

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 BRAZOS § OF
RIVER COALITION §
§ ADMINISTRATIVE HEARINGS

BRAZOS FAMILY FARMERS AND RANCHERS’
EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Bradley B. Ware (“Ware”) and William and Gladys Gavranovic (“Gavranovics”), collectively referred to as the Brazos Family Farmers and Ranchers (“BFFR”), Protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) and the State Office of Administrative Hearings (“SOAH”) regarding the appointment of a watermaster for the Brazos River Basin and respectfully file the following Exceptions to the Proposal for Decision. To that end, Protestants would respectfully state the following:

I. INTRODUCTION

The Administrative Law Judges (“ALJs”) timely issued their Proposal for Decision (“PFD”) in this case on December 17, 2013. The 70 page PFD, and reaches the legal conclusion that Petitioners’ request for a watermaster for the Brazos River Basin, should be granted.

The ALJs issued a Proposal for Decision that rests on flawed analysis of the statutory requirements to consider before appointing a Brazos River Basin Watermaster. They used that analysis to arrive at findings and conclusions that belie not just the whole of the evidence presented in the hearing but also the legal framework on which this hearing was mandated. The ALJs conclude that the appointment of a watermaster is not a difficult decision, nor was it meant to be, and then disregard all legal and factual challenges raised by the opponents. Their PFD is flawed because it does not represent a serious effort to critically evaluate the obvious limitations of the evidence and arguments in support of a watermaster and

the unanswered questions that remain in this record. The PFD and recommended final order presented by the ALJs should not be adopted by the Commission.

II. INSUFFICIENT SUPPORT FOR WATERMASTER

The ALJs did not properly consider the most important issue in this case: The lack of sufficient and diverse support for a Brazos River Basin Watermaster. They treated the fact that less than 25 existing water rights holders in the Brazos River Basin support the appointment of a Brazos River Basin Watermaster not only now, but well before the first day of the hearing. The ALJs treat the issue as strictly a matter of the jurisdiction of the Commission to rule upon a request that may have had the support of 25 or more water rights holders at one time, where such support was withdrawn prior to the hearing. Their treatment of the issue can be summarized by a conclusion that once the minimal signatures on a petition required by §11.451 of the Water Code is satisfied upon the submission of the petition, the Commission's jurisdiction is invoked on a watermaster can be appointed even if most of the original signatories have had a change of heart.

In their briefing of this case, the BFFR questioned the adequacy of support for the watermaster under the requirements of §11.451 that did not hinge on the Commission's jurisdiction to render a final order in this docket. The ALJs did not adequately address the issue in their PFD. They merely noted that BFFR had argued that an important condition precedent included in §11.451 was not satisfied because of the withdrawal of water rights holder's signatures. Then, the ALJs said they disagreed with the argument. Their reason for disagreement was not explained.

Condition Precedent in §11.451

Before the hearing began, the Administrative Law Judges considered and ruled on a Joint Motion for Summary Disposition and Plea to the Jurisdiction by various Protestants in this case including these Protestants, but did not rule upon the more salient question of whether Texas Water Code §11.451 contains condition precedents indispensable to a final Commission Order appointing a watermaster.

The previous Motion framed the issue as a matter of jurisdiction. Relying on §11.452(a) of the Texas Water Code, the Executive Director (“ED”) and the Aligned Parties responses, the ALJs ruled that once the agency, received the original petition with the statutorily mandated 25 or more signatures, then the agency appropriately took jurisdiction over the watermaster request and appropriately referred the matter to SOAH for a hearing. The argument that the agency does not lose *jurisdiction* over the case was buttressed by the Aligned Parties’ observation, with which the ALJs agreed, that the TCEQ itself could appoint a watermaster for the Brazos River Basin on its own motion (§11.451) and that, under §11.452(c) the agency is obligated to issue a written decision once the hearing is completed. The Executive Director cited other decisions in non-related contested cases, presumably to show the *precedent* for the TCEQ completing its consideration of a pending matter even though the numbers of petitioners subsequently fell below the 25 required for the *filing* of a petition, application or rate appeal.

However, the more important question unanswered by the ALJs is whether the Texas Legislative intended that the stated level of support by at least 25 existing water rights holders should be demonstrated for the appointment of a watermaster before one is actually appointed by the TCEQ. The Commission should honor legislative intent for the language used in §11.451.

