

December 13, 2018

Supplemental Comments
LCRA Sunset Review
John Watson

I emailed Comments on the LCRA Review before Sunset Commission on December 6, 2018. In addition I attended the Public Hearing before the Commission on December 12. At that Hearing I was one of around 15–20 citizens who offered comments.

Based on the Hearing and event subsequent to my earlier Comments I submit these Supplemental Comments.

TRANSPARENCY, STAKEHOLDER COMMUNICATION AND ACCOUNTABILITY

First, I want to comment on the behavior of LCRA in the lead-up to the Hearing and on the testimony offered by Mr. Wilson and Mr. Timmerman. Amazingly, at the very moment these officials were sitting in front of you offering “voluntary” acquiescence in Staff recommendations regarding transparency, accountability and better communications with affected stakeholders, they were engaged in a different sort of “transparency”: Transparent insincerity and hypocrisy. The full-page Statesman ad they were running on the very day of the Hearing concerning the proposed Bastrop County groundwater project, which they knew would be a topic of comment before the Commission, puts on full display the sort of behavior criticized by the Staff Report. (And it appears just one week prior to the preliminary Hearing before Administrative Law Judges on the Contested Case hearing on the Bastrop permit

application. If a jury were involved it would be close to jury tampering). For more than four years others and I have been seeking a commitment from LCRA that any groundwater they might be permitted to produce in Bastrop County stay in the county. Not only have they steadfastly refused to make such a commitment; they have refused to even discuss who the ultimate end user might be or the destination to which such water might be exported. But yesterday, on the eve of an expected onslaught of criticism of that project, the affected landowners/stakeholders wake up to learn of some vague “commitment” concerning geographical limits as to where such water might go. Not from LCRA directly but from a newspaper ad. This laughably “transparent” attempt to manipulate the Commission and its Members should be treated by you with the same contempt with which LCRA consistently treats the public, affected stakeholders, and yes, even you and the Legislature. And to add insult to injury the ad was paid for by me and all other electricity and water rate-payers who buy power and/or water sold wholesale by LCRA.

The ad, and a letter sent to LPGCD dated November 29, 2018, makes plain that no existing use for the water they propose to take. Vague talk about population growth is used in an attempt to justify a widely opposed project. In fact this ploy should be seen for what it actually is: LCRA, once again exceeding its statutory authority, is proposing to create a putative huge supply of water just sitting there as a lure and magnet to draw development into the proposed geographical area. Whether or not and to what extent a county, city or region wants to grow in population is a topic that needs debating and decision making from local residents and the governments they elect, not some unaccountable State agency auditioning to be a combination of a supra-Chamber of Commerce and real estate promoter.

This Commission and the Legislature should rein in such extra-statutory forays.

Recommendation to Commission: Do not take professions of voluntary reform in transparency, communications or accountability from LCRA at face value. Make recommendations to the Legislature to put these in enabling statutes. Consider recommending to Legislature that LCRA be required to employ an ombudsman, in consultation with stakeholders, to be an internal voice or watchdog for stakeholder/public interests. Recommend Board establish a Committee on Stakeholder Communication, Transparency and Accountability.

RULE OF CAPTURE

Texas is the only Western State to adhere to the Rule of Capture, which allows for the real property right of water beneath one's land to be drained by the actions of operations on neighboring land.

Thus in the case of LCRA seeking a groundwater permit to produce and sell 25,000 acre feet of water per year (8,146,275,000 gallons) to others, drained landowners will receive no compensation whatever. As they would if this were an oil or gas production operation. Does there have to be the threat of a shooting war, with National Guard called out, as happened with oil and gas poaching in the 1920s, before the Legislature examines the inequities and violation of private property rights created by Rule of Capture? Neighbor vs. neighbor tensions will only grow more frequent and intense as the scramble for water becomes more pressing in coming years. Since the Rule of Capture was adopted by Texas Supreme Court decision in 1904, the science of hydrology has made advances that could be utilized in framing a more rational law for water in our State.

