

THEFT OF STATE WATER & MISTREATMENT OF SUPERIOR VESTED REAL PROPERTY RIGHT TO NORMAL FLOW OF THE STREAM GOES UNABATED

Friends of San Saba (FOSS), a not-for-profit 501(c)(3) entity comprised primarily of riparian landowners, whom possess a superior real property water right as Domestic and Livestock (D&L) users (due to existence under common law long prior to legislative adoption of the appropriation acts of the Texas Legislature) and other concerned Texans who have no other agenda than to keep a sustained flow in the Upper San Saba River (USSR) [the segment of the river in Schleicher, Menard, Mason & McCulloch Counties] in the Colorado River Basin. FOSS seeks attention to this matter not addressed in the Sunset Staff Report: "The legislature's compelling TCEQ to provide protection of this vested real property right to "the normal flow in the stream" and its superior ranking as set forth in Texas Water Code, Chapter 297, Subchapter C, Section 297.21 (a)."

- While TCEQ has only once taken any assertive action directed at stream flow assurance in the past 20 years-- -elimination of "Menard Ditch diversions" in 2017, FOSS has done the following: Commissioned investigations, studies and reports on the hydrology of the San Saba River, which identified wide spread and prolific unregulated, illegal pumping and very significant diversion of "state water";
- Submitted complaints regarding lack of "normal flow of the stream" directly caused by such unregulated, illegal pumping and very significant illegal diversion of "state water" and repeated noncompliance to the TCEQ;
- Reviewed hundreds of pages of TCEQ investigative reports and other documents disclosing that TCEQ Staff is fully aware of the ongoing annual depletion of "the normal flow of the stream" as a direct result of the illegal diversions of "state water";
- Met with state legislators, TCEQ commissioners and TCEQ senior leadership on numerous occasions to discuss the prolific unregulated, illegal pumping and very significant diversion of "state water" and the resulting dried-up riverbed of the USSR (oftentimes a 45 mile stretch of the 140 mile long San Saba River);
- Participated in TCEQ Watermaster evaluations by submitting comments, attending Town Hall, public and TCEQ Commission meetings, only to be informed that TCEQ does not permit the superior property water right owners, D&L users, perspective as to its standing in the water right hierarchy to be a consideration as to appointment of such Watermasters;

- Supported research on endangered and threatened Central Texas Freshwater Mussels by the Texas Parks and Wildlife Department (TPWD), the U.S. Fish and Wildlife Service (USFWS), Texas A&M, Texas State University, Texas A&M AgriLife Research and The Nature Conservancy-- ***notice there is an entity, responsible for protection of "the normal flow of the stream" that is totally absent throughout the past decade in these investigations -- TCEQ.***

TCEQ, in the exercise of the Legislature's mandates, over the past decades has made the decision that it will only enforce the statutory provisions relative to D&L use of state water by those owning land adjacent to streams in Watermaster areas. TCEQ is officially on record as to treatment of the exact same vested superior real property water right differently in the ten (10) River Basins with a Watermaster in place (where the superior right is fully enforced) and in the thirteen (13) river basins without Watermasters (where the D&L user superior real property water right to normal flow is totally ignored-- it is placed as inferior to adjudicated water rights). **Thus, the administration of the protection of the D&L user superior water rights by TCEQ across all 23 river basins is a blatant and obvious process of treating property rights holders differently in stream low flow conditions. This different treatment of these vested real property water right owners by TCEQ is in violation of the Texas Constitution, Article I, Sections 3 (EQUAL RIGHTS) and 3a (EQUALITY UNDER THE LAW) and the U.S. Constitution 5th (DUE PROCESS) and 14th (EQUAL PROTECTION) Amendments. These constitutional violations are compounded by TCEQ's unlawful assertion that the D&L user has no right to petition for the appointment of a Watermaster—the obvious means for gaining protection of the D&L users superior right in periods of low flow.**

TCEQ files are filled with records of low or no flow conditions in the USSR during periods of most years since 2000 due to the existence of approximately 120 shallow bottomed alluvial wells, 17 added since 2016, located in close proximity to the USSR in and around Menard. Most of these wells are not permitted, none have continuous metering of the volume of state water diverted, and are illegally making use of "state water" eliminating normal flow. This illegal activity has persisted for decades without a single penalty having been assessed by TCEQ. All of these approximate 120 wells are diverting water from the "underflow" of the USSR from a depth that is separated from any aquifer by at least 80-100 feet or more. TCEQ staff investigators have reported in writing that ***"The alluvial wells are the most likely cause of water flow loss on the San Saba River based on the best available scientific data"***.

Interestingly, while essentially engaging in "a collective naval stare" and being loquacious as a mime for more than two (2) decades as to conditions of annual no or low flow conditions in the USSR caused by alluvial well diversions that deprive D&L user private property water right owners of access to "the normal flow of the stream", TCEQ has been engaged as the lead Texas state agency in litigation filed in the United States Supreme Court suing the State of New Mexico regarding illegal diversions of water due to Texas because of the exactly same type of diversions via illegal shallow depth alluvial wells in and near the Rio Grande River below Elephant Butte Dam. It certainly is a sad state of affairs when TCEQ decides to condone within the state obvious illegal activities, but goes to the nation's highest court seeking relief from exactly the same behavior elsewhere.

One very significant outcome likely to be a direct result of the TCEQ's "collective naval stare" as to no or low flow in the USSR is direct Federal intervention under the Endangered Species Act. On August 24, 2021, the United States Fish and Wildlife Service (USFWS) issued a proposed federal rule to protect six (6) Central Texas Freshwater Mussels under this Act by listing five (5) species as 'endangered' and one (1) species as "threatened". Four (4) of these species are found or previously existed in the USSR, including the Texas pimpleback, Texas fatmucket, false spike and Texas fawnsfoot. The USSR is within the 1,944 Texas river miles proposed as "critical habitat" for these species. **USFWS identified "flow of stream" as the most essential element for mussel survival.** Thus, the continued "collective naval stare" by TCEQ relative to the abundant and obvious ongoing failure of provision of the normal stream flow to superior property water right D&L users in the USSR is a "sticking the head in the sand" situation and clear invitation for federal intervention in the very near future--- all of which can be avoided by assurance of maintenance of "normal flow of the stream".

FOSS submits : (1) TCEQ refuses to allow D&L users to have access to the only meaningful means for protection of its superior real property water right to "normal flow of the stream" in the USSR, while contemporaneously providing such protection to similar D&L users in ten (10) Texas river basins -- a circumstance that violates both the Texas & U.S. Constitutions; (2) TCEQ has long recognized that shallow depth alluvial well diversions of "state water" without any authorization "are the most likely cause of water flow loss for the USSR based on the best available data"; (3) TCEQ is suing the State of New Mexico for the exact same illegal activity to which it, during the past twenty (20)

years has "looked the other way" in the USSR context; and (4) due to the TCEQ's failure to make any meaningful effort to insure "normal flow of the stream" to D&L users in the USSR there is a high probability of federal intervention-- a circumstance that could easily be avoided by TCEQ taking action for flow protection in this stream segment.

FOSS believes the Commission Members should give consideration to legislative provisions that fully address the matters set forth above consistent with applicable law and the Texas and U.S. Constitutions, in recommendations to the 88th Legislature.

Respectfully submitted,
R. Kinnan Golemon, President
KG Strategies, LLC
1212 Guadalupe Street, #102
Austin, Texas 78701
512/633-9428 (C)
Counsel for FOSS