Section 11.451 of the Texas Water Code has been cited in connection with the jurisdiction of the Commission; but jurisdiction to appoint a watermaster is actually *assumed* by the language of the section. Clearly, the Texas Legislature empowered the Commission to appoint a watermaster if *the TCEQ* determined that senior water rights were threatened, or if at least 25 water rights holders supported the appointment and demonstrated the threat to the Commission. The Texas Legislature allowed the Commission to make the appointment on its own determination. But, absent an agency determination of need for a watermaster, the Texas Legislature required a showing of support by at least 25 water rights holders. This is why analyzing the withdrawal for public support for a watermaster as a *jurisdictional* issue is so lacking. Why would the Texas Legislature provide an additional basis for the Commission to merely to formalize the invocation of the

agency's jurisdiction to consider a watermaster? Obviously, the 25 member petition requirement was not simply a requirement associated with a valid *petition*. It was meant as a different basis for watermaster consideration that did not rest in the hands of a government official.

The difference between the jurisdictional arguments and BFFR's argument regarding the basis for *final agency action*, is important. The agency has the jurisdiction to call a hearing and refer the hearing to SOAH with *no* relevant public support for a watermaster. But, does the Commission have the authority to actually appoint a watermaster without the requisite relevant public support *or* a Commission determination of need? Section 11.452 set out a procedure that has to be followed if the agency receives a petition for a watermaster: A hearing has to be called and a written determination made on the issue of threat. But there is nothing that excuses the Commission from determining whether ultimately the public petition is supported by the minimal number of water rights holders. In short, the Commission is required by the Texas Legislature to answer at least one (1) of two (2) questions in the affirmative when it considers this case in an open meeting: Did the agency determine that a watermaster was necessary; or Do 25 or more water rights holders support the appointment of a watermaster? If neither question can be answered in the affirmative, then §11.451 is not satisfied even if the Commission also finds that there is a threat to senior water rights holders. All conditions precedent have to be satisfied in the enabling statute before the statute is legitimately considered the basis for Commission action. As the caption of §11.451 implies, it is not a matter of jurisdiction, it is a matter of authority.

Conditions precedent in statutory standards are basic to statutory construction. In the construction of a statute, it is the duty of the trier of fact to effectuate the Texas Legislature's expressed intent. [See *In re. Allen*, 366 s.w.3d 696, 703 (Tex. 2012)] Texas Legislature intent is best revealed in the Texas Legislature text. When the statute's text is unambiguous and does not lead to absurd results, the search to find Texas Legislature intent ends. *Entergy Gulf States, Inc. v. Summers*, 282 s.w.3d 433, 437 (Tex. 2009). If the Texas Legislature defined the minimum level of public support for a watermaster, then applying a procedural "gloss" to the statutory condition to apply "other extrinsic aids" to the

construction of §11.451, is something that the Texas Supreme Court warned against in *Fitzgerald v. Advanced Spine Fixation Sys., Inc.* 996 s.w.2d 864, 865-66 (Tex. 1999). We should take the Texas Legislature at its word, as the truest measure of what it intended is what Texas Legislature enacted. [See *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 s.w.3d 644, 651-52 (Tex. 2006)].

In response to BFFR's analysis, the ALJs simply stated in their PFD that the Texas Water Code does not *specifically* require the Commission to find that 25 or more holders of water rights still support the appointment of watermaster at the time the petition is considered. This observation is also lacking in statutory analysis. The pertinent sections of the Texas Water Code do not *specifically* require any number of implied requirements for a agency decision, such as adequacy of notice for a contested case hearing; or a open meeting notice posting. The appropriate statutory construction considers the reasonable legislative intent and considers the hearing record in the context of the expressly stated legislative intent. The Texas Water Code does not *specifically* define "threat," but that fact does not authorize the Commission to disregard the existence of "threat" as a basis—a condition precedent—to the appointment of a watermaster under the same Section 11.451. The ALJs offer a glib response to BFFR's argument on the need for minimal public support when the Commission purports the act under the "four corners" of specific statutory authority. However, their response does not contain any real legal answers as to how they are privileged to disregard the unambiguous statutory requirements in §11.452.

Watermaster Consideration a Difficult Issue

The ALJs preface their discussion of "the merits" of the case with an extraordinary conclusion that this was an "easy case" (PFD p. 15). It is only necessary to examine the flaws in this declaration because it is apparent that the ALJs gave such summary treatment to protestants' evidentiary presentations because they felt—inexplicably—that this was an "easy case."

