testimony* at 10:5.<sup>17</sup> Dr. Brandes’ theoretical analysis proves nothing other than best case and worst case scenarios show different results. The results, however, have no foundation in reality and have no probative value.

The Natural Priority analysis is nothing more than a model. It does not provide evidence supporting Finding of Fact Nos. 47 or 49.

The ALJ’s also relied upon Dr. Brandeis’ testimony regarding water use reports in 2009 and 2011. At pages 40-41 of his prefiled testimony, Dr. Brandes claims to have identified junior water right holders that allegedly diverted during priority call dates. Importantly, however, the basis of his calculations is on self-reported numbers. *Brandes Direct Testimony* 40:13. The accuracy of such “self-reported” numbers are “not possible . . . to assess” according to another Aligned Party expert, Dr. Furnans. *Furnans Direct Testimony* 21:24-26. In addition, Dr. Brandes does not tie the alleged withdrawals to any specific senior water right holder’s ability to obtain water – as the definition requires. This analysis, therefore, is suspect, and lacks any probative value.

## **2. Dr. Furnans**

The ALJs also rely upon analyses undertaken by Dr. Furnans. They note that Dr. Furnans “opined that, on any given day, there may be ‘innumerable’ instances of junior water right holders taking water out of turn when there is a senior water right in the Basin with needs not fully satisfied.” PFD at 34-35. This “opinion,” is conclusory and doesn’t provide evidence of anything other than what might be occurring. As discussed below, Dr. Furnan’s analyses

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<sup>17</sup> In addition, Dr. Furnans testified that when evaluating reliability under the WAM, one could reach a different result in evaluating reliability under the law as set-forth at 30 TAC § 297.58(b). Further evidence that using the WAM to show actual behavior is suspect. *Hearing Transcript*, Vol. II, 219:16-20 (testimony of Furnans).

regarding the Proposed Findings of Fact Nos. 47 and 49 are suspect, and lacks any probative value.

**(a) Junior Diversions**

The ALJs then cite the analysis undertaken by Dr. Furnans wherein he purportedly identified 94 and 79 junior diverters taking water out of turn in in 2009 and 2011. PFD at 35. Before discussing each of these examples, it is important to note the Dr. Furnans himself limits the credibility of his data by acknowledging that his examples are based on “very limited data” and that with more data his analysis “would be more credible.” *Furnans Direct Testimony* 19:27; *Furnans Direct Testimony* 20:27-30; *Furnans Direct Testimony* 21:24-26; *Hearing Transcript*, Vol. II, 223:17 to 225:15 (testimony of Furnans). With that caveat, we address each of the alleged examples.

**(1) alleged improper diversions in 2009**

At pages 21-25 of his prefiled testimony, Dr. Furnans undertakes an analysis that purports to show that 94 junior diverters inappropriately diverted water “when GCWA needed water.” *Furnans Direct Testimony* 24:4-5. This analysis fails for several reasons.

First, Dr. Furnans asserts that GCWA had a need for water. But in 2009, GCWA did not make a priority call. See *Furnans Direct Testimony* 13:11-14 (noting that 2013 was the first priority call ever made by GCWA). In fact, during the 2009 time period analyzed by Dr. Furnans, he did not know whether there was a priority call in-place. *Hearing Transcript*, Vol. II, 203:8 to 204:8 (testimony of Furnans). The failure by GCWA to make a priority call in 2009 calls into question any need for water by GCWA. As Dr. Furnans himself notes, “[a] junior water right is not taking out of turn if the water is not needed by a downstream water right holder.” *Furnans Direct Testimony* 20:24-25.

Second, the basis of his calculations is on numbers that he acknowledges are estimates or guesses. His analysis is based on self-reported numbers, the accuracy of which are “not possible . . . to assess.” *Furnans Direct Testimony* 21:24-26.

Third, Dr. Furnans acknowledges that any one or all of the identified 94 diverters could have been justified with their diversion. According to Dr. Furnans, he did not undertake an analysis as to whether any of the withdrawals, if not withdrawn, would have resulted in a futile exercise. *Hearing Transcript*, Vol. II, 249:13-19 and 253:11-15 (testimony of Furnans).

Finally Dr. Furnans does not tie the alleged withdrawals to any specific senior water right holder’s ability to obtain water – as the definition requires.

While Dr. Furnans attempts to use this example to show evidence of factors identified in the adopted definition of “threat,” it also lacks any probative value.

