

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO: Commissioners DATE: June 20, 2008

THRU: Todd Chenoweth, Director
Water Supply Division *TC*

Robin Smith, Attorney
Environmental Law Division

FROM: Kellye Rila, Section Manager *KR*
Water Rights Permitting & Availability Section

SUBJECT: Herbst Holdings, Ltd.
Docket # 2008-0652-WR
Application No. 21-3149B to Amend COA No. 21-3149
East Frio River, Nueces River Basin
Real County

On June 19, 2006 the Texas Supreme Court issued an opinion in the case of *Marshall v Uncertain*.¹ The Supreme Court in that opinion considered the Commission's practices regarding notice and hearing for applications to amend a water right under Texas Water Code §11.122(b). The Court held that it could not determine under the record in that case whether notice and a hearing would be required. The Court remanded the case to the Commission.

The court in *Marshall* held that when reviewing an amendment to a water right, the Commission must determine whether there could be an adverse impact from the application on other water rights and the environment beyond or irrespective of the full use assumption, explained below. The court also held that the Commission must determine if the application could have an adverse impact on the public interest criteria: beneficial use, public welfare, groundwater effects, consistency with the state and regional water plan, compliance with administrative requirements, and conservation.

The purpose of this memo is to discuss the public notice that should be given in the above referenced application by Herbst Holdings, Ltd. in light of agency rules and the *Marshall* decision.

¹ City of Marshall et. al. v. City of Uncertain et. al., No. 03-1111 (Tx. June 9, 2006).

TO: Commissioners

Page 2

June 20, 2008

Current Permit and Application for Amendment

The applicant currently owns a portion of Certificate of Adjudication (COA) 21-3149. That water right authorizes the Owner to divert and use not to exceed 20.69 acre-feet of water per year at a maximum diversion rate of 1.33 cubic feet per second (600 gallons per minute) from the East Frio River, tributary of the Frio River, tributary of the Nueces River, Nueces River Basin for agricultural (irrigation) purposes on a 61.025 acre tract in Real County. The time priority for this water right is December 31, 1953.

Herbst Holdings, Ltd. has applied for an amendment to its existing certificate to add industrial use to its authorized use.

Rules Related to Notice

The Commission has specified what notice is required for applications to amend a water right in 30 TAC §295.158. Under that rule, in subsection (c), no notice is required if no additional consumptive use is contemplated, no increase in diversion rate or period will be granted, and in the judgment of the Commission there is no potential for harming another water right. This application fits those conditions in all respects.

Water Code

This application for an amendment to an existing water right is governed by Texas Water Code §11.122. Subsection (a) requires a water right holder, except as discussed above, to obtain a water right amendment if the holder is going to change the purpose of use or "otherwise alter a water right."

Subsection (b) of §11.122 sets out the scope of the Commission's authority in reviewing applications to amend a water right. Staff notes that in their application Herbst Holdings, Ltd. is not asking for either an increase in the amount of water authorized for diversion, or an increase in the rate of diversion. With that understanding of the application, it then becomes a duty of the Commission to approve the application "*if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit . . . that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment,*" and the application must meet, "*all other applicable requirements,*" of Chapter 11 of the Water Code. The clause that requires the Commission to compare the requested amendment to the existing permit as if the existing permit was fully exercised is often referred to as the "full use assumption."

TO: Commissioners
Page 3
June 20, 2008

Adverse Impact on Water Right Holders and the Environment

Under the City of Marshall opinion, the Commission must evaluate whether an amendment can adversely impair other water rights or the environment. Under the full use assumption, the addition of industrial use can have no greater impact on other water right holders and the environment than the impacts to those interests under the existing certificate. Both before and after the amendment, the water right holder will only be able to take 20.69 acre-feet of water per year from the East Frio River at the same specified diversion point. The water right holder, under the existing certificate and the proposed amended certificate, could take all of that water in the first part of the year, or take all of that water in later parts of the year, subject to a maximum diversion rate of 1.33 cfs. In other words, there are no special conditions in the permit that restrict the water right holder to a particular pattern of use, or that spreads out the diversion of 20.69 acre-feet to specific amounts over the course of the year. Because there is no specific pattern of use in the certificate, the full use assumption requires the Commission to consider the existing certificate and the proposed amended certificate as potentially exercised under all lawful patterns of use.