The ALJs support for their conclusion is based on reasoning that is counter-intuitive, to say the least, and certainly against all the previous decision making by

authorized entities including the Texas Legislature, Texas Courts, and the TCEQ. The ALJs conclude that it should not be difficult to appoint a watermaster because the ED can do it [§11.326]; a court can do it [§11.402]; and the Commission can do it on its own initiative [§11.451]. It seems to have escaped the ALJs attention that in this case, the record establishes that both the ED and the Commission *did not* in fact decide to appoint a watermaster. Presumably, the ED does not agree that it is such an easy call or he could have saved all the parties to this case the time and expense of a contested case. Concluding that the possibility of a court appointment of a watermaster demonstrates the ease of the decision would also be news to the judges who rule on other broad, statewide policies, including water rights and environmental issues. Moreover, the association of a court appointment with the ease of the decision to appoint a watermaster disregards the fact that there has been no court appointment of a Brazos River Basin Watermaster; and it is not clear what factual circumstances in the Brazos River Basin would support water being “taken into judicial custody” [§11.402(b)]. Perhaps, the ALJs believe that it would be easy for a court to appoint a watermaster because the Texas Water Code does not *specifically* set out any standard definition of “threat” or “need” in §11.402. Finally, the mention that the Commission may appoint a watermaster *after* a finding of threat or need does not obviously indicate that it is easy or appropriate to decide a watermaster is needed with or without the support of existing water rights holders. Either way, the Commission has to make a determination of threat and need. If anything, it shows that there is a difference envisioned between the prescribed minimum support of existing water rights holders and the formality of the signatories to a petition. (*See*, discussion of condition precedent, above.)

Moreover, the ALJs misunderstand the position of the BFFR. It is not BFFR’s belief that the appointment of a watermaster should be “disfavored or difficult.” The undefined standards of §11.451 should be given meaning that reflects reality and which terms have distinct meanings from each other. Unfortunately, the definitions for “threat” and “need” ultimately employed by the ALJs neither reflect the history of consideration of these questions, nor do they give any distinct meaning to the plain words of the statute.

III. THREAT

Early in this proceeding, the Aligned Parties argued for the adoption of the definition of threat utilized in the petition filed by the Concho River Basin Water Conservancy Association, TCEQ Docket No. 2000-0344-WR (Dec. 5, 2001) (“Concho River Case”). That definition of threat included in the final order adopted by the Commission stated that a threat is:

“a set of circumstances creating the possibility that senior water rights holders may be unable to fully exercise their rights – not confined to situations in which other people or groups convey an actual intent to harm such rights. 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.”

It is no wonder that the Aligned Parties sought this definition in the same pleading that they sought partial disposition of this case. With all due respect to the Commission, the definition of “threat” in the Concho River Case is little more than a tautology. The definition asks: Is a water right threatened if there are factors preventing it from being used because of the deliberate *or* accidental actions of others (junior water rights holders) *or* nature, such as less available water than is appropriated? Of course, the answer to this question is always “yes.” This definition is akin to defining a threat, as “a situation where the full use of a water right is threatened.” There is *no* river basin anywhere in the State where water cannot be taken from a senior water right holder through malice, accident or drought. If that is all the Legislature required in §§11.451 and 11.452 then a “hearing” on such a issue would be unnecessary. All parties can stipulate that water *can* be taken away from an appropriator through the actions of others or drought.

The ALJs ruled in response to the Aligned Parties’ Motion for Partial Disposition that the standard used in the Concho River Case would not control this hearing. The ALJs’ PFD, however, determines that the Concho River Case’ definition of threat was “reasonable” and should be used as the basis for decision

in this case. Unfortunately for the opponents, the ALJs came to this decision after the record in *this* case was closed. Using this “bait and switch” of legal standards procedure prejudiced the protestants who participated in the hearing and briefed the record therefrom, based on an ALJ ruling on the applicable definition of “threat” that was reversed after the hearing.

Brazos River Authority (“BRA”) argued that the Texas Legislature authorized watermasters to be appointed for river basins and portions of river basins only where there has been a *showing* of a threat. The Texas Legislature was fully aware that there was already in existence the doctrine of prior appropriation implemented through the Chapter 11, Texas Water Code, the TCEQ, and the ability of a senior appropriator to make a priority call. The Texas Legislature intended that in the hearing authorized by §11.452 there would be a clear showing that the *existing system* of water rights administration and enforcement had *failed* to provide sufficient protection for senior water rights holders in a particular basin to the point where such water rights holders had failed to acquire adequate water under their water rights *even when they used the tools already available to them*. A very rough definition of “threat” for the purpose of authorizing an *additional layer of government* (i.e. a watermaster) could be:

“A set of demonstrated circumstances where existing senior water rights holders are unable to reliably utilize their water rights using all administrative tools now available from the TCEQ.”

