

Jon Niermann, *Chairman*
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Kelly Keel, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 11, 2024

Laurie Gharis
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Complaint by McAllen Public Utility for denial of water by Hidalgo County Water Improvement District No. 3 under Texas Water Code §§ 11.041 and 51.305(d)
TCEQ Docket No. 2024-0243-WR
SOAH Docket No. 582-24-16336

Dear Ms. Gharis:

I have enclosed the following copies of documents to be included in the Administrative Record for the above-referenced case. The documents included are as follows:

- Original petition, Complaint by McAllen Public Utility for denial of water by Hidalgo County Improvement District No. 3 under Texas Water Code §§ 11.041 and 51.305(d)
- Preliminary Response to Original Petition, Hidalgo County Water Improvement District No. 3
- ED's Request for Referral to the State Office of Administrative Hearings; TCEQ Docket No. 2024-0243-WR

Sincerely,

A handwritten signature in black ink that reads "Aubrey Pawelka".

Aubrey Pawelka
Staff Attorney
Environmental Law Division

RECEIVED

FEB - 8 2024

Water Availability Division

TCEQ DOCKET NO. 2024-_____-WR

COMPLAINT BY MCALLEN PUBLIC
UTILITY FOR DENIAL OF WATER
BY HIDALGO COUNTY WATER
IMPROVEMENT DISTRICT NO. 3
UNDER TEXAS WATER CODE
§§ 11.041 AND 51.305(d)

§ BEFORE THE TEXAS COMMISSION

§ ON

§ ENVIRONMENTAL QUALITY
§

ORIGINAL PETITION

McAllen Public Utility ("MPU"), acting in its capacity as the municipally owned utility for the City of McAllen, Texas ("McAllen"), files with the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") this Original Petition complaining of the denial of water by Hidalgo County Water Improvement District No. 3 ("HCWID 3") and refusal of HCWID 3's Board of Directors to supply available water at a reasonable, just, and non-discriminatory price (the "Petition").

I. EXECUTIVE SUMMARY

MPU is entitled to 13,980 acre-feet of water per year water appropriated by HCWID 3 pursuant to Certificate of Adjudication No. 23-848, as amended through Certificate No. 23-848D (COA 848). COA 848 expressly authorizes HCWID 3 to divert up to 8,980 acre-feet of water per year for McAllen's exclusive municipal use. COA 848 further authorizes HCWID 3 to divert an additional 5,000 acre-feet of water per year for municipal purposes in HCWID 3's service area. This is state water to which McAllen is entitled that McAllen cannot legally access without paying HCWID 3 to divert and supply it.

The price demanded by HCWID 3 for the available municipal priority water is unreasonable, unjust, and discriminatory. HCWID 3's refusal to charge a reasonable, just, and non-discriminatory price for the water effectively constitutes a denial of service. In June of 2022, MPU ceased ordering water from HCWID 3 and sought alternative sources of supply. Following

a preliminary investigation by the Executive Director, the Commission should hold a hearing on the Petition and render a written decision finding the price demanded by HCWID 3 to be unreasonable, unjust, and discriminatory and reassign McAllen's municipal priority water rights from COA 848 to McAllen's Certificate of Adjudication No. 23-353 so that McAllen may directly divert and use the municipal class water to which it is legally entitled. In the alternative, TCEQ should exercise its authority to establish and order a just, reasonable, and non-discriminatory price for the 13,980 acre-feet of water to which McAllen is entitled.

II. LEGAL AUTHORITY AND JURISDICTION

1. Statutory Authority

MPU files this Petition in accordance with Texas Water Code Sections 11.041 and 51.305(d). Chapter 51, Water Code, governs water control and improvement districts.¹ HCWID 3 operates as a Water Control and Improvement District ("WCID") in accordance with Chapters 49 and 51, Water Code.² Section 51.305(d) provides, in its entirety, the following:

A landowner of irrigable land in the district or a user of water delivered by the district for any purpose other than irrigation who disputes all or a part of a board order that determines the amount of an assessment, charge, fee, rental, or deposit may file a petition under Section 11.041. That petition filed with the [TCEQ] is the sole remedy available to a landowner or user of water described by this subsection.

Subsection 51.305(d) was originally enacted by the Legislature in 2013.³ While much of the rest of Section 51.305 governs assessments levied by a WCID against irrigable land in the WCID, the statute makes a distinction between such assessments and other "charges, fees, rentals,

¹ Tex. Water Code §§ 51.001, .011.

² Tex. Spec. Dist. Code § 9054.0002.

³ Act of May 2, 2013, 62nd Leg., R.S., ch. 90, § 42, 2013 Tex. Gen. Laws 164, 165, 172 (codified at Tex. Water Code § 51.305(d)).

or deposits required of persons in the district who use or make application to use water.”⁴ Subsection 51.305(d) authorizes “a user of water delivered by the district for any purpose other than irrigation who disputes all or part of a board order that determines the amount of an assessment, *charge*, fee, rental, or deposit” to file the dispute as a petition under Section 11.041.⁵ The board of a WCID may determine a charge to a city.⁶ A petition under Section 11.041 “is the sole remedy available to a user of water described by [Subsection 51.305(d)].”⁷

MPU is “a user of water delivered by the district for any purpose other than irrigation”⁸ and by this Petition disputes all orders by HCWID 3’s Board of Directors that have determined prices charged to McAllen or MPU that are unreasonable, unjust, and discriminatory. Pursuant to Section 51.305(d), this Petition filed under Section 11.041 is the sole remedy available to MPU. Consequently, TCEQ the proper venue⁹ for this dispute and complaint—not only for determination that the price demanded by HCWID 3 is unreasonable, unjust, and discriminatory, but also to order the terms under which MPU and McAllen may access the state water they are entitled to in the

⁴ Tex. Water Code § 51.305(c).

⁵ *Id.* § 51.305(d) (emphasis added).

⁶ *Id.* § 51.319.

⁷ *Id.* § 51.305(d).

⁸ *See id.*

⁹ As explained in this Petition, the Public Utility Commission of Texas (“PUC”) has previously requested an opinion from the Office of the Attorney General to determine whether the PUC or the TCEQ has jurisdiction to determine a dispute against a WCID. The Attorney General observed that the two agencies have at least overlapping jurisdiction and suggested that, if the dispute involves an allocation by HCWID 3 to cover the maintenance and operating expenses of its water delivery system pursuant to Section 51.305, the matter is properly before the TCEQ. Tex. Att’y Gen. Op. No. JS-0004 at 3-4 [hereinafter *AG Opinion*] (available at <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2023/js-0004.pdf>). An appeal before the PUC is currently abated at the State Office of Administrative Hearings. MPU anticipates that the question of whether—and to what extent—the PUC has jurisdiction over MPU’s complaint likely will be addressed at hearing.

form of water rights amendments or by establishing a just, reasonable, and non-discriminatory price.¹⁰

Under Section 11.041, any person entitled to receive or use water from a canal, lateral, reservoir or other conserved or stored supply may present to the Commission a written petition showing the following:

- (1) that he is entitled to receive or use the water;
- (2) that he is willing and able to pay a just and reasonable price for the water;
- (3) that the party owning or controlling the water supply has water not contracted to others and available for the petitioner's use; and
- (4) that the party owning or controlling the water supply fails or refuses to supply the available water to the petitioner, or that the price or rental demanded for the available water is not reasonable and just or is discriminatory.

As explained in more detail below, McAllen is entitled by COA 848 to receive up to 13,980 acre-feet of municipal priority water annually from HCWID 3. The water authorized for McAllen's use under COA 848 is conserved and stored in the Lake Falcon reservoir for HCWID 3's diversion and is supplied to McAllen by HCWID 3 through a system of canals and laterals. MPU and McAllen are willing to pay a just and reasonable price for the water. HCWID 3 has not—and legally cannot—contract to sell the 13,980 acre-feet of water to others because such water is available for McAllen's exclusive municipal use and must be used within HCWID 3's service area, which almost entirely comprises McAllen's corporate limits. The price demanded by HCWID 3 for the available water is neither reasonable nor just and is discriminatory. A check for the \$25 deposit required under Section 11.041(b) accompanies this Petition.

¹⁰ Under Section 11.041, the PUC may participate in the hearing if necessary to present evidence on the price or rental demanded for the available water. Tex. Water Code § 11.041(f).

2. Procedure and Remedies

The Commission has not promulgated rules prescribing a specific procedure for Water Code Section 11.041 petitions. In a prior complaint under Section 11.041 filed by BASF Corporation (“BASF”) against Dow Chemical Company (“Dow”) in TCEQ Docket No. 2018-0852-WR, an administrative law judge (“ALJ”) held that, at a minimum, the TCEQ must decide the four enumerated issues in Section 11.041(a) listed above.¹¹

The Commission has also not promulgated any rules that prescribe, provide for, or limit the scope of remedies available to a petitioner under Section 11.041. However, TCEQ

¹¹ State Office of Admin. Services, Docket No. 582-18-5014, *In the Matter of Complaint by BASF Corp. under Tex. Water Code § 11.041 for Denial of Water under Tex. Water Code §§ 11.033 [sic] & 11.041*, Order No. 5 Determining Scope of Proceedings at 3 (available at https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=227565122018298) [hereinafter *BASF Order*]. In the BASF Order, the ALJ notes in dictum that “BASF has acknowledged in its complaint that, after the TCEQ makes a decision under section 11.041 as to whether the rate demanded is reasonable and just or discriminatory, BASF will have to go to the PUC to ask that agency to set a reasonable rate [under Section 12.013].” Section 11.041, however, includes no limitation on the scope of the “written decision” the TCEQ must make under Section 11.041(f). MPU believes the stated position is incorrect or inapplicable to this Petition.

Even if the ALJ’s comment—which the Commission never adopted—was correct in the context of the BASF complaint, MPU’s complaint is distinguishable from the BASF complaint for at least three significant reasons: (1) unlike BASF, whose claimed entitlement to state water arose only from a contract between the parties, McAllen’s entitlement is imbedded within COA 848 itself (a copy of COA 848 is included with this Petition as Appendix A); (2) the water at issue in this complaint is subject to statutes and rules governing water rights in the Lower Rio Grande Basin, which are administered under a unique priority and accounting system managed by the TCEQ’s Rio Grande Watermaster Program (Tex. Comm’n on Envtl. Quality, Rio Grande Watermaster Program (available at https://www.tceq.texas.gov/permitting/water_rights/wmaster/rgwr); see 30 Tex. Admin. Code §§ 303.1-.55); and (3) the Legislature has required that MPU’s petition under Section 11.041 is the sole remedy available to MPU and McAllen as users of water for nonirrigation uses. (Tex. Water Code § 51.305(c)-(d); see *id.* § 51.319). Section 11.041 provides simply that, on completion of the hearing, the Commission shall render a written decision without limiting the scope of that decision. While the BASF Order does not establish binding, mandatory, or controlling precedent, MPU nevertheless urges the Commission to decline to follow the ALJ’s comment. No legal authority prohibits TCEQ from rendering a written decision under Section 11.041(f) that implements remedies if it finds that the demanded price is unreasonable, unjust, or discriminatory.

Likewise, Water Code Section 12.013 does not govern this complaint for two similar reasons. First, as explained, under Water Code Section 51.305(d) this complaint is the sole remedy available to MPU and McAllen. That statutory requirement necessarily renders any other remedies unavailable, including the PUC’s authority to “fix reasonable rates” under Section 12.013. If TCEQ’s jurisdiction is limited only to declaring the existing price unreasonable, unjust, or discriminatory, such a ruling would risk putting the parties in limbo with no legal means of determining a replacement price. Second, because McAllen is entitled to water as a matter of law under the terms of COA 848 itself, MPU’s complaint does not concern “rates” as that term is used in Section 12.013. This is not a rate case. This is a water rights case, and TCEQ has authority as the administrator of surface water rights permits to order any necessary terms to guarantee that state-owned natural resources are available to those legally entitled to use them at just, reasonable, and non-discriminatory prices.

unquestionably has authority to administer surface water rights,¹² and Section 11.041 indicates that the TCEQ has at least some authority to make determinations about the price demanded for the supply of water from canals or storage.¹³

III. BACKGROUND AND FACTUAL ALLEGATIONS

1. McAllen Public Utility

MPU is a municipally owned utility created in 1945 to supply retail water and wastewater utility service to the citizens of McAllen and portions of its surrounding area.¹⁴ Historically, nearly all raw water needed for municipal purposes by McAllen has been supplied by four districts: Hidalgo County Irrigation District No. 1 (“HCID 1”), Hidalgo County Irrigation District No. 2 (“HCID 2”), HCWID 3, and United Irrigation District (“United”).¹⁵ Each of those four districts diverts raw water for delivery to MPU pursuant to water rights administered through TCEQ’s Rio Grande Watermaster Program. McAllen also owns Certificate of Adjudication No. 23-353, as amended through Amendment 23-353C (“COA 353”), which authorizes McAllen to divert and use up to 678.84 acre-feet of municipal priority water per year at four diversion points, including the same point as HCWID 3’s primary diversion point under COA 848, on the Rio Grande.¹⁶ Aside from watermaster fees and operational expenses, MPU effectively incurs no cost to divert water under COA 353. MPU’s cost to divert water directly under its own water right is effectively zero compared to what HCWID 3 charges for water diverted from the same source.

¹² *E.g.* Tex. Water Code § 5.013(a)(1); *id.* §§ 11.087, .121-.122, .134-.135.

¹³ *Id.* § 11.041(a)(4), (f).

¹⁴ McAllen Public Utility, 2020 Consumer Confidence Report, 2 (2020), <http://mcallenpublicutility.com/wp-content/uploads/2021/06/2020-Water-Quality-Report-Booklet.pdf>.

¹⁵ MPU sources a small percentage of its municipal supply from a privately owned groundwater well and has recently entered discussions with other water suppliers to identify additional sources.

¹⁶ A copy of COA 353 is attached as Appendix B.

2. Hidalgo County Water Improvement District No. 3

HCWID 3 is a water control and improvement district operating under Water Code Chapters 49 and 51 as well as Texas Special District Local Laws Code Chapter 9054. Over 90 percent of HCWID 3's bounded area is within McAllen's corporate limits. While HCWID 3 was originally created to serve both as the supplier of water to McAllen for municipal purposes and as a raw water supplier to irrigation users, the region it serves has urbanized significantly since its formation. Until June of 2022, MPU and McAllen were HCWID 3's largest customer by far. HCWID 3 charges a rate of \$15.40 per acre-foot for water delivered to its regular irrigation customers.

The full scope of service MPU requires from HCWID 3 is, essentially, to pump raw water that McAllen is already legally entitled to receive from the Rio Grande under COA 848 into a canal and pipeline system, whereby the water flows by gravity to MPU's metered delivery points. HCWID 3 does not treat water, and it does not own any treatment works sufficient to supply potable water. There is no material difference between the raw water diverted and delivered to HCWID 3's irrigation customers and the municipal priority water to which MPU is entitled. HCWID 3 uses the same diversion pump station and canal/pipeline system to deliver the water to all customers.

In addition to the 8,980 acre-feet of municipal priority water dedicated to McAllen's use, TCEQ has amended COA 848 to convert irrigation priority water to an additional total of 5,000 acre-feet of municipal priority water. While not specifically restricted to McAllen's use, under COA 848, the additional 5,000 acre-feet of municipal priority water must be used in HCWID 3's service area. As noted, the vast majority of HCWID 3's service area comprises McAllen's

corporate limits. For all practical purposes, McAllen is the only municipal user who can use the additional 5,000 acre-feet of municipal priority water under COA 848.

3. Lower Rio Grande Adjudication and Water Administration

In 1969, the Corpus Christi Court of Appeals resolved a 14-year dispute concerning adjudication of water rights in the Lower Rio Grande River Basin.¹⁷ As part of the resolution, the Court approved a stipulation agreement entered into by and among the State of Texas, various cities in the Lower Rio Grande Valley, and some of the irrigation and water control districts who deliver water to those cities.¹⁸ Water set aside through the approved stipulations for municipal priority supersedes the priority system for irrigation water.¹⁹

Following the Court of Appeals' approval of the stipulations, and the Legislature's enactment of the Water Rights Adjudication Act of 1967, the Texas Water Commission issued the Final Determination of All Claims of Water Rights in the Texas Tributaries of the Lower Rio Grande Segment in 1985.²⁰ The 1985 Final Determination acknowledged the stipulated municipal water rights.²¹ While not directly ordered to do so by the courts, the Texas Water Commission decided to imbed McAllen's municipal priority water in HCWID 3's COA 848 rather than issue McAllen's a stand-alone certificate.