It makes no difference to other water right holders or the environment, whether the water right holder is taking its 20.69 acre-feet for irrigation (the current use) or for industrial use. The effect on water in the river, and therefore water available for downstream water right holders or the downstream aquatic environment will be the same: there will be 20.69 acre-feet per year less after the diversion. Therefore with the full use assumption, the proposed amendment will not cause adverse impact on other water right holders or the environment.

Other Applicable Requirements

Under Section 11.122(b) the proposed amendment must also satisfy all other applicable requirements of Water Code Chapter 11. The Supreme Court in the *Marshall* case itemized those other requirements. We turn now to a consideration of the requested amendments and those other requirements that the Supreme Court has told us are applicable.

Administrative Requirements

Staff has reviewed the application and has found that it meets all administrative requirements of the Water Code. Staff therefore declared the application administratively complete and accepted it for filing with the Chief Clerk on March 1, 2007.

TO: Commissioners

Page 4

June 20, 2008

Beneficial Use

Proposed appropriations of state water must be for a beneficial use. Beneficial use is the non-wasteful use of water for a purpose recognized under the Water Code. The applicant has asked that industrial uses be added to its authorized uses in its certificate. Industrial use is recognized as a beneficial use by Water Code §11.023(a)(2). We will consider whether the use is non-wasteful below.

Protection of Public Welfare

A proposed appropriation of state water must not be detrimental to the public welfare. No definition of "detriment to public welfare" is provided in the law. Therefore, the Commission has wide discretion in determining benefits or detriments to the public welfare. The application seeks to add industrial use to its existing use. This type of multi-use permit is authorized by Water Code §11.023(e). A multi-use permit in this situation would allow the water right owner to continue to irrigate land for crops. At the same time, that water will be available for industrial use. The applicant has indicated that the industrial water would be used for a highway construction project, e.g. water for earth compaction and dust suppression. Water will also be used for re-vegetation which will reduce soil erosion. The applicant states that the amendment, if granted, would be used to minimize the risk of highway construction delays. Those delays could result in additional costs to taxpayers, potential safety issues, and the potential for increased storm and sediment run-off. The Executive Director's opinion is that there is no detriment to the public welfare by granting this application.

Groundwater Effects

A proposed appropriation of state water must consider effects of the proposed permit on groundwater or groundwater recharge. The Commission's Water Availability Model (WAM) is used to evaluate the availability of unappropriated water for new appropriations and takes into account both contribution to river flow caused by groundwater coming to the surface in the river (springs) and decreases in river flow caused by the river flowing over recharge features and losing surface water to groundwater recharge. The WAM contains channel loss factors that account for the gain or loss of river flow. These channel loss factors were developed by the expert engineering contractors hired by the Commission to develop the WAMs. The Nueces WAM² includes the segment of the East Frio River at which the diversion under this permit occurs. The Nueces WAM does not have channel loss factors associated with the East Frio River at the permitted diversion point.

² Water Availability in the Nueces River Basin. Prepared by HDR Engineering for the Texas Natural Resource Conservation Commission. October 1999.

TO: Commissioners
Page 5
June 20, 2008

The 2006 Regional Water Plan for the Plateau Region³ identifies the Frio River Alluvium aquifer as a groundwater source for municipal supply for the City of Leakey. The Frio River Alluvium encompasses reaches of the East Frio River near the permitted diversion point. The Plan indicates concern with overpumping from this aquifer and effects on streamflow. The Planning Group agrees that more study is needed to determine how best to manage this aquifer's water resources.

The amount of water diverted by the owner will be the same (20.69 acre-feet per year) whether that water is drawn out of the river for irrigation or industrial use. Thus, the diversion of water for industrial use will have no greater effect on groundwater resources or groundwater recharge than the diversion of water for the existing irrigation use. Therefore, the Executive Director concludes that there is no potential groundwater issue involved with this application.