The ALJs interpreted BFFR’s proposed definition as requiring a showing of *actual harm*, rather than *impending harm* (PFD p. 20). This was not the intended point of BFFR’s argument. Considering that the appointment of a watermaster amounts to an additional layer of government, “threat” should be defined as a showing that the existing regulatory scheme exposes senior water rights holders to an unreasonable, *impending harm* that cannot be addressed by the existing regulatory program before another governmental official is appointed to oversee the administration of water rights, and attendant costs are added to the TCEQ water rights program.

BFFR's definition of threat would not only distinguish a particularly troubled river basin from *all other* river basins; but would also provide the Commission with a helpful way of examining the record in this case. BFFR does not agree that the hearing record shows that the proponents for the watermaster have experienced actual harm. Almost without exception, the record shows that the three primary senior water rights holders who testified in this case: Dow Chemical Company ("Dow" or "Dow Chemical") [Hearing Transcript p. 39 line 4 - line 18]; Gulf Coast Water Authority ("GCWA"); and Janes Gravel Co. ("Janes" or "Janes Gravel") [Hearing Transcript p. 144 line 1 - line 12] were always able to meet their needs for water through priority calls and/or the existing TCEQ complaint procedure. Dow Chemical's experience with priority calls yielded orders from the agency of junior water rights holders to cease diverting under their permits. GCWA made priority calls that were addressed by the TCEQ staff expeditiously, though subject to a senior call by Dow. However, GCWA was never actually without water under one permit or another [Hearing Transcript p. 105 line 19 - p. 106 line 5]. Janes Gravel complains about the lack of a watermaster but admitted that its primary dispute is with the City of Lubbock and how it asserts its priority under the doctrine of prior appropriation, as a municipality [Hearing Transcript p. 140 line 3 - p. 143 line 25]. (This would not change with a watermaster.) The record shows that Janes Gravel has never actually filed a single complaint or priority call with the TCEQ staff against a junior appropriator [Hearing Transcript p. 156 line 4 - p. 157 line 11].

Each of these three (3) water rights holders complained generally about the administrative lag in agency response time for a priority call or complaint against another water right holder. There was implied testimony that the concept of "threat" was connected with delay [Hearing Transcript p. 109 line 15 - p. 110 line 23]. The supposed "proactive" benefit of a watermaster would prevent losses resulting from the delay of TCEQ staff action. This testimony has to be assessed in the context of actual, rather than speculative loss of access to permitted water. The expectation that the actions of *any* governmental office, including a watermaster, will be free of administrative delay is unrealistic. The demonstrated difference between the actual experience of senior water rights holders with the TCEQ, and the imagined, speculated performance of a watermaster should be clear before the

definition of threat can include the concept of delay. This record does not support the premise that the presence of a watermaster will reduce administrative delay for water rights holders generally, however. Under questioning by protestants, all Aligned Party witnesses and TCEQ staff asserted that they “did not know,” specifically how the watermaster could address daily notices of intent to divert, or even how those notices could be made.

The ALJs devoted significant space in their PFD to establish that key supporters of the appointment of a watermaster, GCWA and Dow, have spent a great deal of money purchasing guaranteed water from multiple sources. They attribute the need for such purchases to the “threat” to which their water rights are exposed. However, these contracts are so long standing that it is just as likely that these parties simply wanted more water than would be available under their water rights. The desire of a water right holder to have even greater resources than their water rights provide does not inexorably support more stringent regulatory means to help that water right holder retain what it has, already.

IV. NEED

The question of need for a watermaster should be derived from a clear determination that senior water rights holders are threatened in *a meaningful way*. If the record does not show that senior water rights have not been or cannot be protected adequately by the TCEQ staff and the existing system of water rights management within the Brazos River Basin, then there is no demonstrated need for a watermaster. In assessing the need for a watermaster there are several components of the concept of “need” to consider: 1) What can a watermaster *actually* provide that the existing system cannot provide? 2) Can a watermaster function in the Brazos River Basin, at all, given the existing known and unknown variables unique to the Brazos River Basin? 3) Is the additional cost of a watermaster program worth the imposition of an additional layer of government?