¹⁷ *State v. Hidalgo Co. Water Cont. and Imp. Dist. No. 18*, 443 S.W.2d 728, 730 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.); see 8 Tex. Tech L. Rev. 577, 578, 619 (1977).

¹⁸ *Hidalgo Co.*, 443 S.W.2d at 737; Tex. Water Comm'n, In the Matter of the Adjudication of the Tex. Tributaries of the Lower Rio Grande Segment of the Rio Grande Basin, Final Determination, Table I page I-1 [hereinafter *Final Determination*] (available at https://gisweb.tceq.texas.gov/WRRetrieveFinals/?SPATIAL_ID=LOWER_RIO_GRANDE).

¹⁹ See 30 Tex. Admin. Code § 302.21(b), .22(a); see also Texas Comm'n on Env'tl. Quality, Rio Grande Watermaster Program ("The municipal priority is guaranteed by the monthly reestablishment of a municipal reserve in the system of 225,000 acre-feet, which is equivalent to one year of average diversions for all municipal demands below Amistad for Texas users.") (available at https://www.tceq.texas.gov/permitting/water_rights/wmaster/rgwr).

²⁰ *Final Determination*, *supra* note 17, at 1.

²¹ *Id.* Table I page I-1.

4. 1944 Treaty and Rio Grande River Basin Drought

On November 1, 1945, the United States ratified a treaty (“1944 Treaty”) with Mexico that, among other things, established the International Boundary and Water Commission (“IBWC”) and obligated each country to deliver minimum volumes of water to the other in certain streams under certain conditions, including Mexico’s obligation to deliver annual minimum volumes from tributaries of the Rio Grande that feed into Lakes Amistad and Falcon.²² For years, Mexico has failed to deliver water to the Rio Grande as required under the 1944 Treaty.²³ The Commission has actively engaged the IBWC to take steps to bring Mexico into compliance with the 1944 Treaty.²⁴ On July 27, 2022, Commissioner Janecka initiated discussions with the Commissioner of the U.S. Section of the IBWC to engage in a binational effort to force Mexico into compliance and increase artificially scarce supply in the Lower Rio Grande Valley.²⁵

The man-made scarcity has been regularly exacerbated by persistent and recurrent drought in the Rio Grande Basin since at least 2003.²⁶ In 2011, the Rio Grande Basin potentially

²² Utilization of Waters of the Colo. and Tjuana Rivers and of the Rio Grande, Mex.-U.S., Nov. 27, 1945, T.S. No. 994 at 8-11 (*available at* <https://www.ibwc.gov/wp-content/uploads/2022/11/1944Treaty.pdf>).

²³ Letter, Cari-Michel La Caille, Director, Tex. Comm’n on Env’l Quality Office of Water, Deficient Water Treaty Deliveries (Jan. 31, 2023), <https://www.tceq.texas.gov/downloads/border/1944-water-treaty/ibwc-letter-macias-1-31-2023-1.pdf>.

²⁴ Letter, Bobby Janecka, Commissioner, Tex. Comm’n on Env’l. Quality, 1944 Water Treaty Deliveries (Jul. 27, 2022), <https://www.tceq.texas.gov/downloads/border/1944-water-treaty/tceq-letter-to-ibwc-07272022.pdf>.

²⁵ *Id.*

²⁶ *Id.*; see Nat. Oceanic and Atmospheric Admin., Drought on the Rio Grande (2012), <https://www.climate.gov/news-features/features/drought-rio-grande>; Vianey Rueda & Drew Gronewold, *The Rio Grande isn’t just a border – it’s a river in crisis* (Oct. 24, 2023, 8:23 AM), <https://theconversation.com/the-rio-grande-isnt-just-a-border-its-a-river-in-crisis-213302>.

experienced its worst drought in history.²⁷ Disaster conditions due to persistent drought continue to occur in Hidalgo County today.²⁸

5. History of HCWID 3 Rate Increases

Since 2012, HCWID 3's Board of Directors ("Board") has raised MPU's delivery charge 70.6 percent—from \$66.80 per acre-foot in 2012 to \$113.96 in 2021. In 2012, HCWID 3 raised MPU's rate 33 percent from \$66.80 to \$88.79. In 2014, HCWID 3 raised MPU's rate an additional 10 percent from \$88.79 to \$97.67. On July 29, 2021, the Board held a special meeting to consider, among other things, adjusting charges for the sale and/or delivery of water, including charges to McAllen.²⁹ The Board approved increasing the delivery charge from \$97.67 per acre-foot to \$113.96 per acre-foot effective September 1, 2021 through August 21, 2022, and HCWID 3 has not adjusted that price to date.

On June 29, 2021, HCWID 3's President informed MPU that the Board had voted to approve an additional increase to \$113.96. The \$113.96 delivery charge remains in place today. For comparison, the rates charged by the four districts to MPU per acre-foot of water are as follows:

| <u>District</u> | <u>2012 Rate</u> | <u>2024 Rate</u> |
|-----------------|-------------------|------------------|
| HCID 1 | N/A ³⁰ | \$60.25 |
| HCID 2 | \$51.26 | \$58.00 |
| HCWID 3 | \$66.80 | \$113.96 |
| United | \$53.44 | \$65.17 |

²⁷ Tex. Water Dev. Bd., Water for Texas, 2022 State Water Plan, Ch. 3 at 36. (available at <https://www.twdb.texas.gov/waterplanning/swp/2022/docs/03-SWP22-Drought.pdf>).

²⁸ Proclamation by the Governor of the State of Texas (Jan. 18, 2024), https://gov.texas.gov/uploads/files/press/DISASTER_drought_disaster_and_renewal_proc_IMAGE_01-18-24.pdf.

²⁹ Minutes of the July 29, 2021 special meeting are included with this Petition as Appendix C.

³⁰ Because of the lack of useful delivery point, MPU did not purchase water from HCID 1 in 2012 and has no records of HCID 1's rates in 2012.

Following implementation by HCWID 3's Board of the unjust and unreasonable delivery charge, MPU ceased ordering water HCWID 3 in June of 2022. Consequently, MPU has been forced to rely more heavily not only on water supply from the other districts named here, but also from newly negotiated water supply arrangements with other suppliers. In 2023, MPU leased additional water rights from Hidalgo County Irrigation District No. 6 and East Rio Hondo Water Supply Corporation. Even those hastily negotiated agreements provide for significantly lower rates than HCWID 3's at \$80.00 and \$45.00 per acre-foot, respectively.³¹ HCWID 3's delivery charge is 42 to 153 percent higher than prices charged by similar entities in the region for essentially identical service. HCWID 3's delivery charge is also 7.4 times the price charged by HCWID 3 to its irrigation customers—again for essentially the same service: delivery of raw water.

6. Procedural History

MPU originally appealed HCWID 3's implementation of the \$113.96 delivery charge to the PUC on October 27, 2021.³² During the discovery period in that matter, MPU took the position that HCWID 3's Board established the \$113.96 delivery charge in a manner inconsistent with the terms of the Permanent Water Supply and Delivery Contract between MPU and HCWID 3, which established a requirement that HCWID 3 could not adjust the delivery charge in an amount disproportionate from adjustments to amounts charged by HCWID 3 to other water users. HCWID 3 disagreed with MPU's position. Consequently, the ALJs in that matter abated the

³¹ MPU desires for those agreements to be temporary and to resume using the state water it is entitled to under COA 848 after TCEQ transfers that water to McAllen's water rights permit.

³² PUC Docket No. 52758, Petition of McAllen Public Utility Appealing Wholesale Water Rates Charged by Hidalgo County Water Improvement District No. 3 in Hidalgo County, Texas, Original Petition (*available at* https://interchange.puc.texas.gov/Documents/52758_1_1162494.PDF).

proceedings under the PUC's rules so that a court of proper jurisdiction resolved the contract dispute.³³

On May 2, 2022, MPU filed an Original Petition in Hidalgo County District Court seeking relief to resolve the contract dispute. The trial court granted HCWID 3's plea to the jurisdiction on January 9, 2023. MPU perfected its appeal of that ruling to the 13th District Court of Appeals, and final briefings were filed on July 17, 2023. The appellate court has not yet ruled on the appeal.

While the judicial case was pending, HCWID 3 appealed the ALJs' abatement of the PUC proceeding to the PUC commissioners. During the PUC commissioners' consideration of HCWID 3's appeal, legislators representing McAllen and HCWID 3 filed a letter with the PUC observing that TCEQ has exclusive jurisdiction over MPU's original complaint about the \$113.96 delivery charge under Section 51.305(d). In response, the PUC commissioners requested an opinion on the jurisdictional issue from the Office of the Attorney General. On June 27, 2023, the Attorney General issued Opinion No. JS-0004, which ultimately determined that the Attorney General could not determine the jurisdictional question.³⁴

Following the Attorney General's opinion, the PUC commissioners issued a Supplemental Preliminary Order directing the ALJs in the abated proceeding to address the jurisdictional question and issue a proposal for decision to determine whether the PUC, TCEQ, or both had jurisdiction to hear MPU's complaint. On January 10, 2024, the ALJs convened a prehearing conference during which the parties and the ALJs deliberated the jurisdictional question. One ALJ expressed hesitation at making a determination that TCEQ had jurisdiction over the ongoing

³³ PUC Docket No. 52758, Petition of McAllen Public Utility Appealing Wholesale Water Rates Charged by Hidalgo County Water Improvement District No. 3 in Hidalgo County, Texas, SOAH Order No. 4 Denying McAllen's Motion for Remand and Request for Certified Issue; Abating Case; Requiring Status Update; and Addressing Hidalgo Co. WID No. 3's Motion to Compel at 3 (May 2, 2022).

³⁴ *AG Opinion*, *supra* note 9, at 4.

proceeding without the TCEQ's participation. The ALJs ordered MPU to file a statement of position on jurisdiction no later than February 9, 2024 and for the parties to file a procedural schedule for determination of jurisdiction no later than February 21, 2024.

McAllen believes that invoking TCEQ's jurisdiction under Water Code Sections 11.041 and 51.305(d) is necessary and unavoidable. The question of whether TCEQ's water rights jurisdiction under Chapters 11 and 51 is exclusive likely will be raised and addressed during the hearing on this Petition. Consolidation of the two proceedings at the State Office of Administrative Hearings may be necessary to resolve the jurisdictional issues despite the fact that the abatement order in the PUC proceeding has not been lifted.

IV. GROUNDS FOR MPU'S COMPLAINT

Under Chapter 11 of the Texas Water Code, all surface water in Texas—including the ordinary flow and the storm, flood, and rainwater of every river—is property of the state and is held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.³⁵ Water Code Section 11.041 governs complaints related to denial of water by a party controlling the water supply to a person entitled to receive it. Among the factors the TCEQ must decide when presented with a petition under Section 11.041 is whether “the price or rental demanded for the available water is not reasonable and just or is discriminatory.”³⁶

Though not expressly stated in the governing statute, the context of the complaint process strongly implies that an unreasonable, unjust, or discriminatory price for state water constitutes an effective denial of water supply by the party controlling the water and that the state has authority to issue orders correcting the price. Under Water Code Sections 11.036 and 11.041, a political

³⁵ Tex. Water Code §§ 11.021(a), .0235(a).

³⁶ *Id.* § 11.041(a); *BASF Order*, *supra* note 11, at 3.

subdivision that controls water owned by the state that sets an unreasonable, unjust, or discriminatory price for the state-owned natural resource does so in violation of statutory law. The TCEQ, as the state's administrator of all surface water rights, is the delegated adjudicative body to resolve complaints about the price of that water.

Municipal priority water in the Lower Rio Grande system is a higher priority—and therefore more valuable—resource than irrigation water. So while it is typical for water suppliers to charge more for municipal priority water than irrigation priority water, HCWID 3's charges to MPU far exceed the typical charges in the region and far exceed HCWID 3's irrigation charges. As noted, MPU is willing to pay a reasonable price for the municipal priority water dedicated to McAllen under COA 848, but MPU believes the \$113.96 per acre-foot delivery charge is plainly unreasonable and unjust when compared against prices charged by similar districts for municipal priority water and is discriminatory when compared against the \$15.40 per acre-foot price charged by HCWID 3 for water delivered from the same system.

Scarcity of water supply in the Lower Rio Grande Valley caused by Mexico's consistent failure to deliver volumes of water required under the 1944 Treaty is exacerbated by the persistent drought conditions in the Rio Grande basin that have existed since 2003. HCWID 3 has taken advantage of the scarcity and natural disaster to unreasonably and unjustly gouge McAllen's citizens for water to which they are legally entitled to receive under COA 848. MPU believes that it is no coincidence that HCWID 3's severe price increases began during the worst drought in recorded history.³⁷ Just as public policy militates against price gouging for necessities like gasoline, food, and medicine in the aftermath of a hurricane, so too should TCEQ's regulation of

³⁷ Tex. Water Dev. Bd., Water for Texas, 2022 State Water Plan, Ch. 3 at 36. (*available at* <https://www.twdb.texas.gov/waterplanning/swp/2022/docs/03-SWP22-Drought.pdf>).

water rights pricing during the severe shortage currently caused by the natural disaster in the Rio Grande Basin.

Requiring HCWID 3 to deliver the municipal priority water to MPU serves no practical public benefit. That McAllen's municipal priority water rights are imbedded in COA 848 creates, in MPU's view, the arbitrary and unnecessary function of a WCID to "deliver" water simply by pumping it over a levee and releasing it into a gravity-fed canal. HCWID 3 is no better suited to own and operate pumping and water delivery facilities than MPU. Indeed, numerous cities throughout Texas successfully own, operate, and maintain water rights, diversion works, and storage facilities. The surest way for TCEQ to guarantee that MPU will be able to access the water dedicated to McAllen's municipal use at reasonable, just, and non-discriminatory prices is to memorialize McAllen's water rights in McAllen's certificate of adjudication. As the state's delegated administrator of water rights, and as successor to the Texas Water Commission's original issuance of COA 353 and COA 848, the Commission has jurisdiction to reassign McAllen's water rights to COA 353. Doing so will also allow HCWID 3 to focus on its important function of supplying Rio Grande water to its irrigation customers in the Lower Rio Grande Valley.

V. CONCLUSION & PRAYER

MPU respectfully requests that the Executive Director make a preliminary investigation of the complaint made in this Petition and determine that there are probable grounds for the complaint that the price or rental demanded for the available water is not reasonable and just and is discriminatory. On completion of the resulting hearing on the complaint, MPU respectfully requests that the Commission render a written decision finding that HCWID 3's price for water to which MPU is entitled is not just or reasonable and is discriminatory.

Finally, MPU respectfully requests that, in the interest of guaranteeing that McAllen can access and use the state water it is entitled to at a just, reasonable, and non-discriminatory price,

the Commission cancel the municipal priority portion of COA 848 and transfer the 13,980 acre-feet of municipal priority water to McAllen's COA 353 as Amendment 23-353D. In the alternative, MPU respectfully requests the Commission determine a reasonable, just, and non-discriminatory price and order HCWID 3 to charge a price no higher than the price determined by the Commission to be just, reasonable, and non-discriminatory. MPU further prays for all legal and equitable relief to which it is entitled.

Respectfully submitted,

WINSTEAD P.C.