Recommendation to Commission: Recommend that Legislature create a Special Committee to study the Rule of Capture; its relation to groundwater and Groundwater Conservation Districts; its impact on private property rights; its impact on waste (when the Railroad Commission was created and rules regarding mandatory unitization and other oil and gas rules were put in place, prevention of ruinous waste was deemed to be one of the stated goals); whether adopting rules similar to those applying to oil and gas production might help protect private property rights; and the role it might play, negative or positive, in helping Texas meet the water needs of a rapidly growing population. Have the Committee report back to the next Legislature that meets in 2021 with its conclusions and recommendations.

CLIMATE CHANGE AND WATER

The recent spate of studies from the IPCC (Intergovernmental Panel on Climate Change) and the U.S. Government have stressed the impact climate change will have on water resources, both surface and groundwater. An overwhelming scientific consensus exists among climate scientists that climate change is real, is mostly driven by human activities – especially the burning of fossil fuels – and will have dramatic and drastic negative impacts on human civilization as it presently is organized unless measures are taken now to mitigate the injection of greenhouse gases into the atmosphere. Texas has one of the leading climate scientists, Dr. Katherine Hayhoe, Texas Tech University, who wrote key parts of the Fourth Climate Assessment of the U.S. issued November 23. Any and all efforts to plan for the future water needs of the fast-growing Texas population that fail to take climate change into account will be leaving out a key factor affecting that future. We already see impacts including higher evaporation rates for surface water, greater demand for groundwater used in agricultural operations from farming to livestock raising due to more unreliable rainfall patterns, decreasing inflows to the Highland Lakes, and

extreme strain on rivers including the Rio Grande. Temperatures in Texas have already risen 2° Fahrenheit in the past 100 years, and unless action is taken soon to reduce greenhouse emissions a further rise is seen as a virtual certainty.

Recommendation to Commission: Recommend to Legislature that all State agencies include in their future planning the impact of climate change. This is not a radical proposition. The U.S. Department of Defense has been taking climate change into account for several years in doing its planning. Many business enterprises do the same. Now cities, States and other political subdivisions are taking climate change into account. It is time for the State of Texas to do so. Fortunately our State is a leader in renewable energy sources of wind and solar. Handled properly seriously addressing climate change could be a boost for our economy.

BOARD OF DIRECTORS

The Board consists of 15 Directors, each appointed by the Governor and confirmed by the Senate. The term for a Director is 6 years. So far as I can learn the 6–year term is one of the longest terms for any State Agency, and exceeds the longest term for any elected official in Texas.

Yet it is common practice for Directors to be re-appointed. In fact three of the current Directors have served for 10 or more years, including Chairman Tim Timmerman. Such lengthy tenure cuts against sound practices for such positions. Six years is adequate time to take into account a learning curve and years of effective service. All Boards of Directors benefit from a turnover and the fresh perspective new Directors bring to deliberations. Several

terms expire in early 2019, providing an opportunity to the Governor to appoint different people with more diverse backgrounds.

There is a notable lack of diversity on the Board. Five members are women. One Director has a Hispanic surname. No African-Americans are on Board.

There is an over-representation on the Board of real estate interested groups and agriculture. There is no representative from the recognized environmental community, even though in-stream environmental flows and the health of Matagorda Bay are issues at the forefront of river management, as are water quality and many other issues with an environmental component.

Recommendations to Commission: Recommend to Legislature that Board terms be limited to one 6-year term. In the alternative reduce initial terms to 3 years and limit terms to two. Recommend required training in governance, effective communications with stakeholders and a clear sense of exactly to whom a Director owes loyalty and a fiduciary duty. Recommend to the Governor that he take diversity into account when making new appointments to Board. Recommend to Legislature that it require at least one Director to be a recognized environmental advocate.

Sunset Advisory Commission

Re: Lower Colorado River Authority (“LCRA”)

Comments by John Watson

For the past 25 years I have lived on a ranch in Blanco County situated on the Pedernales River, a major tributary of the Colorado River/Lake Travis. I am a retired lawyer and financial executive. I belong to two electric distribution co-operatives PEC and Bluebonnet that purchase wholesale power from LCRA. I own land in Bastrop County that adjoins the Lost Pines Boy Scout Camp (Griffith League Ranch) on which LCRA has purchased groundwater rights and is presently seeking a permit to produce a large quantity of water for export out of the county.