Also, BFFR does not read in §§11.451 and 11.452 that “threat”, as used in those two (2) sections, of the Texas Water Code *equals* “need.” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) instructs us to look to

the *language* of the statute itself when it is unambiguous. In the case of §§11.451 and 11.452 the language is unambiguous. Section 11.451 authorizes the Commission to appoint a watermaster on public petition if the Commission *finds* that the rights of senior water rights holders in the basin are threatened. Then, §11.452(a) and (b) require the TCEQ make a *determination* that a need exists for the appointment of a watermaster. The ALJs interpretation of the two terms renders the statutory requirements of §11.452(a) and (b) meaningless. Under the proponents' interpretation of "threat" and "need", the Legislature could have simply stated in §11.451 that if the Commission finds that senior water rights are threatened, then the Commission is directed to mitigate that threat by appointing a watermaster. In fact, the Legislature directed the TCEQ to make each determination, separately.

The logical interpretation of the terms "threat" and "need for a watermaster" in the two (2) sections assigns meaning to both terms as *Entergy Gulf States v. Summers (supra)* directs. The Legislature envisioned a possibility where senior water rights are "threatened," but the threat is insufficient to require the appointment of a watermaster. Perhaps, the Commission could find that senior water rights are "threatened" but finds that the threat is "mild," or otherwise insufficient to justify the appointment of a watermaster. Consequently, the plain language of the statute indicates that "threat" is not a binary concept, but rather, can be a matter of *degree*. Perhaps, the Commission could find that senior water rights are "threatened" but that the threat is such that a watermaster would *not* help to ameliorate the threat. Perhaps, the Commission could find that senior water rights are "threatened," but also finds that a watermaster program would cost too much for that basin (for the agency or the water rights holders), or would be too intrusive, or would otherwise not be right for the perceived "threat." To equate "threat" with the need for a particular governmental program is to assert that there can be only one answer to a particular regulatory need. In our nation's response to the threat of terrorism, for example, there has been no single response or type of response and each response tries to balance effectiveness against the threat against government intrusion. The Texas *Legislature* did not believe a watermaster was necessarily the answer and so it gave the Commission the discretion to determine how any expressed threat by water rights holders could be handled. The

Commission was empowered with the discretion to appoint a watermaster with *no* public support. The Commission was empowered with the discretion to define and determine the nature of a “threat” to senior appropriators within a basin. Finally, the Commission has the discretion *not* to appoint a watermaster *even if* it determines that senior water rights are threatened, under §11.451.

The ALJs were too easily impressed by the statements offered in support of the need for a watermaster and a watermaster’s supposed benefits. In fact, the proponents of a Brazos River Basin Watermaster offered only vague pronouncements about the alleged benefits of a watermaster that were not sufficiently fleshed out during the hearing. The witnesses talked about how a watermaster can be “proactive” in responding to the needs of senior water rights holders, rather than “reactive” as they characterize the TCEQ staff. There was even vague testimony about how a watermaster “prevents” water shortages to senior water rights holders before they occur. TCEQ and BRA witnesses offered no explanation of the interplay between administration of existing water rights under the prior appropriation doctrine, water rights subject to BRA contracts under a credit system, and water rights subject to accounting plans and Water Management Plans. The testimony does not supply all the details of “how.”

Several witnesses testified that a watermaster is able to use “real time” data about water rights, actual water use and requests for water by senior water rights holders and “look downstream” to ensure that junior appropriators do not divert at the expense of senior appropriators. The assumption is that diversion out of priority is the primary reason for unfulfilled requests for water by senior appropriators, rather than drought conditions, evaporation, the intervening operations of reservoirs by water rights holders such as BRA or any other factor beyond the control of a watermaster. In fact, the primary tool of the watermaster appears from the testimony to be a more rapid ability to curtail out of priority diversions and a staff to detect and, presumably punish, unauthorized diversions. Some witnesses testified about the “flexibility” of a watermaster to devise informal “agreements” that could accommodate the immediate or temporary needs of a specific appropriator. Such flexibility, upon closer examination, is largely illusory [Hearing Transcript p. 275 line 19 - p. 289 line 22]. The watermaster, like the TCEQ staff, is

obligated to enforce the law of prior appropriation. Any other arrangement or agreement cannot be imposed on an authorized appropriator by the watermaster. Consequently, the many extant contracts, agreements and plans which overlay the administration of water rights in the Brazos River Basin are potentially impaired by the imposition of a watermaster program.

The immense size of the Brazos River Basin, alone, argues against the practicality of informal arrangements other than enforcement of prior appropriation. It is not practical to expect a watermaster to forge temporary agreements with all downstream appropriators to provide for the day to day diversions by junior appropriators. The logistics of such communications is highly unlikely and was not otherwise explained during the hearing. Even the existing watermaster for the Concho River, admitted during his deposition that imposing the watermaster's will on an appropriator does not realize any administrative savings if the water rights holder challenges the watermaster's proposal [Ramos Deposition p. 57 line 21 - p. 69 line 24]. The Concho River Basin is a fraction of the size of the Brazos River Basin.