401 Congress Ave., Suite 2100

Austin, Texas 78701

Telephone: (512) 370-2800

Facsimile: (512) 370-2850

/s/ James Aldredge

JAMES ALDREDGE

State Bar No. 24058514

JAMES RUIZ

State Bar No. 17385860

ISAAC TAWIL

State Bar No. 24013605

AUSTIN STEVENSON

State Bar No. 24085961

MCALLEN PUBLIC UTILITY

CITY ATTORNEY

P.O. Box 220

1300 Houston Ave

McAllen, Texas 78501

Telephone: (956) 681-1090

ATTORNEYS FOR

MCALLEN PUBLIC UTILITY

Appendix A

Certificate of Adjudication No. 23-848, as amended through 23-848D

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AMENDMENT TO A
CERTIFICATE OF ADJUDICATION

CERTIFICATE No. 23-848D TYPE: §§ 11.122, 11.085 PRIORITY: Class A, Municipal

| | | | |
|--------------|---|------------|---|
| Owner: | Hidalgo County Water Improvement District No. 3 | Address: | 1325 Pecan Blvd McAllen, Texas 78501 |
| Filed: | December 18, 2014 | Granted: | August 21, 2015 |
| Purpose: | Municipal, Mining & Agricultural | County: | Hidalgo, Val Verde, Kinney, Maverick, Dimmit, Webb, Zapata, Starr, Cameron, and Willacy |
| Watercourse: | Rio Grande | Watershed: | Rio Grande Basin |

WHEREAS, a portion of Certificate of Adjudication No. 23-848 authorizes Hidalgo County Water Improvement District No. 3 (Owner/Applicant) to divert and use from the Rio Grande, Rio Grande Basin, not to exceed 8,980 acre-feet of Municipal Priority water per year for municipal purposes in the City of McAllen; 5,000 acre-feet of Municipal Priority water per year for municipal purposes in the Owner's service area; 8,552.60 acre-feet of Class A water per year for agricultural purposes to irrigate 3,901.04 acres in the Owner's service area; and 100 acre-feet of Class A water per year for mining purposes in Hidalgo County, Texas; and

WHEREAS, Owner seeks to amend its portion of Certificate of Adjudication No. 23-848 to add mining use to the 8,552.60 acre-feet of Class A water for agricultural purposes and to add agricultural use to the 100.00 acre-feet of Class A water for mining purposes; and

WHEREAS, Owner seeks to change the place of use for mining purposes to Val Verde, Kinney, Maverick, Dimmit, Webb, Zapata, Starr, Hidalgo, Cameron, and Willacy Counties; and

WHEREAS, Owner seeks to authorize an exempt interbasin transfer to those portions of Kinney, Maverick, Dimmit, and Webb Counties within the Nueces River Basin, and to those portions of Hidalgo, Cameron, Starr, and Willacy Counties within the Nueces-Rio Grande Coastal Basin; and

WHEREAS, Owner further seeks to add a diversion segment for mining purposes

being anywhere along the east bank of the Rio Grande between Val Verde, Kinney, Maverick, Webb, Zapata, Starr, Hidalgo, and Cameron Counties in the Rio Grande; and

WHEREAS, the upstream boundary of the diversion segment is located at Latitude 29.431503° N, Longitude 101.044572° W, in Val Verde County; and

WHEREAS, the downstream boundary of the diversion segment is located at Latitude 25.955256°N, Longitude 97.146311° W, in Cameron County, Texas.

WHEREAS, the Texas Commission on Environmental Quality finds that jurisdiction over the application is established; and

WHEREAS, this amendment, if granted, is subject to requirements and orders of the Rio Grande Watermaster; and

WHEREAS, the Executive Director recommends special conditions be included in the amendment; and

WHEREAS, no requests for a contested case hearing were received for this application; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Commission on Environmental Quality in issuing this amendment; and

WHEREAS, the Texas Commission on Environmental Quality is of the opinion and so finds the proposed changes will not impair the rights of any person entitled to the use of a portion of the American share of the waters of the Rio Grande;

NOW, THEREFORE, this amendment to Certificate of Adjudication No. 23-848, designated Certificate of Adjudication No. 23-848D, is issued to Hidalgo County Water Improvement District No. 3, subject to the following terms and conditions:

1. USE

A. In lieu of the previous authorizations, the Owner is authorized to divert and use, from the Rio Grande, Rio Grande Basin, not to exceed;

1. 8,980 acre-feet of Municipal Priority water per year for municipal purposes in the City of McAllen, Hidalgo County, Texas.
2. 5,000 acre-feet of Municipal Priority water per year for municipal purposes in the Owner's service area, Hidalgo County, Texas.
3. 100 acre-feet of Class A water for mining and agricultural purposes in the Owner's service area, Hidalgo County, Texas.
4. 8,552.60 acre-feet of Class A water per year for agricultural purposes to

irrigate 3,901.04 acres in the Owner's service area and mining purposes in Val Verde, Kinney, Maverick, Dimmit, Webb, Zapata, Starr, Hidalgo, Cameron, and Willacy Counties, Texas.

- B. Owner is also authorized an exempt interbasin transfer to those portions of portions of Kinney, Maverick, Dimmit, and Webb Counties within the Nueces River Basin, and to those portions of Hidalgo, Cameron, Starr, and Willacy Counties within the Nueces-Rio Grande Coastal Basin for mining purposes.

2. DIVERSION

In addition to the previous authorizations, Owner is authorized to divert water for mining purposes anywhere within a diversion segment along the east bank of the Rio Grande in Val Verde, Kinney, Maverick, Webb, Zapata, Starr, Hidalgo, and Cameron Counties between the following two points:

- 1. Upstream boundary of the diversion segment is located at Latitude 29.431503° N, Longitude 101.044572° W, in Val Verde County, Texas.
- 2. Downstream boundary of the diversion segment is located at Latitude 25.955256°N, Longitude 97.146311° W, in Cameron County, Texas.

3. CONSERVATION

Owner 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. Such plans shall include a requirement that in every water supply contract entered into, on or after the effective date of this amendment, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the customer intends to resell the water, then the contract for resale of the water shall have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures.

4. SPECIAL CONDITIONS

- A. Within 90 days prior to the diversion of water for mining use, Owner or contract customer must submit to the TCEQ a water conservation plan to comply with Title 30 TAC Chapter 288.3.
- B. Owner shall install a measuring device which accounts for, within 5% accuracy, the quantity of water diverted from the Rio Grande. Owner shall allow representatives of the Texas Commission on Environmental Quality Rio Grande Watermaster reasonable access to the property to inspect the measuring device.
- C. Owner shall contact the Rio Grande Watermaster prior to diversion of water

authorized by this amendment.

- D. The use of water authorized in USE Paragraph 1 is intended for use by the Owner. All contracts for the sale of all or part of this water by the Owner shall be filed with the Executive Director and found sufficient in accordance with (TAC) §§ 303.51-53 prior to the diversion of water. If the buyer is not currently a water right holder of record in the Middle or Lower Rio Grande, the buyer shall also apply for and be granted a water rights permit authorization which may include a Temporary Water Use Permit, Contractual Permit, or an amendment to this Certificate of Adjudication.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate of Adjudication No. 23-848, as amended, except as specifically amended herein.

This amendment is issued subject to all superior water rights in the Rio Grande Basin.

Owner agrees to be bound by the terms, conditions, and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of State water resources exercised by the Commission.



For the Commission

Date Issued: **August 21, 2015**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



THE STATE OF TEXAS
COUNTY OF TRAVIS

I hereby certify that this is a true and correct copy of a
Texas Commission on Environmental Quality document
which is filed in the permanent records of the Commission.
Given under my hand and the seal of the Commission.

AMENDMENT TO
CERTIFICATE OF ADJUDICATION

Bridget C. Bohac JAN 03 2013
Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality

CERTIFICATE NO. 23-848C

TYPE: 11.122

PRIORITY: Municipal

Owner: City of McAllen

Address: P.O. Box 220
1300 Houston Avenue
McAllen, Texas 78505

Filed: January 11, 2012

Granted: December 18, 2012

Purpose: Municipal

County: Hidalgo

Watercourse: Rio Grande

Watershed: Rio Grande Basin

WHEREAS, City of McAllen (Applicant or City) acquired a portion of Certificate of Adjudication No. 23-848 which authorizes the diversion and use of not to exceed 1,100 acre-feet of Class A water per year from the Rio Grande, Rio Grande Basin for agricultural purposes to irrigate land in Hidalgo County, Texas; and

WHEREAS, the City only acquired the 1,100 acre-feet of water and not the land to which it was appurtenant; and

WHEREAS, Applicant seeks to amend its 1,100-acre-foot portion of Certificate of Adjudication No. 23-848 to change the purpose of use from agricultural to municipal; and change the place of use to the City's water service area in Hidalgo County; and

WHEREAS, the City is not seeking to change the diversion point and indicates Hidalgo Water Improvement District No. 3 will divert and deliver the water for the City's use; and

WHEREAS, pursuant to 30 Texas Administrative Code (TAC) §303.43, the conversion factor of 0.5 is used when converting from Class A to Municipal priority water, resulting in 550 acre-feet of Municipal Priority water for municipal purposes; and

WHEREAS, the Texas Commission on Environmental Quality finds that jurisdiction over the application is established; and

WHEREAS, this amendment, if granted, is subject to requirements and orders of the Rio Grande Watermaster; and

WHEREAS, the Executive Director recommends special conditions be included in the amendment; and

WHEREAS, no requests for a contested case hearing were received for this application; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Commission on Environmental Quality in issuing this amendment; and

WHEREAS, the Texas Commission on Environmental Quality is of the opinion and so finds the proposed changes will not impair the rights of any person entitled to the use of a portion of the American share of the waters of the Rio Grande;

NOW, THEREFORE, this amendment to Certificate of Adjudication No. 23-848, designated Certificate of Adjudication No. 23-848C, is issued to City of McAllen, subject to the following terms and conditions:

1. USE

In lieu of the authorization to divert and use not to exceed 1,100 acre-feet of Class A water per year from the Rio Grande, Rio Grande Basin for agricultural purposes, Hidalgo Water Improvement District No. 3 is now authorized to divert for Owner's use not to exceed 550 acre-feet of Municipal Priority water per year from the Rio Grande, Rio Grande Basin for municipal purposes in, Owner's water service area, as it presently exists or as it may exist in the future in Hidalgo County, Texas

2. CONSERVATION

Owner 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. Such plans shall include a requirement that in every water supply contract entered into, on or after the effective date of this amendment, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the customer intends to resell the water, then the contract for resale of the water shall have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures.

3. SPECIAL CONDITIONS

- A. Hidalgo County Water Improvement District No. 3 shall maintain a measuring device which accounts for, within 5% accuracy, the quantity of water diverted from the Rio Grande for Owner's use, and shall allow representatives of the TCEQ Rio Grande Watermaster reasonable access to the property to inspect the measuring device.

- B. Owner or Hidalgo County Water Improvement District No. 3 shall contact the Rio Grande Watermaster prior to diversion of water authorized by this amendment.
- C. The use of water authorized in USE Paragraph 1 is intended for use by the Owner and diversion by Hidalgo County Water Improvement District No. 3. All contracts for the sale of all or part of this water by the Owner shall be filed with the Executive Director and found sufficient in accordance with Title 30 Texas Administrative Code 303.51-53 prior to the diversion of water. If the buyer is not currently a water right holder of record in the Middle or Lower Rio Grande, the buyer shall also apply for and be granted a water rights permit authorization which may include a Temporary Water Use Permit, Contractual Permit, or an amendment to this Certificate of Adjudication.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate of Adjudication No. 23-848, as amended, except as specifically amended herein.

This amendment is issued subject to all superior water right holders below Amistad Reservoir in the Rio Grande Basin.

Owner and Hidalgo County Water Improvement District No. 3 agree to be bound by the terms, conditions, and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of State water resources exercised by the Commission.



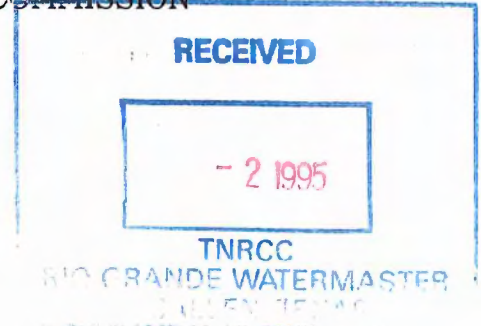
For the Commission

Date Issued: **December 18, 2012**

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



AMENDMENT TO
CERTIFICATE OF ADJUDICATION



CERTIFICATE NO. 23-848B

PRIORITY : Municipal and Class "A"

Name : Hidalgo County Water
Improvement District
No. 3

Address : 1325 Pecan
McAllen, Texas 78501

Filed : June 30, 1995

Granted : **SEP 08 1995**

Purposes : Municipal, Irrigation
and Mining

County : Hidalgo

Watercourse : Rio Grande

Watershed : Rio Grande Basin

WHEREAS, Certificate of Adjudication No. 23-848 was issued to Hidalgo County Water Improvement District No. 3 on October 18, 1971 and authorized diversion and use of not to exceed 8,980 acre-feet of water per annum from the Rio Grande with municipal priority for use by the City of McAllen, and not to exceed 19,852.60 acre-feet of water per annum with Class "A" priority from the Rio Grande to irrigate 7,941.04 acres in TWC Tract No. H-261 (Court No. 532), Hidalgo County, Texas.

WHEREAS, Certificate No. 23-848 was amended on October 10, 1978 wherein 2400 acres (6000 acre-feet) of the Class A irrigation water rights were changed to municipal use, resulting in an additional 3000 acre-feet of municipal water after conversion from irrigation use and reducing the Class A irrigation water to 13,852.60 acre-feet per annum.

WHEREAS, the applicant seeks to amend Certificate No. 23-848, as amended, to authorize a change in the purpose of use of 100 acre-feet out of the aforesaid 13,852.60 acre-feet of Class "A" irrigation water rights to mining use in applicant's service area in Hidalgo County, Texas and to change the purpose of use of 4000 acre-feet of Class "A" irrigation water rights to municipal use resulting in an additional 2000 acre-feet of municipal water after conversion; and

WHEREAS, the Texas Natural Resource Conservation Commission finds that jurisdiction over the application is established;

WHEREAS, no person protested the granting of this application;

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Natural Resource Conservation Commission in issuing this amendment; and

WHEREAS, the Commission is of the opinion and so finds:

- (a) The proposed changes will not impair the rights of any person entitled to the use of a portion of the American share of the waters of the Rio Grande;
- (b) The proposed changes will not violate the terms of the permanent injunction and restraining order made final in the Lower Rio Grande Valley Water Suit.

NOW, THEREFORE, this amendment to Certificate No. 23-848, as amended, is issued to Hidalgo County Water Improvement District No. 3, subject to the following terms and conditions:

1. USE

In lieu of previous authorizations:

- a. With municipal priority, to divert and use not to exceed 8,980 acre-feet of water per annum from the Rio Grande for use by the City of McAllen.
- b. With municipal priority, to divert and use not to exceed 5000 acre-feet of water per annum from the Rio Grande for use in the service area of the certificate owner.
- c. With Class "A" priority, to divert and use not to exceed 9,752.60 acre-feet of water per annum to irrigate 3,901.04 acres of land in Hidalgo County, Texas.
- d. Certificate owner may divert and use 100 acre-feet from the Rio Grande for mining purposes for use in the service area of the certificate owner.

2. WATER CONSERVATION

The certificate owner shall implement a water conservation plan that provides 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. Such plan shall include a requirement that

in every wholesale water contract entered into, on or after the effective date of this amendment, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the customer intends to resell the water, then the contract for resale of the water must have water conservation requirements so that each successive wholesale customer in the resale of the water be required to implement water conservation measures.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate No. 23-848, as amended, except as specifically amended herein.

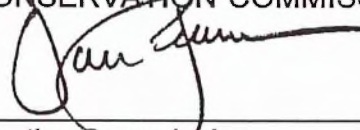
This amendment is issued subject to all superior and senior water rights in the Rio Grande Basin.

Certificate owner agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Natural Resource Conservation Commission and to the right of continuing supervision of State water resources exercised by the Commission.