I have read the Self Evaluation Report (“SER”) of LCRA dated September 2017 and the Sunset Staff Report (“Staff Report”). My Comments will be in two parts, preceded by an Executive Summary. PART I addresses the imperative for LCRA to utilize the latest information about climate change/warming in its planning and operations for water. PART II will address a number of other important issues raised by the SER and Staff Report.

EXECUTIVE SUMMARY

- LCRA current policy does not include taking climate change/warming into account in either operations or planning for the future. This State Agency's two main areas of business activity, water and electricity generation and transmission, are two of the activities expected to be most severely impacted by climate change. As stated by the National Climate Assessment released November 8, 2018: **"The assumption that current and future climate conditions will resemble the recent past is no longer valid."**

Failure to take climate change into account imperils the river basin LCRA is mandated to protect and the stakeholders it serves. Pages 3 through 7.

- LCRA has exceeded its statutory authority by attempting to enter the production, transportation and sale of groundwater. Such activities also result in LCRA harming one set of its stakeholders to benefit others. This is a breach of its duty to the residents of the Colorado River basin. Pages 7 through 9.

- LCRA has an extreme lack of transparency, which works to the detriment of all its stakeholders. This is highlighted by events surrounding the Arbuckle Reservoir and the Lost Pines Boy Scout Camp (Griffith League Ranch) in Bastrop County. A lack of accountability is also evidenced by the opaque financial statements and excessive utilization of Executive Sessions of Board. Pages 9 through 11.

- LCRA appears to be using revenue from electricity operations to subsidize water operations and infrastructure. Electric ratepayers are neither informed nor in agreement with that. Pages 11 through 12.

- CONCLUSION Pages 12 through 13.

PART I

LCRA must begin taking climate change/warming into account in its long range planning and in its current operations in both its water division and its electricity generation and transmission businesses.

The National Climate Assessment released on November 23, 2018, a report written with the input of 13 agencies of the U.S. Government including Department of Defense, NASA and NOAA puts the matter starkly: “Earth’s climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities. **The assumption that current and future climate conditions will resemble the recent past is no longer valid.**”

Summary and Recommendations:

LCRA is presently being affected by climate change/warming, and those impacts will increase substantially in future as relates to its two business lines, water and electric power generation and transmission. Both businesses will be imperiled and the river basin and a population of more than 1.5 million will be put at jeopardy without adequate recognition of, and planning, to address this critical issue.

Recommendation: LCRA should be required, either by the Commission or Legislature, to include the latest scientific data on climate change/warming when doing future planning and in its current operations for both water and electricity generation and transmission.

It should be noted that neither the SER nor Staff Report deals with an issue of critical and overriding importance to LCRA and all its

stakeholders: Climate change/warming. Nowhere in the 61 page Staff Report or in the 73 pages, plus extensive supplemental material, of SER is any reference found concerning climate change and the impacts it will without doubt have on the principal business lines of LCRA, electricity generation and transmission and surface water management and water sales. Perhaps this is not surprising since it was confirmed to the Commenter that climate change/warming is not at this time taken into account in the planning process of LCRA. This confirmation was contained in an email to me from Bob Rose, Chief Meteorologist for LCRA on December 4, 2018.

It is undisputed that temperatures in the LCRA service area have been rising for many years. Since its creation 84 years ago there has been an increase of approximately 1.6 degrees Fahrenheit, or a rate of 0.02 annually. According to the best available science, the increase in temperatures will not only continue, it will actually accelerate in the coming years.

As pointed out by Texas State Climatologist, Dr. John Nielsen–Gammon, Texas this area can expect greater extremes in many types of weather in coming years. This will include greater frequency and greater severity of both droughts and flooding.