It is more likely that the benefit of a watermaster to the Aligned Parties who seek one is to allow junior appropriators to be placed under more regular surveillance and sanctioned for out of priority diversions that they would not otherwise sanctioned for, but for a watermaster's order to cease diversion. Dr. Jordan Furnans testified that a junior appropriator's water right obligated such a water right holder to cease diversions if a senior water right holder "needed" the water [Hearing Transcript p. 290 line 9 - p. 293 line 2]. Without a watermaster, dozens of "violators" continue to divert because, as a practical matter, they do not know the needs of the senior water right holder that is, perhaps, hundreds of miles downstream. The TCEQ staff does not sanction the junior appropriator who diverts out of priority, unless there has been a priority call and the TCEQ notifies junior appropriators to cease diversions. With a watermaster, arguably, the orders could be issued more quickly and the violations detected and sanctioned more quickly. This, practically, is the primary "benefit" if a watermaster is in a basin the size of the Brazos. In extreme drought conditions, appropriators near the mouth of the basin that have need for large amounts of water, such as GCWA and Dow, could

more effectively shut down the junior water rights access to water. The limitations of the right of government to intercede in private contracts, as discussed by the Texas Supreme Court in *Texas Municipal Power Agency v. PUC*, 253 S.W.3d 184, 191-194 (Tex. 2007), must give the TCEQ pause as to the limits of a watermaster's expertise or authority to interfere in existing water contracts.

V. EVIDENCE OF HARM TO SENIOR APPROPRIATORS

The Aligned Parties presented evidence of what they call "harm" to senior water rights holders that only supports a new watermaster if the low bar of "threat" used in the Concho River Case *and* the "threat equals need" analysis is used. At pages 11 through 14 of their Closing Argument, they cite Dr. Brandes' testimony which relies on mathematical modeling to demonstrate the evidence of harm to senior appropriators. Dr. Brandes analyzes several junior water rights holders who reported diversion of water out of turn during a priority call to show how junior water rights holders can divert water that is meant for a senior water right holder. As a mathematical certainty, this anecdotal evidence of harm *could* be relevant to show *something*. In its real application, however, it is not clear whether these several junior water rights holders *actually* kept water that would have otherwise reached the senior water rights holder from reaching the desired appropriator. Presumably, we are asked to extrapolate the effect of some theoretically harmful, "out of priority" diversions to untold other examples of theoretical harm. The appropriate weight to be given to the Aligned Petitioners' speculation is dubious in terms of an evidentiary showing.

VI. EXCEPTIONS TO SPECIFIC PROPOSED FINDINGS OF FACT

BFFR excepts to the PFD specifically for the legal reasons as set out above, and to specific findings of Fact as set out below:

Finding of Fact No. 7:

Some parties later withdrew, so that the number of Petitioners seeking a Brazos River Basin Watermaster fell below the statutorily required 25 before the hearing began. The ALJs denied the Motion for Summary Disposition by the Bell County

Group and others on September 11, 2013, and continued with discovery and proceeded with the hearing despite the lack of 25 holders of existing water rights requesting the appointment of a watermaster.

Finding of Fact No. 9:

Because many of the Petitioners later withdrew their requests for appointment of a watermaster, there were only 15 existing water rights holders requesting water rights as of the prehearing on September 20, 2013.

Finding of Fact No. 18:

There is no evidence that water rights in river basins where there are no watermasters are not actively enforced. To the contrary, the TCEQ uses a variety of regulatory tools in its water rights permitting program to actively enforce water rights, including requiring daily water rights accounting plans, requiring the filing of water rights contracts, and responding to priority calls and concerns of both senior and junior appropriators.

Finding of Fact No. 39:

The definition of “out of priority” diversions is unclear. The evidence did not establish that Junior priority water rights holders were diverting water which: (a) was determined by the TCEQ to have been needed and available to senior downstream water rights; or (b) was not water purchased by junior water rights holders from senior water rights holders. The helicopter trip by the Aligned Parties witness Dr. Jordan Furnans, included photos taken before TCEQ had issued any order requiring junior water rights holders to curtail their water usage.

Finding of Fact No. 45 through Finding of Fact No. 49:

The ALJs provided no definition of “threat” applicable to this case as required by statute, until after the close of the record in this case.