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION



For the Commission

DATE ISSUED: **SEP 08 1995**

ATTEST:

Mamie M. Black
for Gloria A. Vasquez, Chief Clerk

AMENDMENT TO
CERTIFICATE OF ADJUDICATION

CERTIFICATE NO. 23-848A

CLASS "A"

| | | | |
|-------------|---|-----------|-----------------------------------|
| Name | : Hidalgo County Water Improvement District No. 3 | Address | : 1325 Pecan Blvd. McAllen, Texas |
| Filed | : July 24, 1978 | Granted | : September 25, 1978 |
| Purpose | : Municipal | County | : Hidalgo |
| Watercourse | : Rio Grande | Watershed | : Rio Grande Basin |

WHEREAS, the 13th Court of Civil Appeals entered its Final Judgment in Cause No. 261, styled State v. Hidalgo County Water Control and Improvement District No. Eighteen, 443 S.W. 2d 728 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.), known as the Lower Rio Grande Valley Water Suit, adjudicating the rights to use a portion of the public waters of the State of Texas, and pursuant to the terms of the Judgment, the Texas Water Rights Commission duly issued Certificate of Adjudication No. 23-848 to Hidalgo County Water Improvement District No. 3, which authorized the holder to divert and use a maximum of not to exceed 8980 acre-feet of water per annum from the Rio Grande, with municipal priority, for municipal use by the City of McAllen; and to divert and use a maximum of not to exceed 19,852.6 acre-feet of water per annum measured at the point of diversion from the Rio Grande to irrigate 7941.04 acres of land in TWC Tract No. H-261 (Court No. 532), Hidalgo County, Texas, and caused the Certificate to be recorded in Volume 1, pages 627-628, of the Certificate of Adjudication Records of Hidalgo County, Texas; and

WHEREAS, Hidalgo County Water Improvement District No. 3 has withdrawn the irrigation service rights from 2400 acres of the 7941.04 acres within its boundaries (TWC H-261) which have become impractical to irrigate due to urbanization and transferred and awarded same to municipal use, which is a higher order of preference; and

WHEREAS, the Texas Water Commission finds that jurisdiction of the application is established; and

WHEREAS, at a public hearing on September 1, 1978, the Texas Water Commission considered an application by Hidalgo County Water Improvement District No. 3 wherein applicant sought to amend Certificate of Adjudication No. 23-848 in order to change the purpose of use of 2400 acres of Class "A" water rights from irrigation to municipal; the Texas Water Commission is of the opinion and so finds:

- (a) The proposed changes will not impair the rights of any person entitled to the use of a portion of the American share of the waters of the Rio Grande;
- (b) The proposed changes will not violate the terms of the permanent injunction and restraining order made final in the Lower Rio Grande Valley Water Suit; and

WHEREAS, at the public hearing Hidalgo County Water Improvement District No. 3 was named as a party; and

WHEREAS, by law the Executive Director and Public Interest Advocate of the Texas Department of Water Resources were named as parties; and

WHEREAS, no person appeared to protest the granting of this application; and

WHEREAS, the issuance of this permit granting this application is not adverse to any party; and

WHEREAS, the Commission has assessed the effects of issuance of this permit on the bays and estuaries of Texas; and

WHEREAS, when converted to municipal purposes Commission Rules require that each acre of Class "A" irrigation water right shall be allocated 1.25 acre-feet of water per annum and the priority of municipal use shall be applicable thereto.

NOW, THEREFORE, this amendment to Certificate of Adjudication No. 23-848 is issued to Hidalgo County Water Improvement District No. 3 subject to the following provisions:

1. USE

Certificate holder is authorized to divert and use not to exceed 3000 acre-feet of water per annum measured at the diversion point, from the American share of the Rio Grande for municipal purposes in its service area.

In lieu of certificate holder's irrigation authorization in Certificate of Adjudication No. 23-848, with Class "A" priority, certificate holder is authorized to divert and use a maximum of not to exceed 13,852.6 acre-feet of water per annum measured at the diversion point from the Rio Grande to irrigate 5541.04 acres in TWC Tract No. H-261 (Court No. 532), Hidalgo County, Texas.

2. SPECIAL CONDITION

This amendment is issued subject to all terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules and Regulations of the Texas Water Commission and to its right of continual supervision.

TEXAS WATER COMMISSION

/s/ Dorsey B. Hardeman

Dorsey B. Hardeman, Acting Chairman

Date Issued:

October 10, 1978

/s/ Joe R. Carroll

Joe R. Carroll, Commissioner

(SEAL)

Attest:

/s/ Mary Ann Hefner

Mary Ann Hefner, Chief Clerk

CERTIFICATE OF ADJUDICATION

ADJUDICATION NO: 23-848

PRIORITY: Class A and Municipal

OWNER: Hidalgo County Water Improve-
ment District No. 3

ADDRESS: 1801 1/2 Highway
McAllen, Texas 78501

PURPOSE: Irrigation, municipal

COUNTY: Hidalgo

WATERCOURSE: Rio Grande

WATERSHED: Rio Grande

The 13th Court of Civil Appeals of Texas entered its final judgment in Cause No. 261, styled The State of Texas, et al. v. Hidalgo County WC&ID No. 18, et al., 443 S.W.2d 728, (Error ref. n.r.e.), adjudicating the rights to use a portion of public waters of the State of Texas. This "Certificate of Adjudication" is issued subject to the following conditions and to the Rules and Regulations of the Texas Water Rights Commission.

1. USE:

- ✓ (a) With municipal priority, holder is authorized to divert a maximum of not to exceed 8,980 acre-feet of water per annum measured at the point of diversion from the Rio Grande for municipal use by the City of McAllen.
- ✓ (b) With Class A priority, holder is authorized to divert and use a maximum of not to exceed 19,852.60 acre-feet of water per annum measured at the point of diversion from the Rio Grande to irrigate 7,941.04 acres in TWC Tract No. H-261, (Court No. 532), Hidalgo County, Texas. The use of water is limited to the irrigation of the described lands.

2. SPECIAL CONDITIONS:

(a) Waters diverted hereunder shall be allocated in accordance with the Rules, Regulations and Modes of Procedure and Orders of the Texas Water Rights Commission.

(b) All requests for water shall be made to the Watermaster and all uses of water shall be reported in accordance with the Rules, Regulations and Modes of Procedure and Orders of the Texas Water Rights Commission.

This certificate is issued subject to the rules and regulations of the Texas Water Rights Commission and to its right of continual supervision.

TEXAS WATER RIGHTS COMMISSION

O. F. Dent, Chairman

DATE ISSUED:

October 18, 1971

TEST:

rey Strandtman, Secretary

Appendix B

Certificate of Adjudication No. 23-353, as amended through 23-353C

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AMENDMENT TO CERTIFICATE OF ADJUDICATION

8/28/13
TE

| | | | | | |
|-----------------|-----------------|------------|---------------------------------------|-----------|-----------|
| CERTIFICATE NO. | 23-353C | TYPE: | 11.122 | PRIORITY: | Municipal |
| Owner: | City of McAllen | Address: | P.O. Box 5489 McAllen, Texas 78502 | | |
| Filed: | June 5, 2013 | Granted: | August 19, 2013 | | |
| Purpose: | Municipal | Counties: | Hidalgo | | |
| Watercourse: | Rio Grande | Watershed: | Rio Grande Basin | | |

WHEREAS, the City of McAllen (Owner) owns a portion of Certificate of Adjudication No. 23-353 which authorizes the diversion and use of not to exceed 678.84 acre-feet of Municipal Priority water per year for municipal purposes from three points on the Rio Grande, Rio Grande Basin in Hidalgo County; and

WHEREAS, the City of McAllen seeks to amend Certificate of Adjudication No. 23-353 to add a diversion point for its 678.84 acre-foot portion of authorized water per year; and

WHEREAS, the additional diversion point will be on the Rio Grande at Latitude 26.116348°N, Longitude 98.272574°W, bearing S 8°46' 08" W, 13,156 feet from the northeast corner of Lot 4, Block 5, Rio Bravo Plantation Company Subdivision in Hidalgo County Texas; and

WHEREAS, the Texas Commission on Environmental Quality finds that jurisdiction over the application is established; and

WHEREAS, this amendment, if granted, is subject to requirements and orders of the Rio Grande Watermaster; and

WHEREAS, the Executive Director recommends special conditions be included in the amendment; and

WHEREAS, no requests for a contested case hearing were received for this application; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Commission on Environmental Quality in issuing this amendment; and

WHEREAS, the Texas Commission on Environmental Quality is of the opinion and so finds the proposed changes will not impair the rights of any person entitled to the use of a portion of the American share of the waters of the Rio Grande;

NOW, THEREFORE, this amendment to Certificate of Adjudication No. 23-353, designated Certificate of Adjudication No. 23-353C, is issued to the City of McAllen, subject to the following terms and conditions:

1. DIVERSION

In addition to the previous diversion points, Owner is also authorized to divert its authorized water from a point located on the Rio Grande at Latitude 26.116348° N, Longitude 98.272574° W, bearing S 8° 46' 08" W, 13,156 feet from the northeast corner of Lot 4, Block 5, Rio Bravo Plantation Company Subdivision in Hidalgo County, Texas.

2. CONSERVATION

Owner 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. Such plans shall include a requirement that in every water supply contract entered into, on or after the effective date of this amendment, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the customer intends to resell the water, then the contract for resale of the water shall have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures.

3. SPECIAL CONDITIONS

- A. Owner shall install a measuring device which accounts for, within 5% accuracy, the quantity of water diverted from the Rio Grande. Owner shall allow representatives of the TCEQ Rio Grande Watermaster reasonable access to the property to inspect the measuring device.
- B. Owner shall contact the Rio Grande Watermaster prior to diversion of water authorized by this amendment.

This amendment is issued subject to all terms, conditions, and provisions contained in Certificate of Adjudication No. 23-353, as amended, except as specifically amended herein.

This amendment is issued subject to all superior water rights in the Rio Grande Basin.

Owner agrees to be bound by the terms, conditions, and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of State water resources exercised by the Commission.



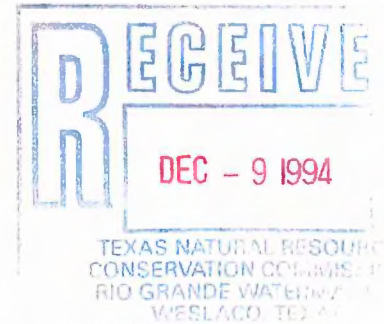
For the Commission

Date Issued: **August 19, 2013**

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



AMENDMENT TO
CERTIFICATE OF ADJUDICATION



CERTIFICATE NO. 23-353B

PRIORITY : MUNICIPAL

Owner : The City of McAllen

Address : P. O. Box 220
McAllen, Texas 78505

Filed : October 27, 1994

Granted : November 18, 1994

Purpose : Municipal

County : Hidalgo

Watercourse : Rio Grande

Watershed : Rio Grande Basin

WHEREAS, an application was received from the City of McAllen to combine the 832.50 acre-feet of Class "B" irrigation rights it owns pursuant to Certificate of Adjudication No. 23-746, as amended, with the rights authorized by Certificate No. 23-353, as amended, and to amend Certificate No. 23-353, as amended and combined, by changing the place of use, purpose of use (from irrigation to municipal use) and the diversion point of the 832.50 acre-feet of water rights; and

WHEREAS, a water conservation plan dated July, 1994 was submitted with the application; and

WHEREAS, as indicated in 31 TAC §303.43, the conversion of the 832.50 acre-feet of Class "B" irrigation rights to municipal rights will result in an authorization to use 333 acre-feet of water per annum for municipal use; and

WHEREAS, Certificate No. 23-353, as amended, currently authorizes the City of McAllen to divert and use not to exceed 345.84 acre-feet of water per annum for municipal purposes; and

WHEREAS, by Commission order approved on November 18, 1994, the water rights authorized by Certificate No. 23-746, as amended, were combined with the water rights authorized by Certificate No. 23-353, as amended, under Certificate No. 23-353, as amended, to be designated by this amendment; and

WHEREAS, the Texas Natural Resource Conservation Commission finds that jurisdiction over the application is established; and

WHEREAS, no person protested the granting of this application; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Natural Resource Conservation Commission in issuing this amendment.

NOW, THEREFORE, this amendment to Certificate No. 23-353, as amended and combined, is issued to the City of McAllen, subject to the following terms and conditions:

1. USE

In lieu of the authorization to divert and use 345.84 acre-feet of water per annum for municipal purposes, under Certificate No. 23-353, as amended, owner is authorized to divert and use not to exceed 678.84 acre-feet of water per annum from the Rio Grande for municipal use within the City's service area in Hidalgo County, Texas.

2. DIVERSION

Owner is authorized to divert the additional 333 acre-feet of water per annum authorized by this amendment from the diversion points currently authorized in Certificate No. 23-353, as amended.

3. SPECIAL CONDITIONS

- a. Owner shall implement the referenced water conservation which provides for the utilizing 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 use or alternative uses. In addition, every wholesale water supply contract entered into, on or after the effective date of this amendment, including any contract extension or renewal, that each successive wholesale customer develop and implement water conservation measures. If the customer intends to resell the water, then the contract for the resale of the water must have water conservation requirements so that each successive wholesale customer in the resale of the water will be required to implement water conservation measures.
- b. Owner shall submit an annual water conservation progress report to the Commission until such time as the conservation goals included in the conservation plan have been met.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate No. 23-353, as amended, except as specifically amended herein.

This amendment is issued subject to all superior and senior water rights in the Rio Grande Basin. Certificate owner agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

This amendment is issued subject to the Rules of the Texas Natural Resource Conservation Commission and to the right of continuing supervision of State water resources exercised by the Commission.

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

William R. Campbell
For the Commission

Date Issued: November 18, 1994

ATTEST:

Gloria A. Vasquez
Gloria A. Vasquez, Chief Clerk

TEXAS WATER COMMISSION



AMENDMENT TO
CERTIFICATE OF ADJUDICATION

CERTIFICATE NO. 23-353A

PRIORITY : Municipal

Name : City of McAllen

Address : P. O. Box 5489
McAllen, Texas
78502

Filed : September 8, 1992

Granted : December 16, 1992

Purpose : Municipal

County : Hidalgo

Watercourse : Rio Grande

Watershed : Rio Grande Basin

WHEREAS, Certificate of Adjudication No. 23-353 was issued to L. M. Berry on September 13, 1971, and authorized the owner to divert and use not to exceed 435 acre-feet of Class "B" water per annum from the Rio Grande to irrigate a maximum of 174 acres of land in TWC Tract No. H-50 (Court No. 96), Hidalgo County, Texas and Commission records currently show The City of McAllen as the owner of a 244.3 acre-foot portion of the water right to irrigate 97.72 acres of land;

WHEREAS, Certificate of Adjudication No. 23-400 was issued to Dixie Mortgage Loan Company on September 17, 1971, and authorized the owner to divert and use not to exceed 1207.675 acre-feet of Class "B" water per annum from the Rio Grande to irrigate a maximum of 483.07 acres of land in TWC Tract No. H-126 (Court No. 256), Hidalgo County, Texas and Commission records currently show The City of McAllen as the owner of a 287.20 acre-foot portion of the water right to irrigate 114.88 acres of land;

WHEREAS, Certificate of Adjudication No. 23-512 was issued to E. I. Fosmire on September 23, 1971, and authorized the owner to divert and use not to exceed 405 acre-feet of Class "B" water per annum from the Rio Grande to irrigate a maximum of 162 acres of land in TWC Tract No. H-183 (Court No. 333), Hidalgo County, Texas and Commission records currently show The City of McAllen as the owner of a 110 acre-foot portion of the water right to irrigate 44 acres of land;

WHEREAS, Certificate of Adjudication No. 23-557 was issued to Rufino Sotelo, et ux on September 27, 1971, and authorized the owner to divert and use not to exceed 97.5 acre-feet of Class "B" water per annum from the Rio Grande to irrigate a maximum of 39 acres of land in TWC Tract No. H-513 (Court No. 1003), Hidalgo County, Texas and Commission records currently show The City of McAllen as the sole owner of the water right;

WHEREAS, Certificate of Adjudication No. 23-597 was issued to David H. Keir on September 28, 1971, and authorized the owner to divert and use not to exceed 119.35 acre-feet of Class "B" water per annum from the Rio Grande to irrigate a maximum of 47.74 acres of land in TWC Tract No. H-301a (Court No. 598a), Hidalgo County, Texas and Commission records currently show The City of McAllen as the sole owner the water right;

WHEREAS, Certificate of Adjudication No. 23-818 was issued to The City of McAllen on October 14, 1971, and authorized the owner to divert and use not to exceed 5 acre-feet of Class "A" water per annum from the Rio Grande to irrigate a maximum of 2 acres of land in TWC Tract No. H-339 (Court No. 677), Hidalgo County, Texas and Commission records currently show The City of McAllen as the sole owner the water right;

WHEREAS, The City of McAllen has requested that their portions of the certificates listed above be combined under Certificate No. 23-353, and to amend Certificate No. 23-353, as combined, as follows:

1. Change the purpose of use of the aforesaid water rights to municipal use. The conversion of the water rights will be made in accordance with Commission rule 303.43 and will equate to 345.84 acre-feet of water per annum for municipal priority.
2. Change the places of use of the aforesaid water rights to the city's service area in Hidalgo County, Texas.
3. Specify the three diversion points to be utilized by the city;

WHEREAS, by Commission order approved on December 16, 1992, all of the water rights owned by The City of McAllen under the aforementioned certificates were combined under 23-353, to be designated by this amendment;

WHEREAS, the Texas Water Commission finds that jurisdiction over the application is established;

WHEREAS, no person protested the granting of this application;

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Water Commission in issuing this amendment; and

WHEREAS, the Texas Water Commission is of the opinion and so finds:

- (a) The proposed changes will not impair the rights of any person entitled to the use of a portion of the American share of the waters of the Rio Grande;
- (b) The proposed changes will not violate the terms of the permanent injunction and restraining order made final in the Lower Rio Grande Valley Water Suit;

WHEREAS, when converted to municipal purposes Texas Water Commission Rules require that each acre-foot of Class "A" irrigation water right shall be allocated 0.5 acre-feet of water per annum with municipal priority and each acre-foot of Class "B" irrigation water right shall be allocated 0.4 acre-feet of water per annum with municipal priority.