The recently released National Climate Assessment, the product of four years work by 13 agencies of the U.S. government including NASA, NOAA and Department of Defense, reinforces such conclusions. As the Assessment states: “Earth’s climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities. **The assumption that current and future climate conditions will resemble the recent past is no longer valid.**” It adds, “the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions.” One of the major sources of greenhouse gas emissions is electric power generation. Thus the

overwhelmingly major revenue source of LCRA, some of which is believed to be used to subsidize water operations, will be under increasing pressure. A broad range of responses to climate change was assessed, as stated by **Dr. Katharine Hayhoe**, climate scientist at Texas Tech University, in response to criticism that the Assessment considered only worst case scenarios: “I wrote the climate scenarios chapter myself so I can confirm it considers **ALL** scenarios, from those where we go carbon negative before end of century to those where carbon emissions continue to rise.” Under any of the scenarios there will be impacts as set out in the National Assessment including more devastating wildfires, severe storms and coastal flooding, **droughts**, crop failures, **water shortages**, threats to public health and the loss of hundreds of billions of dollars to the American economy. About our part of the country it says: “no area of the country will be untouched, from the Southwest, where droughts will curb hydropower and tax already limited water supplies...” It goes on to say, “much of the Southwest will endure worsening droughts, **further taxing limited groundwater supplies.**”

Increasing evaporation already occurs during our hottest months, with reports that as much water evaporates each day from the Highland Lakes as is consumed by water users in Austin. LCRA’s own data shows a disturbing trend of reduced inflows to the Highland Lake system, not all of which can be attributed to variation in rainfall. Sixteen of the 17 warmest years on record have occurred since 2000. Climate science tells us that even if we ceased injecting greenhouse gases into the atmosphere entirely today we would still face the “baked in the cake” problem: Greenhouse gases already in the atmosphere will cause continuing climate change for a long time to come.

The Climate Assessment (<https://www.globalchange.gov/nca4>) represents the latest update of the overwhelming scientific consensus that has evolved from many years of study by the IPCC,

NASA, NOAA, the U.S. Department of Defense, and government and university researchers from around the world. Among entities already incorporating climate change in their planning are the U.S. Department of Defense, property and casualty insurance companies, some State and Municipal governments and many coastal interests.

Given this stark warning, **“The assumption that current and future climate conditions will resemble the recent past is no longer valid,”** it could be argued that continued future water planning that does not take climate change/warming into account amounts to dereliction of duty.

LCRA is particularly vulnerable to coming changes needed to avoid the most severe impacts of climate change and efforts to stop or mitigate the causes, principally emission of greenhouse gases from burning of fossil fuels. Electricity generation by coal-fired plants is identified as one of the largest contributors to greenhouse gases, which is one of the primary causes behind climate change. Enormous pressure has been building to shift to renewable sources of electric power including wind and solar. Fortunately for us here in Texas, our State has become a leader in both resources. With costs of those renewable sources now competitive with burning fossil fuels, more and more cities (indeed, Georgetown, one of the fastest growing cities in the U.S., has committed to going completely to renewables), co-operatives and private providers of retail electricity will be adding renewable energy to their portfolios and decreasing reliance on and use of fossil fuel generated power. This threatens to erode the main revenue base of LCRA. Although electricity generation is specifically excluded from this Sunset Review it is brought in here due to the fact that electricity generation and transmission revenues are almost surely being used to subsidize at least some of LCRA’s water operations, as will be pointed out in a later section of these Comments, and water operations will feel the revenue squeeze. In addition the coal fired

plants operated by LCRA use large quantities of water to cool the operating plants.

As stated by Sunset Staff Report the “biggest long–term challenge facing LCRA’s water division, is the demand for water.” Yet according to information on page 42 of the SER LCRA plans to reduce the price it charges for raw water sold for firm delivery over the coming years, thus receiving both a lower per unit price and lower overall water revenues. Such actions would violate the basic tenets of the economic theory of price signaling. With water supply stress looming, pricing should reflect that undeniable fact and be designed to encourage conservation rather than to promote profligate usage. **As the National Climate Assessment makes clear both surface water and groundwater will be negatively impacted by climate change/warming.**

Action requested of Sunset Commission: Require LCRA to fully take the science behind climate change/warming into account in its water planning. If necessary, recommend that the Legislature mandate such inclusion in the planning process.

PART II

Other Issues that should be addressed by Sunset Commission.

- **LCRA has exceeded its statutory authorization by taking steps to enter the business of purchasing groundwater rights, applying for permits to produce and transport (export) groundwater, and apparently planning to sell such water in a manner similar to its sales of surface water.**

On page 7 of the Staff Report we find this: “The Legislature created the LCRA 84 years ago to control floods, protect and store water, conserve land, and generate and sell electricity.” This

language tracks the authorizing legislation faithfully. Sec. 8503.0021(a), Texas Special District Local Law Codes.