Consistency with Regional and State Plan

Water right applications are only granted if the application addresses a water supply need in a manner that is consistent with the state water plan and the relevant regional water plan, unless the Commission determines that conditions warrant a waiver of this requirement. The purpose of the state and regional water plans is to assess the likely future use of water and to develop strategies for meeting water supply shortfalls. The state and regional water plans simply do not address every possible change in individual water rights. Further, the state and regional plans do not assess or plan for possible water use by highway construction projects. Therefore, the Executive Director concludes that since the state and regional water plans are not designed to cover water needs for highway construction projects, either conditions warrant a waiver of the consistency determination, or the requested amendment is consistent with the relevant regional water plan and the state water plan. The applicant asserts that use of water for industrial uses, such as this TXDOT road project is consistent with the state water plan.

Avoidance of Waste and Achievement of Water Conservation

The Commission has adopted rules to specify the type of water conservation plans that will be required for amendments to existing water rights in 30 TAC §295.9(a)(4). The applicant is not increasing the amount of its appropriation. The applicant is adding industrial use, to accommodate water use for a highway construction project. The applicant has submitted an industrial water conservation plan. Staff has reviewed the plan and finds that the applicant will achieve water conservation and avoid waste. A memo addressing the water conservation plan is included with the other agenda materials.

³ Plateau Region Water Plan. Prepared by Plateau Water Planning Group for the Texas Water Development Board. January 2006.

TO: Commissioners

Page 6

June 20, 2008

Conclusion

This application seeks an amendment to an existing authorization to add industrial use to its existing use. The application does not seek an increase in either the amount of water diverted or the rate of diversion. Under the full use assumption, the amendment will not have an adverse impact on other water right holders or the environment. The application does not raise any issues of beneficial use, detriment to the public welfare, groundwater effects, consistency with the state and regional water plans, compliance with administrative requirements, or avoidance of waste and achievement of water conservation. Commission rules allow this application to be processed without notice. Therefore, the Executive Director recommends that no notice be issued for this application.

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Ron Ellis, Application Manager
Water Rights Permitting Team
Water Supply Division

Date: February 26, 2007

Thru: Bill Billingsley, Team Leader
Resource Protection Team
Water Supply Division

BB 2/26/07

Kristin Wang, Senior Water Conservation Specialist
Resource Protection Team
Water Supply Division

KW 2/26/07

From: Ethan Ham, Water Conservation Specialist
Resource Protection Team
Water Supply Division

EH 2/26/07

Subject: Herbst Holdings, Ltd.
ADJ 3149
CN602819252
Review of Water Conservation Plan for Administrative Completeness

Applicant owns a portion of COA 21-3149 which authorizes the diversion and use of not to exceed 17.66 acre-feet of water per year for agricultural purposes to irrigate 16.48 acres out of 58.84 acres (being 15.395 and 43.45 acre tracts) at a maximum combined diversion rate of 1.33 cfs (600 gpm) from the East Frio River, tributary of the Frio River, tributary of the Nueces River, Nueces River Basin in Real County with a time priority of 12/31/1953.

Applicant seeks to amend COA 21-3149 to add Industrial use.

The 2007 Water Conservation Plan for Herbst Holdings, Ltd. have been reviewed for administrative completeness for industrial/mining use. The submitted plan meets the minimum requirements for industrial/mining uses as defined by TCEQ Rules, Title 30 TAC § 288.3.

The applicant is not currently using this water for agricultural purposes. The Water Conservation Staff of the Resource Protection Team recommends that a special condition be included in the water right amendment. The special condition should state that within 90 days prior to the diversion of water for agricultural purposes, the applicant or contract customer must submit an agricultural water conservation plan to the TCEQ to comply with Title 30 TAC § 288.4.

The request is not inconsistent with the approved Region "J" Water Plan and the approved 2007 State Water Plan.