NOW, THEREFORE, this amendment to Certificate No. 23-353, as combined, is issued to The City of McAllen, subject to the following terms and conditions:

1. USE

Certificate owner is authorized to divert not to exceed 345.84 acre-feet of water per annum from the Rio Grande with municipal priority for use within the City's service area in Hidalgo County, Texas.

2. DIVERSION

- A. On the left, or north, bank of the Rio Grande at Latitude 26.078° N, Longitude 98.252° W, also bearing S 64° E, 1900 feet from the southeast corner of the Juan Antonio Villareal Survey No. 64, Abstract No. 44, approximately 17 miles southwest of Edinburg, Hidalgo County, Texas, which is operated by Hidalgo County Irrigation District No. 2.
- B. On the left, or north, bank of the Rio Grande at Latitude 26.117° N, Longitude 98.265° W, also bearing S 47° 15' E, 2000 feet from the southwest corner of the Antonio Gutierrez Survey No. 63, Abstract No. 34, approximately 15 miles southwest of Edinburg, Hidalgo County, Texas, which is operated by Hidalgo County Irrigation District No. 3.

- C. On the left, or north, bank of the Rio Grande at Latitude 26.182° N, Longitude 98.405° W, also bearing S 81° E, 900 feet from the southwest corner of the Nicolas Zamora Survey No. 48, Abstract No. 76, approximately 5½ miles southwest of Mission, Hidalgo County, Texas, which is operated by United Irrigation District.

3. SPECIAL CONDITION

The City of McAllen shall provide a response to the Commission staff review dated October 9, 1992, of the Water Conservation Plan contained in the application for this amendment within 120 days of the issuance of this amendment.

This amendment is issued subject to all terms, conditions and provisions contained in Certificate No. 23-353, as combined, except as specifically amended herein.

This amendment is issued subject to all superior and senior water rights in the Rio Grande Basin.

Certificate owner agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this amendment.

All other matters requested in the application which are not specifically granted by this amendment are denied.

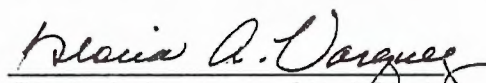
This amendment is issued subject to the Rules of the Texas Water Commission and to the right of continuing supervision of State water resources exercised by the Commission.

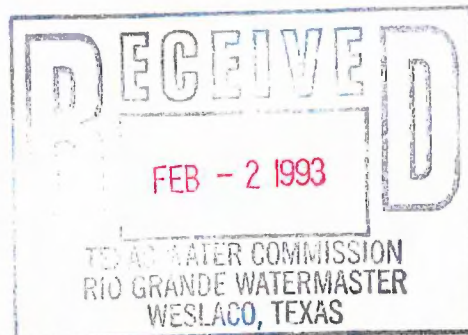
TEXAS WATER COMMISSION


John Hall, Chairman

DATE ISSUED: JAN 11 1993

ATTEST:


Gloria A. Vasquez, Chief Clerk



CERTIFICATE OF ADJUDICATION

ADJUDICATION NO: 23- 353

CLASS: B

OWNER: L. M. Berry

ADDRESS: Route 1, Box 481
Mission, Texas 78572

PURPOSE: Irrigation

COUNTY: Hidalgo

WATERCOURSE: Rio Grande

WATERSHED: Rio Grande

The 13th Court of Civil Appeals of Texas entered its final judgment in Cause No. 261, styled The State of Texas, et al. v. Hidalgo County WC&ID No. 18, et al., 443 S.W.2d 728, (Error ref. n.r.e.), adjudicating the rights to use a portion of public waters of the State of Texas. This "Certificate of Adjudication" is issued subject to the following conditions and to the Rules and Regulations of the Texas Water Rights Commission.

1. USE:

Holder is authorized to divert and use a maximum of not to exceed 435.00 acre-feet of water per annum measured at the point of diversion from the Rio Grande to irrigate 174.00 acres in TWC Tract No. H-50, (Court No. 96), Hidalgo County, Texas. The use of water is limited to the irrigation of the described lands.

2. SPECIAL CONDITIONS:

(a) Waters diverted hereunder shall be allocated in accordance with the Rules, Regulations and Modes of Procedure and Orders of the Texas Water Rights Commission.

(b) All requests for water shall be made to the Watermaster and all uses of water shall be reported in accordance with the Rules, Regulations and Modes of Procedure and Orders of the Texas Water Rights Commission.

This certificate is issued subject to the rules and regulations of the Texas Water Rights Commission and to its right of continual supervision.

TEXAS WATER RIGHTS COMMISSION

DATE ISSUED:

O. F. Dent, Chairman

September 13, 1971

ATTEST:

Audrey Strandtman, Secretary

Appendix C

Minutes of the July 29, 2021 Special Meeting of the Board of Directors of
Hidalgo County Water Improvement District No. 3

HIDALGO COUNTY WATER IMP. DISTRICT NO. 3

**1325 Pecan Blvd
McAllen, Texas 78501
(956) 686-8303
Fax (956) 686-1022**

Othal Brand Jr.-President
Chris Burns-Vice President
Mark Freeland, Secretary

W.D. Moschel-Member
Lance Neuhaus-Member

**BOARD OF DIRECTORS' SPECIAL MEETING
*****AMENDED AGENDA *******

TAKE NOTICE THAT A SPECIAL BOARD MEETING OF THE BOARD OF DIRECTORS OF HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3 WILL BE HELD AT TROPHY TOWERS, 4800 N. 23rd STREET, MCALLEN, TEXAS 78504, AT 12:00 P.M. on THURSDAY, JULY 29, 2021. The agenda is posted in accordance with the accessibility requirements of Section 551.043 of the Texas Government Code. IF DURING THE COURSE OF THE MEETING, THE BOARD OF DIRECTORS SHOULD DETERMINE THAT A CLOSED SESSION OR MEETING IS AUTHORIZED BY SECTIONS 551.071, AND 551.072 OF THE GOVERNMENT CODE, VERNON'S TEXAS CODE, ANNOTATED, NOTICE OF CLOSED OR EXECUTIVE SESSION WILL BE GIVEN AFTER THE COMMENCEMENT OF THE MEETING COVERED BY THE NOTICE PURSUANT TO SECTION 551.101 OF THE TEXAS GOVERNMENT CODE.

Call to Order:

- Pledge of Allegiance
- Prayer

- (1). Consideration and possible action regarding the Budget for the year 2021-2022.
- (2). Consideration and possible action regarding the renewal of the District's contract with Ron Lewis and Associates.
- (3). Consideration and possible action to adjust District charges for sale and/or delivery of water including but not limited to adjustment of Water delivery charges under that certain *Permanent Water Supply and Delivery Contract* between District and City of McAllen, dated in May 1999, as amended.
- (4). Adjourn.

**Hidalgo County Water Improvement District Number Three
Board of Directors' Special Meeting
July 29, 2021**

Call to Order:

President Othal Brand, Jr. called a Special Board Meeting to order at Trophy Towers located at 4800 N. 23rd Street, McAllen, Texas, 78504. The meeting began by reciting the pledge of allegiance. President Othal Brand, Jr. gave the prayer invocation.

Board Members Present:

| | |
|------------------|-----------|
| Othal Brand, Jr. | President |
| Mark Freeland | Secretary |
| W.D. Moschel | Director |
| Lance Neuhaus | Director |

Absent:

| | |
|-------------|----------------|
| Chris Burns | Vice-President |
|-------------|----------------|

Others Attending:

Tomas De Leon
Jose De Leon
Raquel Espinoza

Visitors:

None

Consideration and possible action regarding the Budget for the Year 2021-2022.

A Motion was made by Lance Neuhaus and seconded by W.D Moschel to approve the Budget for the Year 2021-2022 in the amount of \$1,692,568.00. The budget reflects an increase of employee payroll to compensate Tomas De Leon and Jose De Leon as new Co-Managers of the District, for a \$8,000 increase each from their current compensation, and a 6 percent increase for employees Carmen De Leon and Raquel Espinoza. All other maintenance workers will receive a \$0.50 cents per hour increase. The Payroll increase will take effect on September 1, 2021.

Motion Carried.

Consideration and possible action regarding the renewal of the District's contract with Ron Lewis and Associates.

A Motion was made by Lance Neuhaus and seconded by W.D. Moschel to approve the renewal of the District's contract with Ron Lewis and Associates, but will attempt to bring the contract amount down, if possible.

Motion Carried.

Thursday, July 29, 2021 at 12:00 p.m.

Water Improvement District_000032
0045

Consideration and possible action to adjust District charges for sale and/or delivery of water including but not limited to adjustment of Water delivery charges under that certain Permanent Water Supply and Delivery Contract between District and City of McAllen, dated in May 1999, as amended.

A Motion was made by Lance Neuhaus and seconded by W.D. Moschel to approve the rate increase for water irrigation from \$11.55 per acre to \$13.40 per acre for In-District irrigation. All other irrigation rates will increase 17% percent. The Flat Rate Assessment and out of District rate stays the same. The rate to the City of McAllen under Adjudication Numbers, 0848-000, and 0848-00, 0353-002 will increase by \$0.05 cents which is a water delivery rate at \$0.34975 cents per 1,000 gallons translated the charge to \$113.96 effective September 1, 2021. The water delivery rates are as follows:

| | |
|--|------------------------|
| In District Irrigation ----- | \$13.40/per acre |
| Floodway Irrigation----- | \$16.60/per acre |
| Yard Water (<i>less than 1.00 ac</i>) ----- | \$29.10 |
| Out of District----- | * \$18.29/per acre |
| City of McAllen----- | \$113.96/per acre-foot |
| City of McAllen (<i>only 550 ac. ft.</i>)----- | \$39.43/per acre-foot |
| City of McAllen (transferred water) ----- | \$35.84/per acre-foot |

Flat Rate Assessment ----- \$14.50/per acre

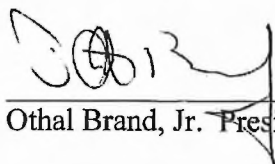
****RATE PER ACRE FOOT = 2 X RATE PER ACRE**

Motion Carried.

Adjourn

Due to no further discussion a Motion was made by Mark Freeland and seconded by by W.D. Moschel to adjourn the Board Meeting at 2:00 p.m.

Motion Carried.


Othal Brand, Jr. President


Mark Freeland, Secretary

Appendix C

Minutes of the July 29, 2021 Special Meeting of the Board of Directors of
Hidalgo County Water Improvement District No. 3

HIDALGO COUNTY WATER IMP. DISTRICT NO. 3

**1325 Pecan Blvd
McAllen, Texas 78501
(956) 686-8303
Fax (956) 686-1022**

Othal Brand Jr.-President
Chris Burns-Vice President
Mark Freeland, Secretary

W.D. Moschel-Member
Lance Neuhaus-Member

BOARD OF DIRECTORS' SPECIAL MEETING

*******AMENDED AGENDA *******

TAKE NOTICE THAT A SPECIAL BOARD MEETING OF THE BOARD OF DIRECTORS OF HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3 WILL BE HELD AT TROPHY TOWERS, 4800 N. 23rd STREET, MCALLEN, TEXAS 78504, AT 12:00 P.M. on THURSDAY, JULY 29, 2021. The agenda is posted in accordance with the accessibility requirements of Section 551.043 of the Texas Government Code. IF DURING THE COURSE OF THE MEETING, THE BOARD OF DIRECTORS SHOULD DETERMINE THAT A CLOSED SESSION OR MEETING IS AUTHORIZED BY SECTIONS 551.071, AND 551.072 OF THE GOVERNMENT CODE, VERNON'S TEXAS CODE, ANNOTATED, NOTICE OF CLOSED OR EXECUTIVE SESSION WILL BE GIVEN AFTER THE COMMENCEMENT OF THE MEETING COVERED BY THE NOTICE PURSUANT TO SECTION 551.101 OF THE TEXAS GOVERNMENT CODE.

Call to Order:

- Pledge of Allegiance
- Prayer

- (1). Consideration and possible action regarding the Budget for the year 2021-2022.
- (2). Consideration and possible action regarding the renewal of the District's contract with Ron Lewis and Associates.
- (3). Consideration and possible action to adjust District charges for sale and/or delivery of water including but not limited to adjustment of Water delivery charges under that certain *Permanent Water Supply and Delivery Contract* between District and City of McAllen, dated in May 1999, as amended.
- (4). Adjourn.

**Hidalgo County Water Improvement District Number Three
Board of Directors' Special Meeting
July 29, 2021**

Call to Order:

President Othal Brand, Jr. called a Special Board Meeting to order at Trophy Towers located at 4800 N. 23rd Street, McAllen, Texas, 78504. The meeting began by reciting the pledge of allegiance. President Othal Brand, Jr. gave the prayer invocation.

Board Members Present:

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| Othal Brand, Jr. | President |
| Mark Freeland | Secretary |
| W.D. Moschel | Director |
| Lance Neuhaus | Director |

Absent:

| | |
|-------------|----------------|
| Chris Burns | Vice-President |
|-------------|----------------|

Others Attending:

Tomas De Leon
Jose De Leon
Raquel Espinoza

Visitors:

None

Consideration and possible action regarding the Budget for the Year 2021-2022.

A Motion was made by Lance Neuhaus and seconded by W.D Moschel to approve the Budget for the Year 2021-2022 in the amount of \$1,692,568.00. The budget reflects an increase of employee payroll to compensate Tomas De Leon and Jose De Leon as new Co-Managers of the District, for a \$8,000 increase each from their current compensation, and a 6 percent increase for employees Carmen De Leon and Raquel Espinoza. All other maintenance workers will receive a \$0.50 cents per hour increase. The Payroll increase will take effect on September 1, 2021.

Motion Carried.

Consideration and possible action regarding the renewal of the District's contract with Ron Lewis and Associates.

A Motion was made by Lance Neuhaus and seconded by W.D. Moschel to approve the renewal of the District's contract with Ron Lewis and Associates, but will attempt to bring the contract amount down, if possible.

Motion Carried.

Thursday, July 29, 2021 at 12:00 p.m.

Water Improvement District_000032
0049

Consideration and possible action to adjust District charges for sale and/or delivery of water including but not limited to adjustment of Water delivery charges under that certain Permanent Water Supply and Delivery Contract between District and City of McAllen, dated in May 1999, as amended.

A Motion was made by Lance Neuhaus and seconded by W.D. Moschel to approve the rate increase for water irrigation from \$11.55 per acre to \$13.40 per acre for In-District irrigation. All other irrigation rates will increase 17% percent. The Flat Rate Assessment and out of District rate stays the same. The rate to the City of McAllen under Adjudication Numbers, 0848-000, and 0848-00, 0353-002 will increase by \$0.05 cents which is a water delivery rate at \$0.34975 cents per 1,000 gallons translated the charge to \$113.96 effective September 1, 2021. The water delivery rates are as follows:

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| Out of District----- | * \$18.29/per acre |
| City of McAllen----- | \$113.96/per acre-foot |
| City of McAllen (<i>only 550 ac. ft.</i>)----- | \$39.43/per acre-foot |
| City of McAllen (transferred water) ----- | \$35.84/per acre-foot |

Flat Rate Assessment ----- \$14.50/per acre

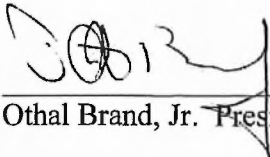
****RATE PER ACRE FOOT = 2 X RATE PER ACRE**

Motion Carried.

Adjourn

Due to no further discussion a Motion was made by Mark Freeland and seconded by by W.D. Moschel to adjourn the Board Meeting at 2:00 p.m.

Motion Carried.


Othel Brand, Jr. President


Mark Freeland, Secretary

Appendix D

STATE OF TEXAS §
 § AMENDMENT TO PERMANENT WATER SUPPLY
COUNTY OF HIDALGO § AND DELIVERY CONTRACT

WHEREAS, HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3, a water control and improvement district operating under the laws of the State of Texas and a political subdivision of the State of Texas, hereinafter referred to as "DISTRICT" and the CITY OF MCALLEN, a municipality of the State of Texas, by and through the McALLEN PUBLIC UTILITIES BOARD, an agency of the City of McAllen, hereinafter jointly referred to as "CITY" entered into a PERMANENT WATER SUPPLY AND DELIVERY CONTRACT in May 1999 effective September 1, 1998, a true and correct copy of which is attached hereto as Exhibit "A" and incorporated herein for all purposes (the "Contract"); and

WHEREAS, the CITY desires to establish an additional diversion point on the DISTRICT's First Lift Main Irrigation Canal for diversion by CITY for the purpose of the delivery of water covered by the Contract from said point to a reservoir of the CITY located in Lots 5, Section 5 of the Hidalgo Canal Company Subdivision.

