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**RE: The Lower Colorado River Authority's (LCRA) Discretion to Not Enter into the White Stallion Contract**

Dear Sirs and Madams:

We are writing on behalf of the No Coal Coalition in regards to the extent of discretion that is vested in the LCRA Board of Directors to deny a contract to provide water to a proposed new coal plant in Matagorda County (the White Stallion Energy Center project or “White Stallion”). As set forth in this letter, it is our opinion that the LCRA has legal authority to deny the contract to White Stallion. LCRA is unique among most river authorities; it manages its water system under a concept of firm and interruptible rights. This management concept makes LCRA a steward of nearly all of water in the Lower Colorado River basin. Furthermore, the interpretation that “if LCRA has water available to meet a request for supply...LCRA must make that water available”<sup>1</sup> is not supported by the legislative and judicial mandates regarding LCRA’s authority. We are aware of the Texas Supreme Court decision, *City of San Antonio v. Texas Water Commission*, 407 S.W.2d 752 (Tex. 1966), but find it does not apply to the situation at hand.

**I. LCRA Is Unique Among River Authorities, and has Broad Authority and Discretion to Deny the White Stallion Water Contract.**

LCRA is a unique river authority. Unlike most other Texas river authorities, LCRA oversees a set of “firm” and “interruptible” water rights.<sup>2</sup> Operating under “firm” and “interruptible” water rights clearly distinguishes LCRA from other river authorities in Texas. LCRA oversees this system under a management concept that makes LCRA steward of the Lower Colorado River basin. Therefore, in addition to the general enabling legislation discussed below in Section II, this unique legal structure is important. It adds a layer of authority and offers a clear distinction of the Lower Colorado River basin from others in Texas.

LCRA was originally created as a conservation and reclamation district under Article 16, Section 59 of the Texas Constitution, through enabling legislation in 1934. It was created in response to a cycle of droughts and floods along the lower Colorado River. Unlike other river authorities, LCRA has rights to nearly all of the water in the Lower Colorado River basin, currently in excess of 2 million acre feet per year.

**A. LCRA, as the steward of the basin, runs the basin under a management concept.**

One aspect of LCRA’s authority over the Lower Colorado River is the nature and function of its Water Management Plan (“WMP”). Pursuant to a final judgment and consent decree, LCRA is required to complete a WMP that is submitted to and approved by TCEQ. *See* Final Judgment and Decree dated April 20, 1988, approved by Judge J. F. Clawson of the 264th

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<sup>1</sup> This oft-repeated phrase is contained, for example, in the LCRA publication entitled *White Stallion Energy Center Proposed Contract*.

<sup>2</sup> To our knowledge, the Brazos River Authority is the only other River Authority that allocates interruptible water rights.

Judicial District of Bell County, Texas. This comprehensive WMP serves as a roadmap for LCRA's management, use, and preservation of its waters.

Among other things, this consent decree and its subsequent management plans created a concept of water rights that is unique (except for the Brazos River system). In most basins, water rights are classified under the seniority process of the prior appropriation legal system. In these basins, all water rights are given a priority date. When water becomes scarce during times of drought, the most senior water rights are protected and junior rights holders can be cut off from the river. In this manner, water withdrawals are limited in times of shortage.

Under the LCRA decree and management plan concept, LCRA is authorized to "manage" its water rights which include most of the available water in the Lower Colorado River. Rather than being classified by a priority date, the water managed by the LCRA is classified as "firm" and "interruptible"; and while this may seem at first blush to be the same as the "senior-junior" system, it is in many ways fundamentally different. Unlike the date-priority system, this system of "firm" and "interruptible" rights is structured and has been approved as a "management" concept rather than as a pure system of legal rights. As such, the management entity – the Board and staff of the LCRA – arguably has much more discretion than do other river authorities (except for the BRA).

For example, the WMP states that "LCRA, within the intent and meaning of its legal authority, is the steward of the water rights granted to it by the State of Texas." WMP at 1-4 (emphasis added). It further states that "LCRA, in exercising its responsibilities as a steward of the water resources of the Colorado River and its tributaries, will strive to maximize the beneficial use of Colorado River water and achieve a sustainable balance among the competing demands on the system." WMP at 1-5 (emphasis added). The WMP contains language supporting this management concept. And plainly, in order for LCRA to serve as steward of the Colorado and to achieve a sustainable balance among competing demands, LCRA must have discretion in overseeing its water contracts. The fact that LCRA has this discretion in denying a water contract is a logical consequence of the policies and mandates of the WMP.