The following standard water conservation language should be included in the permit:


“Owners shall implement water conservation plans that provide for the utilization of those practices, techniques, and technologies that reduce or maintain the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses.”

No further review is required by the Water Conservation Staff of the Resource Protection Team.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO: Chief Clerk

DATE: June 20, 2008

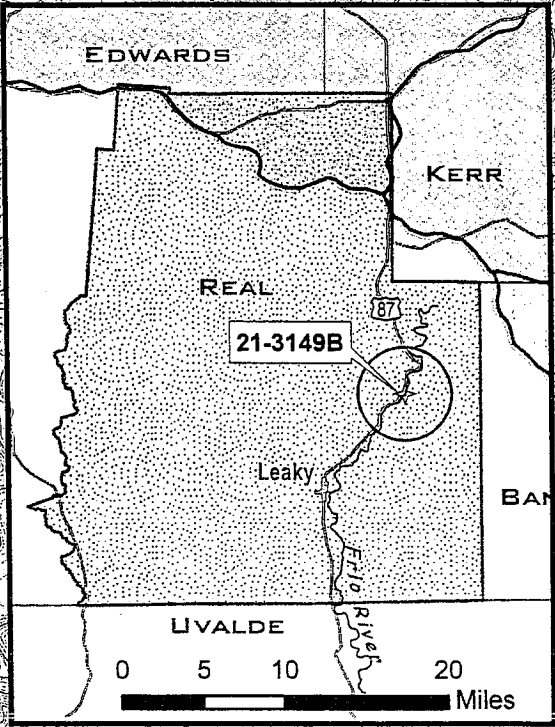
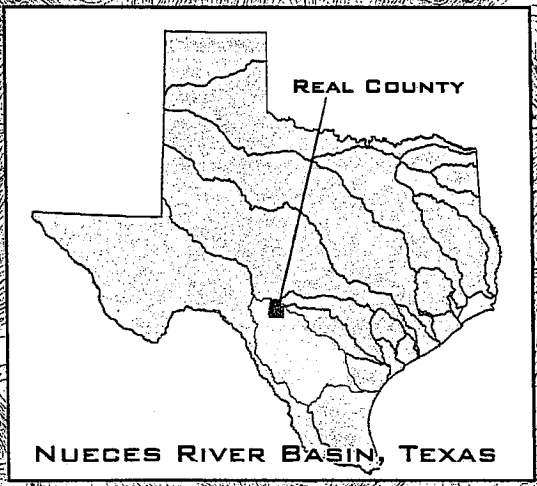
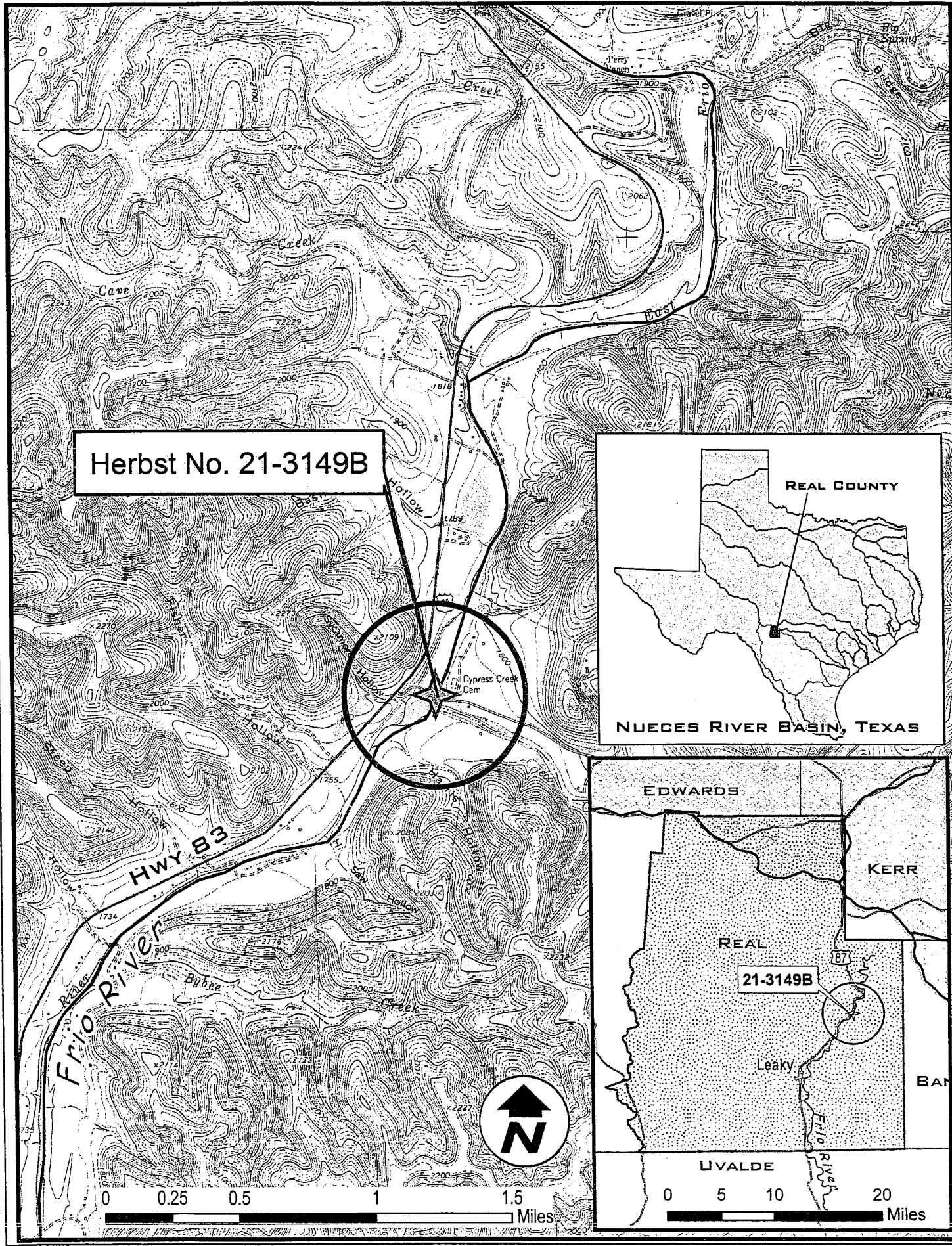
THRU:  Diana Delgado, Team Leader
Water Rights Permitting Team