NOW, THEREFORE, the DISTRICT and the CITY agree to amend the Contract as follows:

1. Substitute the following Paragraph 5 in lieu of existing Paragraph 5 in the Contract to read as follows:

Delivery Points

5. *DISTRICT will deliver to CITY said waters from its First Lift Main Irrigation Canal for diversion by CITY at a point located at the corner of 18th Street and Expressway 83 in CITY, and/or DISTRICT agrees to deliver to CITY said waters from its First Lift Main Irrigation Canal for diversion by CITY and delivery through a pipeline to the CITY's reservoir described above at an additional diversion point located on the said Canal near a point on its said Canal approximately 125 feet north of the southwest corner of Lot 5, Section 5 of the Hidalgo Canal Company Subdivision, Volume Q, Pages 175-177, Deed Records of Hidalgo County, Texas.*

2. Substitute the following Paragraph 6 in lieu of existing Paragraph 6 of the Contract to read as follows:

Measurement of Water

6. *The amount of water delivered by DISTRICT hereunder shall be determined as follows: (a) water delivered to CITY shall be measured by meters or measuring devices located at the delivery points, and (b) that amount shall be multiplied by a factor of 1.10 so as to take into account transportation losses occurring prior to delivery of water at the delivery points. CITY agrees to install and maintain such meters or measuring devices at its expense, subject to DISTRICT's approval as to the type of meter and construction and maintenance methods utilized. DISTRICT shall read the meters monthly on the fourth Friday of each month and promptly certify in writing to CITY the amount of water measured at the meter(s) point and the date the meter was read each month. Access to the meter(s) for reading and examination shall be free to all parties hereto.*
3. It is agreed that all other terms and conditions of the Contract shall remain in full force and effect and applicable to waters covered by the Contract delivered by the DISTRICT to CITY whether delivered at the new additional delivery point or at the existing diversion point at the corner of 18th Street and Expressway 83.

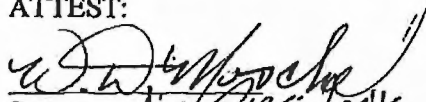
This Amendment is executed by the parties through their authorized representatives on the dates indicated below.

HIDALGO COUNTY WATER
IMPROVEMENT DISTRICT NO. 3

Date: May 16, 2011

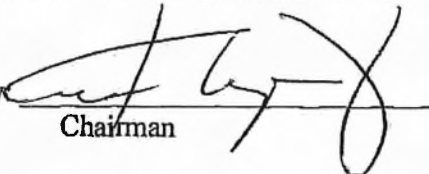
By: 
President, Board of Directors

ATTEST:

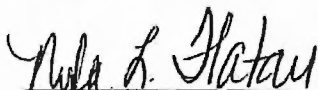

Secretary Vice President

MCALLEN PUBLIC UTILITIES BOARD

Date: 4/19/11

By: 
Chairman

ATTEST:


Secretary

STATE OF TEXAS

§

COUNTY OF HIDALGO

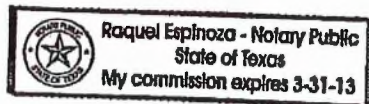
§

This instrument was acknowledged before me on this the 16th day of May, 2011 by Ofthal E. Brand, Jr., President of HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3, a water district operating under the laws of the State of Texas, on behalf of said District.

Raquel Espinoza
Notary Public in and for The State of Texas

Notary's Printed Name:

Raquel Espinoza



STATE OF TEXAS

§

COUNTY OF HIDALGO

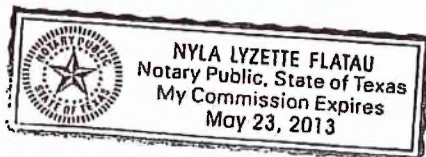
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This instrument was acknowledged before me on this the 19th day of April, 2011, by Tony Aquino Jr., Chairman of McALLEN PUBLIC UTILITIES BOARD, an agency of the City of McAllen, State of Texas, on behalf of said agency.

Nyla L. Flatau
Notary Public in and for The State of Texas

Notary's Printed Name:

Nyla L. Flatau



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Exhibit "A"

STATE OF TEXAS

§

PERMANENT WATER SUPPLY AND DELIVERY CONTRACT

COUNTY OF HIDALGO

§

THIS AGREEMENT is entered into by and between **HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3**, a water control and improvement district operating under the laws of the State of Texas and a political subdivision of the State of Texas, hereinafter referred to as "**DISTRICT**," and the **CITY OF McALLEN**, a municipality of the State of Texas, through the **McALLEN PUBLIC UTILITIES BOARD**, an agency of the City of McAllen, hereinafter jointly referred to as "**CITY**," terminating a prior Permanent Water Delivery Contract entered into between the parties which was effective September 1, 1983, and substituting in lieu thereof this Contract, wherein DISTRICT agrees to divert, furnish and deliver water to CITY, and CITY agrees to receive such waters from DISTRICT under the following terms and conditions:

Water Allocation

1. (a) The waters to be diverted, furnished and delivered by DISTRICT to CITY hereunder are those waters of the Rio Grande which CITY is entitled to receive from DISTRICT and use for municipal purposes, as allocated by the Texas Natural Resource Conservation Commission, Rio Grande Watermaster, or its successors ("**Commission**"), more particularly 8,980 acre feet per annum measured at the Rio Grande as reflected by Certificate of Adjudication No. 23-848, initially issued by the Commission's predecessor, Texas Water Rights Commission, of record in Volume 1, pages 627-628 of the Certificate of Adjudication Records of Hidalgo County, Texas, to which reference is hereby made; up to the amount of 3,000 acre feet per annum of Rio Grande water measured at the Rio Grande as allocated to DISTRICT by the Commission, being that water which DISTRICT is authorized to divert for municipal use under Amended Certificate of Adjudication No. 23-848A issued by the Commission on October 10, 1978, of record in Volume 2, pages 201-204 of the

Certificate of Adjudication Records of Hidalgo County, Texas, to which reference is hereby made for the purposes of this Contract; and an additional amount of water of up to a maximum of 2,000 acre feet per annum of Rio Grande water measured at the Rio Grande which District is authorized to divert under amendment to Certificate of Adjudication No. 23-848B issued by the Commission on September 8, 1995 and of record as Document No. 476966 in the Official Records of Hidalgo County, Texas.

(b) DISTRICT further agrees to deliver hereunder any amount of Rio Grande water, which CITY acquires and becomes entitled to divert from the Rio Grande when CITY provides necessary authorization to DISTRICT authorizing it to divert such waters from the Rio Grande and the DISTRICT is able to divert and deliver such water as needed by CITY without undue interference in DISTRICT'S then existing delivery commitments to CITY and others.

2. Water will be delivered as needed by CITY subject to DISTRICT's delivery system capability and taking into account water delivery commitments of DISTRICT to others entitled to water service from DISTRICT.

3. DISTRICT further agrees to divert and deliver hereunder any amounts of Rio Grande water whose purpose of use is designated as municipal or industrial, measured at the Rio Grande, which CITY acquires and becomes entitled to from other than DISTRICT, provided CITY provides necessary authorization to DISTRICT authorizing it to divert such municipal or industrial use waters from the Rio Grande, and provided further that DISTRICT is able to divert and deliver such waters without undue interference with DISTRICT's then-existing delivery commitments to landowners in DISTRICT, CITY and others.

Water Delivery Charge

4. CITY shall pay to DISTRICT monthly, at its office in McAllen, Texas, 9.5¢ cents (\$0.095) for each one thousand (1,000) gallons of water, or portion thereof, for all water diverted and delivered

by DISTRICT described in Paragraph 1(a) above, and for all water diverted and delivered by DISTRICT under paragraph 1(b), 7¢ cents (\$0.07), all measured as provided in paragraph 6 below, beginning on September 1, 1998 through August 31, 1999, and thereafter on an annual basis until such rates are adjusted as provided for in paragraph 10 below. CITY agrees to pay DISTRICT, on or before the fifteenth (15th) day of the month following the date of DISTRICT's monthly statement to CITY, the amount of water delivery charges due for the prior month's services.

Delivery Point

5. DISTRICT will deliver to CITY said waters from its First Lift Main Irrigation Canal for diversion by CITY at CITY's Boeye Reservoir located at the corner of 18th Street and Expressway 83 in CITY.

Measurement of Water

6. The amount of water delivered by DISTRICT hereunder shall be determined as follows: (a) water delivered to CITY shall be measured by CITY's meter located at CITY's intake diversion structure on DISTRICT's Main Canal at CITY's Boeye Reservoir, and (b) that amount shall be multiplied by a factor of 1.10 so as to take into account transportation losses occurring prior to delivery to CITY's Reservoir. CITY agrees to install and maintain such meter at its expense, subject to DISTRICT's approval as to the type of meter and construction and maintenance methods utilized. CITY shall read the meter monthly on the fourth Friday of each month and promptly certify in writing to DISTRICT the amount of water measured at the meter point and the date the meter was read each month. Access to the meter for reading and examination shall be free to all parties hereto.

Water Diversion Reports and Amounts

7. DISTRICT will make the necessary Rio Grande water diversion reports to the Commission, or its successors, of the amount of water diverted from the Rio Grande for CITY based upon the amount of water delivered and measured as provided in paragraph 6 above. DISTRICT will pay

assessments established by the Commission, or successors, relating to the administration of water rights of the Lower Rio Grande as such pertains to the 5,000 acre feet under Amended Certificates of Adjudication No. 23-848. CITY agrees to pay such assessment with respect to the 8,980 acre feet under Certificate of Adjudication No. 23-848.

Annual Use and Allocation

8. CITY agrees that amounts of raw water delivered to it by DISTRICT from the Rio Grande for municipal use during any calendar year during the term hereof shall be reported and considered as water used under this Contract and charged against the water allocation or allotment provided for in Paragraph 1 of this Contract before any of such water deliveries are considered used and charged against the allocation or allotment of Rio Grande water to which CITY is otherwise entitled.

9. The CITY agrees that it will order from and take delivery of all of the water to which CITY is entitled from the DISTRICT under Paragraph 1 of this Contract. In the event CITY fails to order and take delivery of such amount during the twelve (12) months' period ending December 31 of each year, then the CITY agrees to pay to the DISTRICT the then-existing delivery charge on the amount of water representing the difference in the amount actually received by the CITY from the DISTRICT and the amount of the CITY's entitlement under Paragraph 1 of this Contract.

Adjustments to Delivery Charges

10. The water delivery charges under this Contract is effective during the twelve (12) months period from September 1 through August 31 of the following year. The water delivery charges hereunder shall be annually reviewed by the Board of Directors of DISTRICT. In the event DISTRICT determines that an adjustment in said charges is necessary for the ensuing year, it shall give CITY written notice of such adjustment at least thirty (30) days prior to August 31. The new water delivery charges shall become effective the following September 1.

It is agreed that adjustments in the water delivery charges of CITY hereunder will be on the equivalent percentage basis as adjustments made in charges required of others receiving water service from DISTRICT.

In the event CITY is dissatisfied with the adjustment in the water delivery rate established by DISTRICT, it may exercise any appeal rights that it may have under law.

Failure of Delivery

11. DISTRICT shall not be liable to CITY for failure of delivery in the event of mechanical failure, strikes, acts of God, or other occurrences beyond DISTRICT's control, nor shall DISTRICT be liable to CITY in any event so long as DISTRICT is taking reasonable steps to continue and maintain service to CITY. In the event drought conditions result in a limited amount of water available for allocation by the Commission or other applicable governing agency and there is implemented by said regulatory agency a proration of the available water supply, then in such event, the amount of water covered by this Contract will be prorated so that CITY will be treated on the same basis as other similar users upon the Lower Rio Grande.

Transfer of Contract

12. This Contract shall not be transferred by CITY without the express written approval of DISTRICT.

Term of Contract

13. This Contract shall be deemed effective on September 1, 1998, and shall remain effective, unless terminated by mutual agreement of the parties. In the event CITY fails to comply with any of the provisions hereof, DISTRICT, after giving CITY thirty (30) days advance written notice of the provisions so violated, may terminate the operation of this Contract pending the curing by CITY of its said default. Amendments to the water delivery charge rate shall be evidenced by DISTRICT's

notice of rate adjustment to CITY as provided in paragraph 10 hereof. All other amendments hereto shall be in writing and mutually agreed upon by both parties.

Enforcement

14. It is understood and agreed that either party hereto may demand specific performance of this Contract.

Laws and Regulations

15. This Contract shall be subject to the Rules and Regulations of the Commission, or its successors, as they presently exist or as they are hereafter amended, to the extent such Rules and Regulations pertain to the operations of the parties hereunder. This Contract shall be subject to all valid applicable state, federal and local laws, rules and regulations; provided, however, either party hereto shall be entitled to abide by this Contract and regard all laws, rules and regulations issued by any federal or state regulatory body as not in conflict herewith and may act in accordance herewith until such time as any provision hereof is held invalid or in conflict with such laws, rules and regulations by final judgment in a court of competent jurisdiction after all appeals have been exhausted.

Non-Waiver

16. The waiver by either party of any provision of this Contract shall not be construed as a precedent or waiver of such provision thereafter, unless this Contract is amended in writing reflecting such waiver.

Authorization

17. Those representatives of the parties executing this Contract below represent one to the other that they are authorized by action of the governing bodies of each party to execute this Contract.

Prior Contract Terminated

18. The parties entered into a Permanent Water Delivery Contract effective September 1, 1983, containing similar terms to this Contract. This Contract amends and terminates said prior 1983 Contract upon its effective date, and upon and after the effective date hereof of September 1, 1995, the said 1983 Permanent Water Delivery Contract shall be deemed void and of no further force and effect.

EXECUTED by the parties, through their authorized representatives on the dates indicated below.

HIDALGO COUNTY WATER
IMPROVEMENT DISTRICT NO. 3

Date: 5-12-99

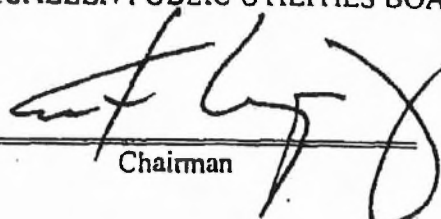
By: 
President, Board of Directors

ATTEST:

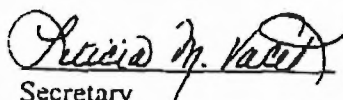

Secretary

MCALLEN PUBLIC UTILITIES BOARD

Date: 5-5-99

By: 
Chairman

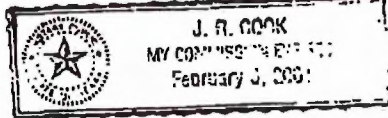
ATTEST:


Secretary

STATE OF TEXAS §

COUNTY OF HIDALGO §

This instrument was acknowledged before me on this the 12th day of May, 1999, by Glasscoe Dayle, President of HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3, a water district operating under the laws of the State of Texas, on behalf of said District.



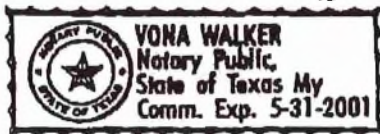
My Commission Expires:

J.R. Cook
Notary Public in and for The State of Texas
J.R. Cook
Notary's Printed Name:

STATE OF TEXAS §

COUNTY OF HIDALGO §

This instrument was acknowledged before me on this the 5th day of May, 1999, by Tony Aguirre, Chairman of McALLEN PUBLIC UTILITIES BOARD, an agency of the City of McAllen, State of Texas, on behalf of said agency.



My Commission Expires:

Vona Walker
Notary Public in and for The State of Texas

Notary's Printed Name:

file: hawaii\work\pmu-000020

TCEQ DOCKET NO. 2024-0243-WR

| | | |
|---------------------------------------|----------|------------------------------------|
| COMPLAINT BY McALLEN PUBLIC | § | BEFORE THE TEXAS COMMISSION |
| UTILITY FOR DENIAL OF WATER BY | § | |
| HIDALGO COUNTY WATER | § | |
| IMPROVEMENT DISTRICT NO. 3 | § | ON |
| UNDER TEXAS WATER CODE §§ | § | |
| 11.041 AND 51.305(d) | § | ENVIRONMENTAL QUALITY |

PRELIMINARY RESPONSE TO ORIGINAL PETITION

Hidalgo County Water Improvement District No. 3 (“Water Improvement District”) intends to fully respond to the numerous factual misstatements made by McAllen Public Utility (“McAllen”) in its February 8, 2024 original petition. Until then, the Water Improvement District is filing this preliminary response to address the legal deficiencies in McAllen’s petition. In short, the Texas Commission on Environmental Quality (“TCEQ”) should not refer McAllen’s petition to the State Office of Administrative Hearings (“SOAH”) because McAllen has not requested relief that TCEQ can grant.