**B. LCRA oversees firm and interruptible water rights, and according to the WMP, water management today requires a "flexible" approach.**

An important aspect of LCRA's WMP, which has been approved by TCEQ, is the unique concept of a water right that is termed an "interruptible" water right. The WMP defines "interruptible stored water" as "stored water supplied pursuant to contract or resolution, where the contract, resolution or special conditions defining the commitment specifically provides that such commitment is 'subject to interruption or curtailment.'" WMP at P-12. Currently the vast majority of LCRA's commitments for interruptible stored water are for irrigation downstream, with most of that irrigation being used for rice farming. These irrigation operations have historically used the waters that are now considered part of LCRA's interruptible stored water supply.

Managing LCRA's water users today requires a flexible approach. The WMP in fact acknowledges this challenge. It states: "In response to new challenges and uncertainties, it is imperative that water management institutions, at all levels, adopt a balanced, flexible, and feasible approach that gives due weight to all the conflicting demands on the water, including the heavy economic dependence of the farmers on historic uses of irrigation water, rapidly emerging public interest in recreation, and environmental values." WMP at P-1. Inherent in a "flexible approach" to water management is discretion.

**C. The WMP acknowledges the importance of long-term planning, which also requires discretion.**

As a water manager and steward, LCRA considers long-term planning. The WMP states the following:

"Additionally, the spectra of long-range shifts in global climatic patterns have injected a new element of uncertainty in water resources planning and management. Clearly, the past may no longer be a valid guide to the future."

WMP at P-1. These statements are reflective of LCRA policy. They also are extremely wise. If certain projections about changes in rainfall patterns come to pass, then a reduction on annual precipitation of approximately 15% may result.<sup>3</sup> It makes sense from a stewardship standpoint that interruptible rather than firm obligations should be the primary form of water contracts in the foreseeable future, reserving the use of "firm" yield water for only the highest use, which is municipal use, unless a detailed evaluation of long-term benefits, including jobs generated and jobs lost, among other environmental considerations, indicates another course of action is advisable. In other words, a wise steward would carefully guard and fully consider long-term firm yield contracts.

The important point is that LCRA considers long-term planning, and this too requires discretion for the water manager. The various long-term planning considerations such as climate change counsel that the water manager must carefully weigh long-term firm yield contracts.

In sum, the WMP and its mandates point to the discretion that LCRA has as steward of the basin. And a critical basis for LCRA's discretion with regard to its water users is that LCRA serves as a water manager, oversees firm and interruptible users, and engages in long-term planning.

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<sup>3</sup> See Dr. Ronald Sass, *Grus Americana and a Texas River*, at 22 (Rice University, November 2010), available at <http://bakerinstitute.org>. Dr. Sass used the 15% figure for the Guadalupe River Basin but has stated separately that it would be applicable to the Lower Colorado River basin as well. Additionally, other publications have discussed the impacts of climate change. See *Proposed White Stallion Coal Fired Power Plant Water Demands and the Highland Lakes Water Supply*, prepared by Glenrose Engineering for the Lone Star Chapter of Sierra Club (June 2011) (discussing between a 5% and 24% reduction in precipitation due to various climate change scenarios, and also discussing climate change impacts on evapotranspiration, runoff, recharge, and lake evaporation).

## **II. LCRA's Enabling Legislation Even More Firmly Establishes LCRA's Discretion Over Its Water Contracts.**

The Texas Constitution and the LCRA enabling legislation set forth broad authority for the LCRA. This includes express grants of authority to “control” and “conserve” and “preserve” the waters of the Colorado. It also entails implied authority, because any limitations on LCRA authority must be expressly stated in the Legislation, and those enumerated limitations do not include a limit on LCRA's discretion to control its water contracts.

### **A. The Texas Constitution and the LCRA Enabling Statute expressly vest LCRA with plenary authority, and the Texas courts have likewise construed a river authority's powers to be broad.**

The Texas Constitution and the LCRA enabling legislation vest LCRA with broad and plenary authority. First and foremost, the Texas Constitution vests LCRA, as a governmental entity created pursuant to Section 59, Article XVI with the duty to conserve the natural resources of the State, including: (1) to “control” the waters of the river and (2) to accomplish the purposes of “conservation” and “preservation.” In full, this portion of the Constitution authorizes LCRA to undertake:

*The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes..., and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.*

Texas Constitution, Section 59(a), Article XVI (emphasis added).