FROM: Ron Ellis, Project Manager
Water Rights Permitting Team

SUBJECT: Herbst Holdings, Ltd.
Docket # 2008-0652-WR
ADJ 3149
CN602819252
RN101484103
Application No. 21-3149B to Amend Certificate of Adjudication No. 21-3149
TWC §11.122
East Frio River, Nueces River Basin
Real County

Below is the caption for this application:

Consideration of the public notice required for Herbst Holdings, Ltd.'s application for an amendment to Certificate of Adjudication No. 21-3149 to add industrial use to its authorized agricultural use. Herbst Holdings' Certificate of Adjudication No. 21-3149 authorizes the Owner to divert and use not to exceed 20.69 acre-feet of water per year at a maximum diversion rate of 1.33 cubic feet per second (600 gallons per minute) from the East Frio River, tributary of the Frio River, tributary of the Nueces River, Nueces River Basin for agricultural (irrigation) purposes on a 61.025 acre tract in Real County. The Executive Director recommends that no notice be required for this application. (Kellye Rila, Todd Chenoweth, Robin Smith)





TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

P.O. Box 13088, MC-160
Austin, Texas 78711-3088

Telephone No. (512) 239-4691 FAX (512) 239-4770

APPLICATION FOR AMENDMENT TO A WATER RIGHT

REQUIRING MAILED AND PUBLISHED NOTICE

NOT REQUIRING MAILED AND PUBLISHED NOTICE

Reference Texas Administrative Code § 295.158(b) or (c)

Notice: This form will not be processed until all delinquent fees and/or penalties owed to the TCEQ or the Office of the Attorney General on behalf of the TCEQ are paid in accordance with the Delinquent Fee and Penalty Protocol.