Forays into groundwater acquisition and commercial sale, as in the pending permit application with Lost Pines Groundwater Conservation District (“LPGCD”) in Bastrop County, not only go outside the statutory grant of authority, but also violate at least two of the above stated purposes for which LCRA was originally created. First, far from “protecting and storing water” the sought permit would harm the Simsboro Layer of the Carrizo–Wilcox Aquifer by “mining” water, that is, producing water at a rate beyond the recharge capacity of the aquifer. That would harm rather than protect water. Second, by draining the aquifer, water would be squandered and the land sitting atop it adjacent to and nearby would be harmed rather than “conserved” as mandated by statute. As a result of the rule of capture nearby landowners would experience a valuable real estate right, namely access to and ownership of water beneath their land, be depleted without compensation or recourse. Landowners are faced with harm to their land and wells and diminishment of the value of their land.

“Compliance with legislative requirements” falls squarely within the matters the Legislature mandated this Sunset Review cover. See p. 13, Staff Report.

In the past LCRA has obtained permits to drill groundwater wells and use the water in connection with operations of its electric generation power plants, including Lost Pines Power Park in Bastrop County. So far as can be ascertained the current effort to obtain a permit to drill 8 wells and transport the water to some undisclosed location for sale to some undisclosed buyer is the first attempt by LCRA to produce groundwater for commercial sale to outside entities. This unauthorized activity should be halted immediately. The pending permit at Lost Pines Groundwater Control District in Bastrop County should be withdrawn forthwith.

The fact that the Self Evaluation fails to mention the purchase of water rights in Bastrop County (by Deed filed in January 2015, some 33 months before the date of the SER) or that a permit application had been filed with LPGCD (early 2018, but likely in the planning stage when the SER was written) suggests to the Commenter that LCRA was not eager to put this information before the Sunset Commission, the Legislature or the wider audience of stakeholders.

Action requested of Sunset Commission: Admonish LCRA for exceeding its statutory authorization of permitted activities. Recommend that the water rights purchased at the Lost Pines Boy Scout Ranch (Griffith League Ranch) in Bastrop County, be put into a conservation easement with such easement to be held by a local Land Trust. Recommend that the pending permit application in Bastrop County be withdrawn or put in abeyance.

• Lack of transparency and accountability.

On page 13 of the Staff Report we find the following: “Citing problems with transparency and accountability, the 84th Legislature placed river authorities under Sunset review and directed Sunset staff to assess their governance, management, operating structure, and compliance with legislative requirements.”

Referring specifically to LCRA, the Staff Report, p. 13, in discussing what it calls the “biggest long-term challenge facing LCRA’s water division, the demand for water,” the Report states as follows: “Recognizing the limits of relying entirely on the river to meet various water demands, LCRA plans to make substantial investments to secure additional new water supply projects into the future, but will need cooperation, buy-in, and trust from the communities in which it operates to be successful in the future.

However, at points in its history, LCRA's approach to, and level of, public involvement and engagement in these projects has varied." Both the off-channel Arbuckle Reservoir and the Lost Pines Boy Scout Camp proposal are vivid examples of this.

That last sentence of the quote above is a substantial understatement when it comes to the activities of LCRA in Bastrop County regarding the Boy Scout Camp water rights purchase and permit application. This Commenter met with the LCRA Manager of Water Supply and Conservation in May 2014 (more than 7 months before the purchase was completed) in an effort to make the case that LCRA should not purchase the water rights, should not be involved in groundwater sales, and to try and get an explanation of what the plans were for such water if it was permitted. I was told any production would likely not exceed 10,000 acre feet per year and would not endanger any existing water wells near by (the pending permit application seeks approval to produce 25,000 acre feet per year). I was refused information about the specific uses, buyer, destination or pipeline route to transport water from the Boy Scout Ranch. (No such information has ever been provided to landowners, stakeholders or even to the LPGCD, which is being asked to grant a permit.) I asked that LCRA call and hold a public meeting in Bastrop County to inform stakeholders of its plans. No such meeting was ever arranged by LCRA. As the Staff Report points out, the decision of the Board of LCRA to apply for the pending permit was made in Executive Session. That would seem, on its face, to violate the Open Meetings Act, and there is no apparent justification for such secrecy.