I. BACKGROUND

The Water Improvement District obtains raw water from the Rio Grande pursuant to water rights issued under Chapter 11 of the Texas Water Code. The Water Improvement District sells that water to McAllen under a wholesale water supply contract, last amended in 2011. In September 2021, the Water Improvement District increased McAllen’s rate under the contract. In October 2021, invoking Section 12.013 of the Texas Water Code, McAllen appealed the Water Improvement District’s contractual water rates to the Public Utility Commission of Texas (“PUC”).

In August 2022, McAllen’s legislative delegation argued to the PUC that the TCEQ had exclusive jurisdiction over the rates at issue. The PUC asked the Attorney General to weigh in on that jurisdictional issue. On June 27, 2023, he did, stating that the PUC “has broad, general

jurisdiction to fix water rates for any purpose in chapter 11 or 12” and that TCEQ has jurisdiction in a “limited circumstance” where the dispute “involves an allocation by the District to cover the maintenance and operating expenses of its water delivery system pursuant to section 51.305”—and “[o]therwise, the matter must be heard by the PUC.”¹

McAllen’s appeal at the PUC remains pending. On February 8, 2024, McAllen filed a Section 11.041/51.305 petition with TCEQ. The executive director has ten days to determine whether McAllen’s petition meets the requirements of 30 TAC § 291.129.² If so, the executive director forwards the petition to SOAH.

II. MCALLEN’S TCEQ PETITION IS LEGALLY DEFICIENT

The Attorney General has opined that TCEQ’s water rate jurisdiction is limited to review of O&M allocations.³ McAllen’s TCEQ petition does not request that the TCEQ review O&M allocations. Instead, McAllen appeals the Water Improvement District’s entire supply and delivery rate and invites the TCEQ do the following: (1) review the Water Improvement District’s entire supply and delivery rate and “render a written decision” that the rate “is not just or reasonable and is discriminatory,” (2) transfer the Water Improvement District’s water rights to McAllen, and (3) “determine a reasonable, just, and non-discriminatory price and order [the Water Improvement District] to charge a price no higher than the price determined by the Commission to be just, reasonable, and non-discriminatory.”⁴ As further explained below, the TCEQ should decline the invitation.

¹ Tex. Att’y Gen. Op. JS-0004 at 3-4 (June 27, 2023) (“[I]f the dispute involves an allocation by the District to cover the maintenance and operating expenses of its water delivery system pursuant to section 51.305, the matter is properly before the TCEQ. Otherwise, the matter must be heard by the PUC.”).

² See 30 TAC 291.131.

³ In addition, the Water Improvement District understands Section 51.305 to give TCEQ the limited jurisdiction to review O&M allocations set by Board order, but not those set pursuant to a contract. See, e.g., Tex. Water Code § 51.319. Here, the Water Improvement District charges contractual rates.

⁴ McAllen’s Petition at 15-16.

1. PUC—not TCEQ—has jurisdiction to hear an appeal of the Water Improvement District’s supply and delivery rate.

McAllen has appealed the Water Improvement District’s entire supply and delivery rate.⁵ However, the Attorney General made clear that TCEQ has limited jurisdiction, only over allocation of estimated O&M expenses. McAllen’s TCEQ petition doesn’t say anything about allocation of O&M expenses. The word “allocation” doesn’t appear in the petition at all. McAllen filed a statement of position with the SOAH judges in the PUC proceeding on February 9, just a day after filing the TCEQ petition, in which it conceded that TCEQ’s jurisdiction is limited to review of allocation of O&M expenses (Attachment A). TCEQ should not refer to SOAH that which it does not have jurisdiction over.

2. TCEQ may not unilaterally transfer the Water Improvement District’s water rights to McAllen.

The Water Improvement District owns the water rights used to supply and deliver water to McAllen.⁶ McAllen has asked the TCEQ to transfer the Water Improvement District’s water rights to McAllen.⁷ As explained in an amicus curiae brief filed by the Attorney General’s office on TCEQ’s behalf in a recent Texas Supreme Court case, TCEQ does not “make the final determination of water rights ownership” because TCEQ only exercises an “administrative record-keeping function.” (Attachment B at 1-2). The Attorney General’s office further informed the Supreme Court that “[o]nce a water permit is issued and vested in the holder, it can be bought and sold like any other property,” that TCEQ’s “authority does not extend to adjudicating private disputes simply because they involve water rights,” and that “a dispute about who owns the water rights” should not be adjudicated at TCEQ. (Attachment B at 3). The Supreme Court agreed,

⁵ See, e.g., McAllen’s Petition at 10 (referencing the “\$113.96 delivery charge”).

⁶ See, e.g., McAllen’s Petition at Appendix A (Certificate Nos. 23-848, 23-848A, 23-848B, and 23-848D).

⁷ See McAllen’s Petition at 15-16.

holding that the adjudication of disputes related to ownership of surface water rights is not within TCEQ's jurisdiction, *see Pape Partners, Ltd. V. DRR Family Properties LP*, 645 S.W.3d 267, 269 (Tex. 2022), and specifically that "TCEQ lacks jurisdiction to decide conflicting claims of ownership to surface-water rights." *Id.* at 275-76.

TCEQ in a Section 11.041 proceeding is not empowered to unilaterally transfer the Water Improvement District's water rights to McAllen. TCEQ should not refer to SOAH that which it does not have jurisdiction over.

3. TCEQ does not set water rates.

Finally, McAllen asks TCEQ to set a new water rate.⁸ But the Legislature has ordered that only the PUC can take the next step and set a new rate: "The utility commission shall fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12 of this code." *See* Tex. Water Code 12.013(a) (emphasis added).

A SOAH judge in a prior Section 11.041 proceeding at TCEQ held as much: "Section 12.013 gives the PUC the authority to 'fix reasonable rates.' Section 11.041 does not involve 'fixing' any rate; it involves a determination as to whether the price demanded is reasonable and just or discriminatory." (Attachment C at 3). The petitioner in that case conceded that after TCEQ made a decision under Section 11.041, it would "have to go to the PUC to ask that agency to set a reasonable rate." (Attachment C at 3). For good reason: As TCEQ stated in a filing in that case, it "no longer has ratemaking authority" and it "no longer has the dedicated staff expertise to determine water rates."⁹ That's in part because Senate Bill 1 (2013) transferred over \$1.6 million

⁸ McAllen's Petition at 16.

⁹ Executive Director's Response to BASF's Motion to Determine the Scope of the Proceedings or Certify a Question at 5, *In the Matter of the Complaint by BASF Corporation For Denial of Water Under the Texas Water Code §§ 11.038 and 11.041*, TCEQ Docket No. 2018-0852-WR (Oct. 8, 2018).

in funding and 20 FTEs from TCEQ to the PUC so that the PUC could carry out its responsibilities related to economic regulation of water utilities.¹⁰

Because only the PUC sets water rates, TCEQ should not refer to SOAH any issues relating to setting a new water rate.

III. CONCLUSION

McAllen's petition does not request any relief that the TCEQ is empowered to provide. As pled, there is nothing in McAllen's petition for TCEQ to refer to SOAH. The executive director should decline to refer McAllen's petition to SOAH. In the alternative, TCEQ's referral order should specify that (a) TCEQ's jurisdiction is limited to review of allocation of estimated O&M expenses; (b) TCEQ cannot and will not unilaterally transfer the Water Improvement District's water rights to McAllen; and (c) the PUC, not the TCEQ, sets rates.

Date: February 16, 2024

Respectfully submitted,



Taylor Holcomb
State Bar No. 24074429
Heath Armstrong
State Bar No. 24105048
JACKSON WALKER LLP
100 Congress Avenue, Suite 1100
Austin, Texas 78701
512-236-2060
512-236-2002 (Fax)
tholcomb@jw.com
harmstrong@jw.com

Attorneys for the Water Improvement District

¹⁰ Texas Sunset Advisory Commission Final Report with Legislative Action at 4b-4c (July 2013); *see also* 2014-2015 General Appropriation Act at VIII-64, Item 11 (Contingency for HB 1600).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record via e-mail, regular mail, hand-delivery, or fax on February 16, 2024.

Taylor Holcomb

Taylor Holcomb

Attachment A



Filing Receipt

Filing Date - 2024-02-09 02:21:06 PM

Control Number - 52758

Item Number - 70

**SOAH DOCKET NO. 473-22-1659.WS
PUC DOCKET NO. 52758**

| | | |
|------------------------------------|----------|----------------------------------|
| PETITION OF MCALLEN PUBLIC | § | PUBLIC UTILITY COMMISSION |
| UTILITY APPEALING WHOLESALE | § | |
| WATER RATES CHARGED BY | § | OF TEXAS |
| HIDALGO COUNTY WATER | § | |
| IMPROVEMENT DISTRICT NO. 3 | § | |

**MCALLEN PUBLIC UTILITY'S
STATEMENT OF POSITION**

McAllen Public Utility (“MPU” or “McAllen”) files this Statement of Position as required by SOAH Order No. 7. Order No. 7 requires MPU to file this Statement of Position no later than February 9, 2024. It is, therefore, timely.

As noted by the Attorney General, there is at least some overlapping jurisdiction between the Commission and the Texas Commission on Environmental Quality.¹ The question is whether, and to what extent, one agency or the other has jurisdiction over this dispute. As noted in Order No. 7, the Commission framed the issues thusly:

- Do the facts demonstrate that the Commission has authority under Texas Water Code section 12.013 to decide this appeal? If so, was the petition filed in accordance with Texas Water Code section 12.013 and 16 Texas Administrative Code section 24.107?
- Do the facts demonstrate that all or certain portions of the appealed rates fall outside the Commission’s appellate authority under Texas Water Code section 12.013 (including numerous sub-questions)?

The Attorney General suggested that section 12.013 can be harmonized with Water Code section 51.305(d) if the latter is construed as an exception to section 12.013 and concluded that “if the dispute involves an allocation by [HCWID 3] to cover the maintenance and operating expenses of its water delivery system pursuant to section 51.305, the matter is properly before the TCEQ. Otherwise, the matter must be heard by the [Commission].”²

MPU agrees that Water Code section 51.305(d) serves as an exception to the Commission’s broad authority under section 12.013, and that at least the portion of MPU’s complaint concerning

¹ Tex. Att’y Gen. Op. No. JS-0004 at 3-4 (*available at* <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2023/js-0004.pdf>).

² *Id.*

maintenance and operational expenses of HCWID 3's water delivery system must be heard by the TCEQ. As MPU stated during the January 10 prehearing conference, there are fact issues that must be determined to know whether this dispute involves the type of allocation, and remainder, to cover maintenance and operating expenses of HCWID 3's water delivery system governed by section 51.305. MPU suspects that it does, which would require TCEQ to preside over the dispute—at least in part. MPU agrees with the ALJs that determining the scope of TCEQ's jurisdiction in this proceeding without TCEQ's participation would be inappropriate. And the scope of the Commission's jurisdiction would be difficult, if not impossible, to determine without also determining that of the TCEQ. Therefore, on February 8, 2024, MPU filed a petition to invoke the TCEQ's jurisdiction under Water Code section 11.041.

More substantively, MPU takes the position that the only expenses MPU or McAllen should legally be required—and have ever been required—to pay are expenses related to HCWID 3's maintenance and operation of its water delivery system. To that end, MPU believes that the primary adjudicator of this dispute should be the TCEQ. However, as a Water Control and Improvement District, HCWID 3 has powers and duties beyond delivering water, including drainage, land reclamation, and navigation. To the extent that HCWID 3 has charged MPU for any expenses unrelated to maintaining and operating the water delivery system, the Commission may be required to adjudicate the legality of those charges and whether MPU is due any refund.

Under Texas Water Code Section 11.041, the TCEQ's executive director must have a preliminary investigation of MPU's complaint and determine whether there are probable grounds for the complaint prior to setting a time and place for a hearing on MPU's petition. TCEQ's rules require the executive director to determine whether the petition meets TCEQ's rules relating to probable grounds within ten days of the filing of the petition.³ If the executive director determines that the petition does meet the requirements of the rule, the executive director will forward the petition to the State Office of Administrative Hearings ("SOAH").⁴ Once the executive director forwards the TCEQ petition to SOAH, MPU may move to consolidate the hearings. However, because of the unique nature of the overlapping statutory jurisdiction, the parties will likely need to confer to determine whether that action is appropriate or feasible.

³ 30 Tex. Admin. Code § 291.131.

⁴ *Id.*

Order No. 7 also requires the parties to this proceeding to file an agreed proposed procedural schedule or, if the parties are unable to agree, then to file separate proposed schedules. Before February 21, the undersigned counsel will confer with the parties about whether to request a delay in that deadline to allow the TCEQ executive director to forward the TCEQ petition to SOAH and for SOAH to convene a preliminary hearing in that matter.

Respectfully submitted,

WINSTEAD P.C.

401 Congress Ave., Suite 2100
Austin, Texas 78701
Telephone: (512) 370-2800
Facsimile: (512) 370-2850

/s/ James Aldredge

JAMES ALDREDGE
State Bar No. 24058514
JAMES RUIZ
State Bar No. 17385860

ISAAC TAWIL
State Bar No. 24013605
AUSTIN STEVENSON
State Bar No. 24085961

**MCALLEN PUBLIC UTILITY
CITY ATTORNEY**

P.O. Box 220
1300 Houston Ave
McAllen, Texas 78501
Telephone: (956) 681-1090

**ATTORNEYS FOR
MCALLEN PUBLIC UTILITY**

CERTIFICATE OF SERVICE

I certify that notice of this filing was provided to all parties of record via electronic mail on February 9, 2024 in accordance with the Second Order Suspending Rules issued in Project No. 50664.

/s/ James Aldredge

JAMES ALDREDGE

Attachment B

No. 21-0049

IN THE SUPREME COURT OF TEXAS

Pape Partners, Ltd., Glenn R. Pape, and Kenneth W. Pape,
Petitioners,

v.

DRR Family Properties, LP and Louise W. Champagne,
Respondents.

On Petition for Review from the Tenth Court of Appeals, Waco
Cause No. 10-17-00180-CV

AMICUS CURIAE BRIEF OF THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
IN SUPPORT OF THE PETITION FOR REVIEW

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant
Attorney General

SHAWN COWLES
Deputy Attorney General for
Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection
Division

KELLIE E. BILLINGS-RAY
Deputy Chief, Environmental
Protection Division
State Bar No. 24042447
Kellie.Billings-Ray@oag.texas.gov

LINDA B. SECORD
Assistant Attorney General
State Bar No. 17973400
Linda.Secord@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION
DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
(512) 463-2012
(512) 457-4638 Fax

August 26, 2021

Identity of *Amicus Curiae* and Counsel

Amicus Curiae:

Texas Commission on
Environmental Quality

Counsel:

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas Commission on Environmental Quality (the Commission) respectfully submits this *amicus curiae* brief in support of the petition for review filed by Petitioners, Pape Partners, Ltd., Glenn R. Pape, and Kenneth W. Pape. Specifically, the Commission writes to support Petitioners' position as to the scope of the Commission's jurisdiction over water rights adjudication.

STATEMENT OF INTEREST

The Texas Water Code gives the Commission general jurisdiction over “water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.” Tex. Water Code § 5.013(a)(1). The term “water rights adjudication” referenced in this statutory provision is a term of art under the Texas Water Code and relates to the Commission's issuance of certificates of adjudication and in doing so, determining the amount of use, place of use, purpose of use, point of diversion, rate of diversion, and where appropriate, the acreage to be irrigated. *Pape Partners, Ltd. v. DRR Family Props. LP*, 623 S.W.3d 436, 443 (Tex. App.—Waco 2020, pet. filed) (Gray, T., dissenting).

The Commission does not, under the express provisions of the Texas Water Rights Adjudication Act of 1967 (the Adjudication Act), make the final

determination of water rights ownership.¹ Rather, the Commission exercises its administrative record-keeping function, which is then followed by an automatic and mandatory judicial review of the law and facts based on issues defined at the Commission during the agency process. Tex. Water Code §§ 11.317, .320(a).