Customer Reference Number (if issued): CN

Note: If you do not have a Customer Reference Number, complete Section II of the Core Data Form (TCEQ-10400) and submit it with this application.

1. Name: HERBST HOLDINGS, LTD
Address: P.O. Box 1050
CORPUS CHRISTI, TEX 78403
Email Address: sgherbst@sbcglobal.net Fax: 361.882-9210

2. Applicant owes fees or penalties?
 Yes No
If yes, provide the amount and the nature of the fee or penalty as well as any identifying number:

3. Permit No. _____ Certificate of Adjudication No. 21-3149-100

Stream: X Watershed: _____
Reservoir (present condition, if one exists): _____
County: REAL

RECEIVED

DEC 28 2006

4. Proposed Changes To Water Right Authorizations:

WATER RIGHTS PERMITTING

Add Industrial use

(ATTACH ADDITIONAL PAGE AS NECESSARY, ATTACH MAP/PLAT DEPICTING PROJECT LOCATION, DIVERSION POINT, PLACE OF USE AND OTHER PERTINENT DATA)

5. I understand the Agency may require additional information in regard to the requested amendment before considering this application.

6. I have submitted the required fees herewith. (Sections 295.131-295.139)

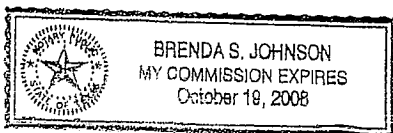
HERBST HOLDINGS LTD
SG Herbst mgr
Name (sign)

Brenda S. Johnson
Name (sign)

SG HERBST
Name (print)

Brenda S. Johnson
Name (print)

Subscribed and sworn to me as being true and correct before me this 18th day of December, 2006



Brenda S. Johnson
Notary Public, State of Texas

Herbst Holding Ltd.

(361) 882-8407
(361) 882-9210 Fax

P.O. Box 1050
Corpus Christi, TX 78403

March 10, 2008

Ron Ellis
Project Manager
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Herbst Holdings Ltd.
ADJ3149: CN602819252, RN101484103
Application No. 21-3149B

RECEIVED
TOED
WATER SUPPLY DIV.
2008 MAR 26 AM 11 00

Dear Mr. Ellis,

Pursuant to your letter of February 28, 2008, please note the following responses with regard to your items # 1-7 below:

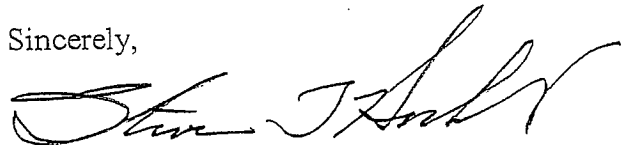
- Item #1: Please refer to your letter dated Feb 7, 2007 to Oct 10, 2007, which indicates all administrative requirements have been met with regard to the subject application.
- Item #2: The proposed amendment is a beneficial use of the water right, because as outlined in the original application, the proposed use of the water is for road construction/maintenance of a public roadway.
- Item #3: The proposed amendment will not be detrimental to the public welfare, and in fact, will be beneficial to the public welfare because the water is to be used for construction/maintenance of a public roadway.
- Item #4: The proposed amendment should have no material effect on ground water recharge because the water's use in road construction should be no different in those respects from it's currently approved use in irrigation.
- Item #5: The proposed use of water in the construction/maintenance of a public road clearly falls within a water supply need consistent with the State water plan. As outlined in that plan the "County - Other" and/or "Manufacturing" need categories could apply in this instance and the proposed amendment is consistent with the plan in meeting those needs.

Item #6: The construction work will be performed by Allen Keller Co. who is a contracting firm approved and hired by Texas Department of Transportation for project STP 2006 (523) Real Co. HWY 83, and which met all applicable requirements as set out by that entity.