Findings of Fact No. 50 through Finding of Fact No. 74:

These findings regarding the benefits of a watermaster are unrelated to the proposed budget for the watermaster in this case, which included only a watermaster, an unspecified number of lower paid assistants, and an executive

assistant. More importantly, there was no concrete evidence in the record of how the watermaster staff was going to function, how it could administer water rights more effectively than the TCEQ water rights program as a whole, and, more importantly, how it could possibly provide the alleged benefits asserted by the Aligned Parties in the context of the budget constraints. Considering the ED's costs in responding to priority calls in 2009, it is nonsensical to assume that the limited resources of the watermaster program could do so much more with so much less in monetary and personnel resources.

Finding of Fact No. 75 and Finding of Fact No. 76:

These Findings of Fact are nonsensical. The Texas Legislature has made it the duty of the TCEQ to administer water rights. To say that the requirement that they do so has taken resources away from other work is to usurp unlawfully the prerogatives of the Texas Legislature. The Texas Legislature has funded water rights to the extent it felt appropriate, and has charged the TCEQ with operating within those budgetary guidelines. When presented with the opportunity to implement and fund a Brazos River Basin Watermaster program this past Regular Session of the Texas Legislature, the Texas Legislature declined.

Finding of Fact No. 79:

This finding of fact is nonsensical also, because it disregards the fundamental purpose of this hearing. This hearing was not to determine whether water rights holders could afford to pay a watermaster, but whether a watermaster was needed. There has to be some cost benefit analysis to that determination. Nothing in the record identifies any benefit at all to BFFR associated with the additional costs of a watermaster.

Finding of Fact No. 80 and Finding of Fact No. 81:

Again, these Findings of Fact usurps the prerogatives of the Texas Legislature, which determines the funding and programming of the Texas Commission on Environmental Quality.

Finding of Fact No. 83:

This Finding of Fact is characterized by rank speculation and is against the weight of evidence in the record, where no one was willing to testify as to how a watermaster program would practically function on a day to day basis.

Finding of Fact No. 89:

This conclusory finding is unrelated to any supporting findings regarding how the Brazos River Basin Watermaster would actually function, and how water rights would be administered differently under a watermaster versus under the existing TCEQ water rights enforcement regime. In the absence of any supporting findings, which cannot be found in the evidence of record, this finding is clearly not supported by substantial evidence or even a scintilla of evidence.

It follows, then that if the legal analysis and the factual record combined do not support the ALJs' conclusions that senior water rights in the Brazos River Basin are threatened and that that threat should be addressed by the appointment of a watermaster, that the Conclusions of Law based on those erroneous findings should be withdrawn and replaced with conclusions that deny the Aligned Parties' request for appointment of a watermaster to buttress their rights and burden other water rights holders in the Brazos River Basin for the costs of the enhancement of the water rights for those few.

VII. SUMMARY AND CONCLUSIONS

Brazos Family Farmers and Ranchers respectfully request the ALJs grant these exceptions and recommend appropriate changes to the Proposal for Decision to be incorporated into a Final Order denying the Petitioners' request for a watermaster in the Brazos River Basin for the reasons stated herein in addition to the reasons set forth in their Proposal for Decision, issued December 17, 2013.

Respectfully submitted,

WEBB & WEBB
ATTORNEYS AT LAW

712 Southwest Tower
211 East Seventh Street
Austin, Texas 78701
Tel: (512) 472-9990
Fax: (512) 472-3183

By: 
Stephen P. Webb
State Bar No. 21033800

By: 
Gwendolyn Hill Webb
State Bar No. 21026300
ATTORNEYS FOR PROTESTANTS BFFR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 6th day of January, 2014.

FOR THE CHIEF CLERK:
LaDonna Castañuela
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
512-239-3300
512-239-3311 (fax)

FOR BRAZOS RIVER AUTHORITY:
Douglas G. Caroom
dcaroom@bickerstaff.com
Susan Maxwell
smaxwell@bickerstaff.com
Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746
512-472-8021
512-320-5638 (fax)

FOR THE EXECUTIVE DIRECTOR:
Ross W. Henderson, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, TX 78711-3087
512-239-6257
512-239-0626 (fax)
rhenders@tceq.texas.gov

FOR THE UPPER BRAZOS COALITION:
Jason Hill
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Ave., Suite 1900
Austin, TX 78701-2442
512-322-5830
512-472-0532 (fax)
jhill@lglawfirm.com

FOR LUMINANT GENERATING COMPANY
Thomas E. Oney, Attorney
Luminant Energy Company LLC
1601 Bryan Street, Suite 22-130B
Dallas, Texas 75201
Phone: 214-875-9086
Fax: 214-875-8660
tom.oney@luminant.com