## **(2) Alleged Improper Diversions in 2011**

At pages 25-26 of his prefiled testimony, Dr. Furnans undertakes the same analysis that purports to show that 79 junior diverters inappropriately diverted water “when GCWA had a demonstrated need for water” in 2011. *Furnans Direct Testimony* 25:23. This analysis fails for many of the same reasons as his 2009 analysis fails – the lack of a priority call by GCWA although Dr. Furnans asserts a need existed, the inadequate data, the failure to undertake a futility analysis, and the failure to tie the alleged withdrawals to any specific senior water right holder’s ability to obtain water. *Hearing Transcript*, Vol. II, 249:13-19 (testimony of Furnans). Once again, while Dr. Furnans attempts to use this example to show evidence of factors of the adopted definition of “threat,” it lacks any probative value.

### **(b) Helicopter Flyover**

The ALJs also rely on the helicopter surveillance undertaken by GCWA and evaluated by Dr. Furnans. PFD at 35-36. The ALJs fail to recognize, however, that the helicopter analysis is unreliable and shows nothing.

On the first day after the TCEQ priority call order was issued, Dr. Furnans identified only three alleged violators of that TCEQ order. This is less than 0.3% of the water rights holders. *Hearing Transcript*, Vol. II, 258:18-25 (testimony of Furnans). He has no idea whether requiring these pumpers to allow the water to flow would have been futile. *Hearing Transcript*, Vol. II, 259:1-4 (testimony of Furnans). He never interviewed any of those pumpers. He has no evidence that these pumpers weren't domestic and livestock pumpers or otherwise legally permitted to pump. *Furnans Direct Testimony* 28:10-11; *see also Hearing Transcript*, Vol. II, 256:7-12 (testimony of Furnans). He doesn't know whether the order had actually been distributed, whether these pumpers had received the order, or when they stopped pumping. *Hearing Transcript*, Vol. II, 254-257 (testimony of Furnans). He even admitted that he does not know for a certainty whether these individuals were, in fact, pumping. *Hearing Transcript*, Vol. II, 257:7 to 258:10 (testimony of Furnans). Finally, and most significantly, he admits that the alleged violators might have been entitled to the water they were supposedly pumping under a permit with the Brazos River Authority. *Hearing Transcript*, Vol. II, 259:12 to 260:16 (testimony of Furnans).

### **3. Mr. Janes**

The ALJs cite Mr. Janes' testimony, but they also recognize that "he did not have any evidence to prove that Lubbock [(a junior water right holder)] was failing to appropriately pass

water downstream . . . .” PFD at 37. Mr. Janes’ testimony, therefore, does not support Proposed Finding of Fact Nos. 47 or 49.

#### **4. Conclusion**

Neither Proposed Finding of Fact Nos. 47 nor 49 find adequate support in the record. The Aligned Parties may have shown drought conditions, but they did not show a “threat” as “threat” is defined by the ALJs. If the Legislature had wanted the appointment of a watermaster with a showing of a drought, it would have used the word “drought” instead of the words “threat” and “need.” Therefore, the Bell County Group’s Exception Nos. 4, 5, 6, 8, 9, and 10 should be sustained.

#### **E. PROPOSED FINDING OF FACT NOS. 48 (STORAGE) IS NOT SUPPORTED BY THE EVIDENCE IN THE RECORD**

Proposed Finding of Fact No. 48 asserts that there has been evidence that senior water right holders are threatened by the storage of water by holders of junior rights. This is unsupported by the record. The only discussion of this issue is at page 33 and 34 of the PFD – a discussion of the analysis undertaken by Dr. Brandeis.

Dr. Brandes analyzes reservoir inflows and outflows to determine if inflows to the reservoirs analyzed were passed downstream during call periods. *Brandes Direct Testimony* 36:1-20. His own conclusion is not definitive (note the word “appear”): “Thus, all of these reservoirs **appear** to have been depleting streamflows either by impoundment or by diversion and use of the inflows during TCEQ call periods.” *Brandes Direct Testimony* 37:5-7 (emphasis added). To the credit of Dr. Brandes, he appropriately does not reach a definitive a conclusion because he cannot – he has not analyzed and cannot account for the question of whether BRA’s

credit system could have explained why it appeared that there should have been more outflows. *Hearing Transcript*, Vol. II, 364:20-25 (testimony of Brandes). Nowhere in his testimony does he address the fact that, as shown in Exhibit DOW102 (Article III), BRA is allowed to impound inflows that Dow would otherwise be entitled to and subsequently release them when Dow requests deliveries, giving Dow a credit against the charges for that water that has been impounded. *Hearing Transcript*, Vol. I, 15:8-12 (testimony of Leathers).

While this analysis attempts to address storage of water, it fails because it is rooted in conjecture and supposition. It proves nothing because it is incomplete.