Item #7: Water right holders or the environment will not be impacted by this amendment since the allowable amounts should not impact the availability of other water rights holders to access water anymore than from its currently approved irrigation use. Environmental concerns were addressed by, the Texas Department of Transportation and contractor in permitting of the road.

Should you have any further questions or concerns please contact me at:
(361) 882-8407.

Sincerely,

A handwritten signature in black ink, appearing to read "Stevens G. Herbst". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Stevens G. Herbst, Manager
Herbst Holdings Ltd.

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 28, 2008

Mr. Stevens G. Herbst
Herbst Holdings Ltd.
P.O. Box 1050
Corpus Christi, TX 78403
Fax (361) 882-9210

FACSIMILE AND
CERTIFIED MAIL

RE: Herbst Holdings Ltd.
ADJ 3149
CN602819252, RN101484103
Application No. 21-3149B to Amend Certificate of Adjudication No. 21-3149
TWC §11.122
East Frio River, Nueces River Basin
Real County

Dear Mr. Herbst:

This acknowledges receipt, on October 29, 2007, of your request to put your application on hold pending a decision on notice requirements.

The Commission is reviewing notice requirements for water right amendment applications pursuant to Texas Water Code (TWC) §11.122(b). On Friday, January 18, 2008, the Commission decided that in order to determine if an amendment application requires notice, staff must consider how an application addresses the relevant public interest criteria described in TWC §11.134 and outlined by the Texas Supreme Court in the case of *Marshall v. Uncertain* as well as how the proposed amendment will impact water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount.

Therefore, staff is requesting responses to Items 1-7 below. In lieu of providing responses, you may agree to the issuance of published notice and mailed notice to the water rights holders in the Nueces River Basin.

If you elect to proceed without agreeing to published and mailed notice, additional information is required.

1. Confirm whether this application meets the administrative requirements for an amendment to a water use permit pursuant to TWC Chapter 11 and Title 30 Texas Administrative Code (TAC) §§ 281.295. and 297. An amendment application should include, but is not limited to, a sworn application, maps, completed conservation plan, fees, etc.
2. Discuss how the proposed amendment is a beneficial use of the water right as defined in TWC §11.002 and listed in TWC §11.023. Identify the specific proposed use of the water (e.g., road construction, hydrostatic testing, etc.) for which the amendment is requested.

3. Explain how the proposed amendment is not detrimental to the public welfare. Consider any public welfare matters you think might be relevant to a decision on the application. Examples could include concerns related to the well-being of humans and the environment.
4. Discuss the effects, if any, of the proposed amendment on groundwater or groundwater recharge.
5. Describe how the proposed amendment addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement. The state and regional water plans are available for download at this website: http://www.twdb.state.tx.us/RWPG/planning_page.asp.
6. Provide evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined in TWC §11.002. Examples of evidence could include, but are not limited to, a water conservation plan or, if required, a drought contingency plan, meeting the requirements of 30 TAC §288.
7. Explain how the proposed amendment will or will not impact water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount.

The responses will be reviewed by the Executive Director's staff to make a determination of the application's notice requirement. The staff-recommended notice determination will then be set on Commissioner's Agenda for consideration. In lieu of responding to Items 1-7 above, you may agree to published notice and mailed notice to the water rights holders in the Nueces River Basin.

If you elect to proceed with published and mailed notice, please remit fees in the amount of \$244.40, described below.

Filing Fee	\$ 100.00
Recording Fee	\$ 1.25
<u>Notice Fee (Nueces River Basin)</u>	<u>\$ 244.40</u>
TOTAL FEES DUE	\$ 345.65
FEES PAID	\$ 101.25
BALANCE DUE	\$ 244.40

Please provide the information requested above or the notice fees by March 31, 2008, or the application may be returned pursuant to 30 Texas Administrative Code §281.19.

If you have any questions concerning this application, please contact me at (512) 239-1282 or by email at roellis@tceq.state.tx.us.

Sincerely,



Ron Ellis, Project Manager
Mail Code 160
Water Rights Permitting Team
Water Rights Permitting & Availability Section