STATEMENT OF FACTS

The Commission incorporates by reference the Statement of Facts as set forth in the Petition for Review.

SUMMARY OF ARGUMENT

The dispute in this case is who owns private property rights, and neither the plain language of the Adjudication Act nor any other provision of the Texas Water Code provides the Commission with a mechanism to determine such a dispute. Instead, the Adjudication Act specifically recognizes the role of judicial review in the water rights process. *Id.* § 11.320. As recognized both in statute and in case law, these disputes are properly before the Court. *See, e.g., Id.* §§ 11.317, .320(a); *Bd. of Water Eng'rs v. McKnight*, 229

¹ Water Rights Adjudication Act, Tex. Water Code §§ 11.301-.341(Adjudication Act).

S.W. 301, 307 (Tex. 1921). The district court properly had jurisdiction to decide this case.

ARGUMENT

Surface water in Texas is owned by the State and held in trust for Texas citizens. Tex. Water Code § 11.021(a); *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982) (*In re Adjudication of Water Rights*).² Through a system of water rights prioritization, the State grants the right to use water to individuals or entities such as ranchers, farmers, cities, or industries. The Commission has an important role to play in issuing and recording those grants. However, the Commission's authority does not extend to adjudicating private disputes simply because they involve water rights. Once a water permit is issued and vested in the holder, it can be bought and sold like any other property. And, like any disagreement about the ownership of property, a dispute about who owns the water rights is properly adjudicated in court.

Historically, water rights were based on a priority system that indicated the seniority of a water right based on "first in time, first in right." Tex. Water

² See generally Tex. Comm'n on Envtl. Quality, *Am I Regulated? Water Rights in Texas*, available at https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr_amiregulated.html.

Code § 11.027. Today, priority dates for new water appropriations are based on the date the application is declared administratively complete at the Commission. The process at the Commission is not adjudicatory. Rather, it is one of recordation. Unless a party is using surface water for a reason designated as exempt under the Water Code,³ any party that wishes to obtain a surface water right must get permission from the Commission prior to this use. *Id.* § 11.121.

I. The Texas Supreme Court in *McKnight* determined it was a violation of the doctrine of separation of powers for a state agency to determine property rights.

In *McKnight*, the Court considered a water rights challenge involving the rights of various claimants to waters of the Pecos River. *McKnight*, 229 S.W. at 301. Specifically, the *McKnight* court considered the constitutionality of the Irrigation Act of 1917 (the predecessor to the Water Rights Adjudication Act of 1967). The Court ultimately struck down the Irrigation Act, which authorized a state agency to determine property rights, as violating the doctrine of separation of powers. *Id.* at 304. The Court explained that in order for the Board of Water Engineers (a predecessor agency to the Commission) to determine a property right, it must,

³ See Tex. Water Code §§ 11.1405, .142, .1421, .1422, and 18.003.

decide the most intricate questions of law and of fact—questions with respect to the validity and superiority of land titles, questions of contract, questions of boundary, questions of limitations, and questions of prescription. An inquiry involving such questions and resulting in the binding adjudication of property rights is strictly judicial, and we would not uphold the Constitution as it is plainly written were we to sanction the delegation of the power to conduct and to finally determine such an inquiry to any other tribunal than the courts.

Id. at 307.

For many years, *McKnight* left water rights in a state of uncertainty. *In re Adjudication of Water Rights*, 642 S.W.2d at 439. The Legislature’s answer came years later in the form of the Adjudication Act. Tex. Water Code §§ 11.301-.341

II. The Adjudication Act provided a mechanism to quantify and record water rights.

By the late 1960’s, water rights were a bit of a jumble, with Texans holding rights derived from a variety of sources (some dating to Spanish land grants), taking different forms, and memorialized in different ways (sometimes recorded in the county deed records, sometimes not). The Adjudication Act was designed to bring order. The Legislature gave claimants a deadline to submit their claims to the Commission’s predecessor, which then sorted, examined, and—after judicial determination—converted everything into a uniform system, resulting in successful claimants holding a water rights permit. The Adjudication Act provided a mechanism to quantify and categorize rights

of water users in Texas, and it provided the foundation of modern-day surface water rights in Texas.⁴ *Id.*

When first enacted, the Adjudication Act required all claimants of water rights, except those who already operated under permits or certified filings, to file a statement with the Texas Water Commission setting out their claims. Tex. Water Code §§ 11.303(c), .307. Among other things, the statement was to include “the location and the nature of the right claimed,” “the stream or watercourse and the river basin in which the right is claimed,” and “the dates and volumes of use of water.” *Id.* § 11.303(c)(2), (3), (5).

The Commission held a preliminary hearing on each claim and notified the parties. *Id.* §§ 11.309, .312. The parties could then file a contest of the

⁴ The Adjudication Act provides:

The conservation and best utilization of the water resources of this state are a public necessity, and it is in the interest of the people of the state to require recordation with the commission of claims of water rights which are presently unrecorded, to limit the exercise of these claims to actual use, and to provide for the adjudication and administration of water rights to the end that the surface-water resources of the state may be put to their greatest beneficial use. Therefore, this subchapter is in furtherance of the public rights, duties, and functions mentioned in this section and in response to the mandate expressed in Article XVI, Section 59 of the Texas Constitution and is in the exercise of the police powers of the state in the interest of the public welfare.

Tex. Water Code § 11.302.

preliminary decision. *Id.* § 11.313. There was a hearing on each contest, and it was followed by the Commission's final determination. *Id.* §§ 11.314, .315. Finally, parties were permitted to timely file motions for rehearing. *Id.* § 11.316.

After all applications for rehearing were complete, the Commission filed a certified copy of its final determination in district court, together with all the evidence presented to or considered by the Commission. *Id.* § 11.317. The district court then ordered the date for filing exceptions to the final determination, the date for hearings on exceptions, and notified all parties. *Id.*

At the completion of the judicial process, the court issued its final decrees, and the Commission recognized the terms of the final decree through an issuance of a certificate of adjudication. Tex. Water Code § 11.323. The certificates of adjudication were then filed and recorded by the clerk of the county in which the appropriation of the water was made and then returned to the holder. *Id.* § 11.324.

Once perfected in the courts, those water rights became a vested property interest that can be conveyed and assigned through conveyance instruments such as deeds. Tex. Water Code § 11.040; *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679-80 (Tex. App.—Austin 1947, no writ). When presented with deed(s) establishing a chain of title, the Commission

updates its records to note the change in ownership. 30 Tex. Admin. Code § 297.83.

The Texas Supreme Court has long recognized that the jurisdiction to determine disputes in private property rights is inherently a judicial function—one that under the doctrine of separation of powers the Commission does not have jurisdiction to determine. *McKnight*, 229 S.W. at 307.

III. The Texas Supreme Court determined the judicial review function of the Adjudication Act makes it constitutional.

The Texas Supreme Court considered the constitutionality of the Adjudication Act in *In re Adjudication of Water Rights*, 642 S.W.2d at 439. The Court made specific note of section 11.320 of the Adjudication Act and explained that this judicial review provision is what separates the act from the constitutionality issues that plagued the earlier Irrigation Act. *Id.* at 442.

Section 11.320 states,

the court shall determine all issues of law and fact independently of the commission's determination. The substantial evidence rule shall not be used. The court shall not consider any exception which was not brought to the commission's attention by application for rehearing. The court shall not consider any issue of fact raised by an exception unless the record of evidence before the commission reveals that the question was genuinely in issue before the commission.

Tex. Water Code § 11.320.

Under the Adjudication Act, the Commission does not make the final determination. There is a two-step procedure. The Commission makes its determination, which is followed by a mandatory and automatic judicial review. *In re Adjudication of Water Rights*, 642 S.W.2d at 442. The Court determined that the Adjudication Act, unlike the Irrigation Act construed under *McKnight*, provides a constitutional method for adjudication. *Id.*

There is no provision under the Adjudication Act, and no party has pointed to any such provision, that gives the Commission authority to determine private property disputes. As indicated by the plain language of the Adjudication Act, the Commission's role is an administrative, record-keeping function. Water rights disputes are adjudicated as any other property dispute.

PRAYER

The Commission urges this Court to grant Petitioners' Petition for Review.

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Attachment C

**SOAH DOCKET NO. 582-18-5014
TCEQ DOCKET NO. 2018-0852-WR**

| | | |
|---------------------------------------|----------|--------------------------------|
| IN THE MATTER OF COMPLAINT BY | § | BEFORE THE STATE OFFICE |
| BASF CORPORATION UNDER TEXAS | § | |
| WATER CODE § 11.041 FOR DENIAL | § | OF |
| OF WATER UNDER TEXAS WATER | § | |
| CODE §§11.033 & 11.041 | § | ADMINISTRATIVE HEARINGS |

**ORDER NO. 5
DETERMINING SCOPE OF PROCEEDINGS**

On September 12, 2018, BASF Corporation (BASF) filed a Motion to Determine the Scope of Proceedings and, in the Alternative, Motion to Certify a Question. Both Dow Chemical Company (Dow) and the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) filed briefs opposing the alternative motions, to which BASF responded. After considering the arguments and legal authorities cited, the Administrative Law Judge (ALJ) determines that the scope of the proceedings should include all the issues set out in Texas Water Code § 11.041, including (a)(4): “that the party owning or controlling the water supply fails or refuses to supply the available water to the petitioner, or that the price or rental demanded for the available water is not reasonable and just or is discriminatory.”

BASF filed a written petition under Texas Water Code § 11.041 alleging that 1) BASF is entitled to receive water owned by Dow; 2) BASF is willing and able to pay a just and reasonable price for the water; 3) Dow has not contracted with any other party for the use of the water; and 4) Dow refuses to supply water to BASF or demands a price for the water that is not reasonable and just or is discriminatory.

The ED issued a request to the Chief Clerk of the TCEQ for referral of BASF’s complaint to the State Office of Administrative Hearings for a hearing. In the request for referral, the ED stated that, after an investigation, it found probable grounds for the complaint, but limited the referral to “a hearing on the issues addressed by section 11.041 not relating to the reasonableness of the rate.”

BASF's motion seeks a ruling by the ALJ that section 11.041 requires TCEQ to issue an opinion addressing all issues, including the issues set out in (a)(4). The ED takes the position that the issue regarding the reasonableness of the demanded price is outside the jurisdiction of TCEQ and may be addressed only by the Public Utility Commission of Texas (PUC). In support, the ED points to the Legislature's amendment of Texas Water Code § 12.013(a) in 2013, which transferred the authority to "fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12" of the Code, from TCEQ to the PUC. The ED argues that by amending section 12.013, the Legislature intended to transfer all aspects of TCEQ's ratemaking authority. Furthermore, the ED points out, TCEQ no longer has dedicated staff with the expertise to determine water rates. The ED contends that when the two statutes are read together, the result is that TCEQ can address all issues under section 11.041(a) except (a)(4) (reasonableness of the price demanded).

The ALJ is not persuaded by the ED's argument. In the first place, section 11.041, which was also amended in 2013, clearly states that TCEQ is responsible for holding a hearing on a complaint filed under section 11.041 and issuing a written decision:

The commission shall hold a hearing on the complaint at the time and place stated in the order. It may hear evidence orally or by affidavit in support of or against the complaint, and it may hear arguments. The utility commission may participate in the hearing if necessary to present evidence on the price or rental demanded for the available water. On completion of the hearing, the commission shall render a written decision.¹


This section was amended in 2013, at the same time that the PUC was given ratemaking authority. It references the limited role the PUC may take in providing evidence on the reasonableness of the price demanded, but does not state that the issue may only be decided by the PUC. If the Legislature had intended that TCEQ could not make a decision as to whether the rate demanded was reasonable, it could have deleted (a)(4) when it amended section 11.041 in 2013. Instead, the Legislature required TCEQ to make a decision on that issue and provided the PUC with a potential role in the TCEQ's decision-making process.

¹ Tex. Water Code § 11.041(f).

Furthermore, when the two statutes are read together, they do not provide for conflicting authority. Section 12.013 gives the PUC the authority to “fix reasonable rates.” Section 11.041 does not involve “fixing” any rate; it involves a determination as to whether the price demanded is reasonable and just or discriminatory. BASF has acknowledged in its complaint that, after the TCEQ makes a decision under section 11.041 as to whether the rate demanded is reasonable and just or discriminatory, BASF will have to go to the PUC to ask that agency to set a reasonable rate. At that time, the PUC may have to determine what a reasonable rate is, based on evidence submitted to it. That ruling may turn on different factors or evidence than the evidence submitted to the TCEQ.

TCEQ is required by Texas Water Code § 11.041(f) to issue a written decision on all of the issues listed in section 11.041(a). If TCEQ fails to consider one of the issues, it would be subject to a claim that its action was arbitrary, capricious, or an abuse of discretion. *City of El Paso v. Public Utility Commission of Texas*, 883 S.W. 2d 179, 184 (Tex. 1994) (An agency’s decision is arbitrary or results from an abuse of discretion if the agency failed to consider a factor the Legislature directs it to consider.) Based on the ALJ’s analysis of the law, the ALJ denies the ED’s request to limit the scope of the hearing. The ALJ will hear evidence and submit proposed findings and conclusions to the TCEQ as required by section 11.041 in its entirety.

SIGNED October 25, 2018.



JOANNE SUMMERHAYS
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TCEQ

TCEQ Interoffice Memorandum

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From: *AP* Aubrey Pawelka, Staff Attorney, Environmental Law Division

Date: February 20, 2024

Subject: Complaint by McAllen Public Utility for Denial of Water by Hidalgo County Water Improvement District No. 3 Under Texas Water Code §§ 11.041 and 51.305(d); Executive Director's Request for Referral to the State Office of Administrative Hearings; TCEQ Docket No. 2024-0243-WR

On February 8, 2024, McAllen Public Utility (MPU or McCallen) filed a petition under Tex. Water Code §§ 11.041 and 51.305(d), alleging that Hidalgo County Water Improvement District No. 3 (HCWID 3) has refused to sell water to MPU at a reasonable price and that MPU is entitled to the water. This petition and its attachments are attached to this memorandum.

In its petition, MPU alleged that Certificate of Adjudication No. 23-848, as amended through Certificate No. 23-848D, (COA 848) expressly authorizes HCWID 3 to divert up to 8,980 acre-feet of water per year for McAllen's exclusive municipal use. COA 848 further authorizes HCWID 3 to divert an additional 5,000 acre-feet of water per year for municipal purposes in HCWID 3's service area. MPU claims it is entitled to the 13,980 acre-feet of state water that McAllen cannot legally access without paying HCWID 3 to divert and supply it. MPU purchased water from HCWID 3 for many years up until 2022, and MPU desires to continue purchasing water from HCWID 3 at a reasonable rate.

MPU requested that the executive director (ED) determine that probable grounds exist for the complaint that the price or rental demanded for the available water is not reasonable and just, and is discriminatory, and set a hearing at the State Office of Administrative Hearings (SOAH). MPU requested that, upon completion of the hearing on the complaint, the commission render a written decision finding that HCWID 3's price for water to which MPU is entitled is not just or reasonable and is discriminatory.

Tex. Water Code § 51.305(d) provides that a user of water delivered by the district who disputes all or part of a board order that determines the amount of an assessment, charge, fee, rental, or deposit may file a petition under Section 11.041. The statute states that the petition filed with the commission is the sole remedy available.

Tex. Water Code § 11.041 provides a petition process for relief if an entity can show that it is entitled to receive or use the water, that it is willing to pay a just and reasonable price for the water, that the party controlling the water supply has not contracted the water to others and the water is available for the petitioner's use, and

that the party controlling the water supply refuses to supply the available water to the petitioner at a reasonable and just and nondiscriminatory price.

Under 30 Tex. Admin. Code § 291.131, the ED performs a limited review of the petition to determine if the petition meets the requirements of 30 Tex. Admin. Code § 291.129. If the ED determines that the petition meets the requirements of section 291.129, the ED shall forward the petition to SOAH for an evidentiary hearing under Tex. Water Code §§11.036 - 11.041, as applicable. An evidentiary hearing shall be held; and at the completion of the hearing, the commission shall render a written decision.

MPU asserts that it has shown that it is entitled to use the water for municipal purposes and is willing and able to pay a just and reasonable price for the water. MPU alleges that the new rate for the water is not reasonable and just or is discriminatory.

The ED finds that MPU's petition meets the requirements of 30 Tex. Admin. Code § 291.129. The ED requests that this petition be referred to SOAH for a hearing on the issues addressed by Tex. Water Code § 11.041.

Attachments

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