Dr. Brandes also analyzes the surface elevations of reservoirs to come to the same conclusion – that “not all inflows were passed downstream” during call periods. *Brandes* 38:9-10. This surface elevation analysis, however, suffers from the same defects as the inflow/outflow analysis. It is not sufficient to know whether all inflows were being passed downstream. What is important is whether such actions were permissible, and if not, whether such actions might have affected senior water right holders. As before, the analysis is devoid of any credible conclusions in this regard.

In fact, Dr. Brandes’ conclusions are again very carefully qualified. On page 39 of his prefiled testimony he accepts the fact that such actions “were not necessarily” in violation of TCEQ call orders. *Brandes* 39:1-22. He admits to not knowing what directives were issued by TCEQ with regard to the inflows. *Brandes* 39:5-7. In addition, his analysis fails to address the possibility of how BRA’s credit system might indicate a misleading result.

Given the failure to address these factors, Dr. Brandes once again appropriately qualifies his conclusion by using the word “suggests” and “indicates”:

“This **suggests** that even under the TCEQ call order that was in effect during this time, these reservoirs were impounding streamflows that they should not have been if the prior appropriation doctrine had been fully enforced. *Brandes* 39:17-19 (emphasis added).

“Furthermore, even during periods when the TCEQ had issued priority water right calls and was purportedly enforcing the prior appropriation doctrine, these results **indicate** that inflows to the reservoirs were being impounded out of priority order.” *Brandes* 40:3-6 (emphasis added).

In sum, his analysis may “suggest” certain things, but it proves nothing with respect to improper storage of water with respect to the definition of “threat.”

Proposed Finding of Fact No. 48 does not find adequate support in the record. Therefore, the Bell County Group’s Exception Nos. 7, 9 and 10 should be sustained.

**III**  
**EXCEPTIONS RELATING TO NEED**  
**(EXCEPTIONS 11-12)**

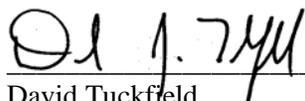
The ALJs define “Need” as something that is desireable or useful. The question that remains, however, is for whom it is desireable or useful. The ALJs ignore a basic and critical issue in this analysis. At page 55 of the PFD the ALJs note that there are roughly 1350 water rights in the Basin. According to Proposed Finding of Fact No. 9, however, only 15 people or entities seek appointment of a watermaster. That is, only 1.1% of the water right holders are seeking appointment of a watermaster. The lack of support by the water right holders undercuts Proposed Conclusion of Law No. 10, and the Bell County Group’s Exception Nos. 12 and 13 should be sustained.

**IV  
CONCLUSION & PRAYER**

WHEREFORE, PREMISES CONSIDERED, the Bell County Group respectfully requests that its Exceptions, as set-forth in this pleading, be sustained.

Respectfully submitted,

THE AL LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "D. J. Tuckfield", is written over a horizontal line.

David Tuckfield  
State Bar No. 00795996  
12400 Highway 71 West  
Suite 350-150  
Austin, TX 78738  
(512) 576-2481  
(512) 366-9949 Facsimile  
david@allawgp.com

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the attached Exceptions to PFD has been served on the following via e-mail on this 6<sup>th</sup> day of January, 2014:

*The Dow Chemical Company*

Represented by: Fred B. Werkenthin, Jr.  
Booth, Ahrens & Werkenthin, P.C.  
515 Congress Avenue, Suite 1515  
Austin, TX 78701-3503  
[fbw@baw.com](mailto:fbw@baw.com)

*Gulf Coast Water Authority*

Represented by Molly Cagle  
Baker & Botts, L.L.P.  
1500 San Jacinto Center  
98 San Jacinto Blvd.  
Austin, TX 78701  
[molly.cagle@bakerbotts.com](mailto:molly.cagle@bakerbotts.com)

*NRG Texas Power LLC*

Represented by: Joe Freeland  
Mathews & Freeland, L.L.P.  
327 Congress Avenue, Suite 300  
Austin, TX 78701  
[jfreeland@mandf.com](mailto:jfreeland@mandf.com)

*R.E. Janes Gravel Co.*

Represented by: Scott R. Shoemaker  
The Terrill Firm, P.C.  
810 West 10th Street  
Austin, Texas 78701  
[sshoemaker@terrill-law.com](mailto:sshoemaker@terrill-law.com)

*Service on the above for Aligned Parties per SOAH Order No. 1.*

*Executive Director*

Ross W. Henderson  
Staff Attorney  
Texas Commission on Environmental Quality  
MC-173, P. O. Box 13087  
Austin, TX 78711-3087  
[rhenders@tceq.texas.gov](mailto:rhenders@tceq.texas.gov)