FOR PUBLIC INTEREST COUNSEL:
Eli Martinez, Attorney
512-239-3974
512-239-6377 (fax)
Eli.martinez@tceq.texas.gov

Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, TX 78711-3087

Elizabeth A. Townsend
Jackson, Sjoberg, McCarthy & Townsend, LLP
711 w. 7th St.
Austin, Texas 78701
Phone: 512-472-7600
Fax: 512-225-5565
btownsend@jacksonsjoberg.com

FOR DOW CHEMICAL CO.:
Fred B. Werkenthin, Jr.
Booth, Ahrens & Werkenthin, PC
515 Congress Ave., Suite 1515
Austin, TX 78701-3504

FOR NRG TEXAS POWER LLC:
Joe Freeland
Mathews & Freeland LLP
327 Congress Avenue, Suite 300
Austin, TX 78701

512-472-3263
512-473-2609 (fax)
fbw@baw.com

FOR THE GULF COAST WATER AUTHORITY:
Molly Cagle
Molly.cagle@bakerbotts.com
Paulina Williams
paulina.williams@bakerbotts.com
Partner, Baker, Botts, LLP
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, TX 78701
512-322-2532
512-322-2501(fax)

FOR CITY OF HOUSTON:
Edmond McCarthy
Jackson, Sjoberg, McCarthy & Townsend, LLP
711 West 7th Street
Austin, Texas 78701
Phone: 512-472-7600
Fax: 512-225-5565
EMCCARTHY@JACKSONSJOBORG.COM

FOR BRAZOSPORT WATER AUTHORITY:
Jason Cordoba
Mauro & Cordoba, PLLC
208 Parking Way
Lake Jackson, Texas 77566
Phone: 979-297-9854
Fax: 979-299-6440
Jason@maurolaw.com

FOR DAN KACIR:
Dan Kacir
1821 Everton Drive
Temple, Texas 76504
Phone: 254-493-1307
Fax: 254-773-2173
dkatty2000@yahoo.com

FOR I.J. TALBOTT & FRANK L. MAURO, J.D.:
Frank L. Mauro, J.D.
208 Parking Way
Lake Jackson, Texas 77566

FOR CHESTER E. DIXON:
Chester E. Dixon
24 W. Rivercrest Drive
Houston, Texas 77042

FOR MARGIE KRAEMER & KRAEMER FARMS:
Margie Kraemer
Kraemer Farms

512-404-7800
512-703-2785 (fax)
jfreeland@mandf.com

FOR CITY OF BELTON, CITY OF KILLEEN, CITY OF
HARKER HEIGHTS, BELL COUNTY WCID No. 1, CITY OF
COPPERAS COVE :
David Tuckfield
The AL Law Group PLLC
12400 Highway 71 West, Suite 350-150
Austin, Texas 78731
Phone: 512-576-2481
Fax: 512-366-9949
david@allawgp.com

FOR R.E. JANES GAVEL CO:
Scott R. Shoemaker
The Terrill Firm PC
810 West 10th Street
Austin, Texas 78701
Phone: 512-474-9100
Fax: 512-474-9888
sshoemaker@terrill-law.com

FOR LEONARD TRUSTS & JPMORGAN CHASE BANK,
TRUSTEE
W. Thomas Buckle
Scanlan, Buckle & Young PC
602 West 11th Street
Austin, Texas 78701-2099
Phone: 512-478-4651
Fax: 512-478-7750

FOR GEORGE SIDNEY KACIR:
George Sidney Kacir
1821 Everton Drive
Temple, Texas 76504
Phone: 254-773-2171
Fax: 254-773-2173
kacirlaw@sbcglobal.net

FOR HUGH DAVIS:
Hugh Davis
2025 Charboneau Drive
Waco, Texas 76710-2651

FOR ALDREDGE & SHANAHAN, LP
Aldredge & Shanahan, LP
1345 S FM 908
Rockdale, Texas 76567-4476

FOR THE CITY OF CLEBURNE:
City of Cleburne
P O Box 677

296 CR 100
Rogers, Texas 76569

FOR BETTY KACIR WHEELER ESTATES:
Kacir Wheeler, LLC
Craig Wheeler, Registered Agent
4325 Stanford Avenue
Dallas, Texas 75225
Phone: 972-768-8110
cwheeler66@mac.com

Cleburne, Texas 76033

FOR RICHARD D. LUNDBERG:
Richard D. Lundberg
Lundberg Farms
P O Box 329
Clifton, Texas 76634



GWENDOLYN HILL WEBB