The Staff Report also criticizes LCRA for its actions in connection with the Arbuckle Reservoir. This includes efforts to avoid doing an Environmental Impact Statement, even though the project will undeniably impact the local environment in a variety of ways.

Failure to inform local stakeholders is, as the Report says, a recipe for conflict and resistance to projects.

Even now, on the eve of the Public Hearing of Sunset Commission and with the Staff Report criticizing the lack of transparency and accountability having been available since September 2018, LCRA has remained reluctant to tell the Commenter whether or not its policy regarding taking climate change into account in planning has changed since 2014. [After three emails and one phone call Mr. Bob Rose, Chief Meteorologist of LCRA, finally emailed an answer to me on December 4, 2018, stating:

Bob Rose

8:48 AM
(8 hours
ago)

to me

John:

I apologize for not getting back to you late next week. LCRA and its Board do not have a formal position concerning global climate change/warming. I hope this answers your question.

The Sunset process you mention deals with the operational efficiency of LCRA. It doesn't involve an analysis of or engage in policy issues such as climate change.

Thank you for your interest.]

Action requested of Sunset Commission: Strong recommendation, with specifics, that LCRA adopt and enforce a more open posture toward the public and its stakeholders; that it stop routinely using Executive Sessions of the Board to discuss and decide important matters impacting stakeholders; that the financial statements be revised to include understandable information needed by stakeholders; and that Board establish a Governance Committee or Ombudsman to oversee observance of both transparency and accountability, with a user–friendly complaint process.

- **Use of electricity revenue to subsidize water infrastructure**

There has long existed a suspicion that revenue from wholesale power sales and electric transmission was being diverted, without notice or explanation to ratepayers, to subsidize water division infrastructure, and possibly operational losses. That goes far beyond the red herring cited in the SER and Staff Report of releases of water to generate hydropower. There appears to be confirmation of such cross-subsidization on page 18 of the Staff Report where there is a discussion of use of funds from the Resource Development Fund to pay interest on debt related to Arbuckle Reservoir of \$10.2 million in 2017. The Resource Development Fund derives its funds from electric transmission revenue. That feels to me as though through my co-op electric bills I may be subsidizing low cost water for rice farmers and others, without either proper authorization on part of LCRA to do that and without adequate disclosure.

Action requested of Sunset Commission: Require LCRA to demonstrate statutory authority to use electricity related revenues to subsidize water division operations. If such authority exists recommend to Legislature that such authority be removed. If not removed require full disclosure in financial statements so electric rate-payers can be aware of where a portion of their monthly electric bills goes, and protest if that seems an improper diversion.

CONCLUSION

LCRA is an agency that has greatly benefited Texans in the Colorado River watershed in its 84 years of existence. The cardinal original purposes of flood control and producing electricity have proven their value time and again. In the recent flooding in the upper and western watershed the adroitly managed flood control operations did a remarkable job of protecting varied interests while minimizing damage to stakeholders. Beginning in the late 1930s and early 1940s LCRA was instrumental in working with rural

electric distribution co-operatives, newly formed under the Rural Electrification Act, in bringing electricity to a huge swath of rural Texas, including my family land in Bastrop County and the home I now live in outside Johnson City. The countryside and small towns such as Johnson City were transformed by the advent of electricity's arrival. The historic legacy of LCRA is a proud one of achievement and service to the people of its service territory.

Today, LCRA continues to play a vital role in the region. Yet it has lost its way in some important areas. The drift into opacity, lack of transparency, failure to consult with and inform stakeholders of information important to them, and its assumed role of encouraging growth, instead of accommodating growth, far from remaining true to its original mission has led to an erosion of trust among many of its stakeholders and customers. Rather than engage in mission creep by attempting to venture into groundwater sales, which is taking from one group of LCRA stakeholders to benefit another group of possible future residents in an area remote from the waters' source, LCRA should re-dedicate itself to fulfilling its original mission with efficiency, candor, and outreach to affected stakeholders.

The Sunset Commission review and recommendations can steer LCRA back to its historic and beneficial path from which the Colorado River basin and its inhabitants have benefited for 84 years.