*Public Interest Counsel*

Eli Martinez  
James B. Murphy  
Texas Commission on Environmental Quality  
Office of Public Interest Counsel  
P.O. Box 13087, MC-103  
Austin, TX 78711-3087  
[eli.martinez@tceq.texas.gov](mailto:eli.martinez@tceq.texas.gov)  
[jmurphy@tceq.state.tx.us](mailto:jmurphy@tceq.state.tx.us)

*Brazos River Authority*

Represented by: Doug G. Caroom  
Bickerstaff Heath Delgado Acosta, LLP  
3711 S. MoPac Expressway, Bldg One, Suite 300  
Austin, TX 78746  
[dcaroom@bickerstaff.com](mailto:dcaroom@bickerstaff.com)

*Luminant Energy Company, LLC*  
Represented by: Beth Townsend  
711 W. 7th Street  
Austin, TX 78701  
[btownsend@jacksonsjoberg.com](mailto:btownsend@jacksonsjoberg.com)

*William & Gladys Gavranovic, Jr.  
Bradley B. Ware*  
Represented by: Gwendolyn Hill Webb  
Attorney at Law  
Webb & Webb  
211 E. 7th Street, Suite 712  
P.O. Box 1329  
Austin, TX 78767  
[gwen.hill.webb@sbcglobal.net](mailto:gwen.hill.webb@sbcglobal.net)

George Sidney Kacir  
1821 Everton Drive  
Temple, TX 76504  
[kacirlaw@sbcglobal.net](mailto:kacirlaw@sbcglobal.net)

The City of Temple  
Represented by: Kayla Landeros  
Deputy City Attorney  
City of Temple  
2 N. Main Street, Suite 308  
Temple, TX 76501  
[klanderos@templetx.gov](mailto:klanderos@templetx.gov)

*Madelon Leonard Trust III  
Martha Leonard Trust III  
Miranda Leonard Trust III  
Mary Leonard Childrens Trust  
JPMorgan Chase Bank, NA., as Trustee*  
Represented by: W. Thomas Buckle  
Scanlan, Buckle & Young, P.C.  
602 West 11th Street  
Austin, TX 78701-2099  
[tbuckle@sbylaw.com](mailto:tbuckle@sbylaw.com)

*City of Houston*  
Represented by: Edmond McCarthy  
711 W. 7th Street  
Austin, TX 78701  
[emccarthy@jacksonsjoberg.com](mailto:emccarthy@jacksonsjoberg.com)

*City of Stamford  
North Central Texas Municipal Water Authority  
West Texas Municipal Water District  
City of Lubbock  
White River Municipal Water District  
City of Abilene*  
Represented by: Jason Hill  
Lloyd Gosselink Rochelle & Townsend, P.C.  
816 Congress Avenue, Suite 1900  
Austin, TX 78701-2478  
[jhill@lglawfirm.com](mailto:jhill@lglawfirm.com)

Dan Kacir  
1821 Everton Drive  
Temple, TX 76504  
[dkatty2000@yahoo.com](mailto:dkatty2000@yahoo.com)

*Betty Kacir Wheeler Estates*  
Represented by: David Wheeler  
401 N. 9th Street  
Temple, TX 76501  
[uk@dlair.net](mailto:uk@dlair.net)

*Brazos Water Authority (BWA)*  
Represented by: Ronald Woodruff  
1251 FM 2004  
Lake Jackson, TX 77566  
[rewoodruff@attnet](mailto:rewoodruff@attnet)

I also certify that a true and correct copy of the attached Exceptions to PFD has been served on the following via regular mail on the 6<sup>th</sup> day of January, 2014:

FRANK L. MAURO, J.D.  
208 PARKING WAY  
LAKE JACKSON, TX 77566

ELLEN WEINACHT  
BOX 326  
BALMORHEA, TX 79718

ALDREDGE & SHANAHAN, LP  
1345 S. FM 908  
ROCKDALE, TX 76567-4476

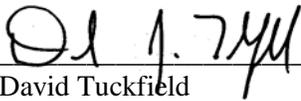
CITY OF CLEBURNE  
P.O. BOX 677  
CLEBURNE, TX 76033

RICHARD D. LUNDBERG  
LUNDBERG FARMS  
P.O. BOX 329  
CLIFTON, TX 76634

MARGIE KRAEMER  
KRAEMER FARMS 296 CR 100  
ROGERS, TX 76569

HUGH DAVIS  
2025 CHARBONEAU DR.  
WACO, TX 76710-2651

CHESTER E. DIXON  
24 W. RIVERCREST DR.  
HOUSTON, TX 77042

  
\_\_\_\_\_  
David Tuckfield