LCRA's enabling legislation further emphasizes the Authority's duties to “control” and “preserve” the waters of the Colorado River and, importantly, places these critical duties on equal footing with “distribution” of the water:

*The authority is created under and is essential to accomplish the purposes of Section 59, Article XVI, Texas Constitution, including the control, storing, preservation, and distribution of the waters of the Colorado River and its tributaries within the boundaries of the authority for irrigation, generation of electric energy and power, and other useful purposes; the reclamation and irrigation of arid, semiarid, and other lands needing irrigation; the development of parks on lands owned or acquired by the authority; and the conservation and development of the forests, water, and electric power in this state.*

LCRA Enabling Legislation, Special District Local Laws Code (hereinafter “Enabling Legislation”) § 8503.001(b) (emphasis added).

Besides these broad purposes to control and preserve the water resources of the Colorado, the language and structure of the Enabling Legislation show that LCRA has broad discretion in deciding how or whether to preserve or sell the waters under its authority. In fact, the Enabling Legislation does not support a conclusion that LCRA must make un-contracted water available upon request. The Enabling Legislation states that LCRA “may use, distribute, and sell” its waters, just as it “may” control, store, and preserve those waters:

The authority may control, store, and preserve, within the boundaries of the authority, the waters of the Colorado River and its tributaries and the lands of the authority for any useful purpose and may use, distribute, and sell those waters, within the boundaries of the authority or within the boundaries of the watershed that contributes inflow to the Colorado River below the intersection of Coleman, Brown, and McCulloch counties, for any such purpose.

Enabling Legislation § 8503.004(b) (emphasis added).

Importantly, in this provision as well, it is evident that the Enabling Legislation, places LCRA’s authority to “control” and “preserve” the waters of the Colorado River on equal footing with the LCRA’s authority to “use” or “distribute” those waters. This is evident in the structure of § 8503.004(b), which is divided into two directives (*i.e.*, the first part discusses authority to “control, store, and preserve” and the second half discusses authority to “use, distribute and sell”).

In other words, the LCRA has separate authority, apart from the authority to distribute and sell, and this separate authority explicitly includes that of controlling and preserving the waters of the Colorado River. Of note, this reading of the Enabling Legislation is consistent with the LCRA’s development of an active and evolving Water Management Plan, which sets aside 50,000 acre feet of water for future use as part of a long-term effort to “preserve” the waters of the Colorado River.

Furthermore, LCRA is not limited by its Enabling Legislation to only those specifically enumerated acts. LCRA has plenary authority: the Legislation provides LCRA “may do any and all other acts or things necessary or convenient. . . to the exercise of all powers, rights, privileges, authority, or functions conferred on the authority by the constitution, this chapter, or any law.” Enabling Legislation § 8503.004(u).

In practice, the Texas courts have consistently described river authorities, including LCRA, as having “broad” exercise of power. *See, e.g., San Antonio River Authority v. Lewis*, 363 S.W.2d 444, 451 (Tex. 1962) (“[T]he corporate and governmental power of the San Antonio River Authority are extremely broad.”); *Lower Nueces River Water Supply Dist. v. Cartwright*, 274 S.W.2d 199, 207 (Tex. Civ. App. 1954) (referring to river authorities as “powerful entities” having broad and important governmental authority within their sphere of operation); *Meaney v. Nueces County Nav. Dist.*, 222 S.W.2d 402, 407 (Tex. Civ. App. 1949) (stating that conservation

and reclamation districts possess broad and sweeping powers); *Weyel v. Lower Colorado River Authority*, 121 S.W.2d 1032, 1033 (Tex. Civ. App. 1938).

**B. Any limitations on LCRA’s authority must be expressly stated in the Enabling Legislation, and none of the limitations in the Enabling Legislation concern LCRA’s discretion with regard to water contracts.**

The Enabling Legislation contains a provision on the limitations of LCRA’s authority. *See* Enabling Legislation § 8503.005. Notably, this list does not limit LCRA’s authority on exercising discretion with regard to its water contracts. This is important because the Enabling Legislation specifically provides that LCRA has “all the powers, rights, privileges, and functions” conferred by law “except as expressly limited by this chapter.” Enabling Legislation § 8503.004(a) (emphasis added). As a matter of statutory construction, it is clear that LCRA’s authority should not be interpreted to be arbitrarily limited. Consequently, nothing in the LCRA statutory provisions indicates that LCRA is constrained in its discretion in entering water contracts.

And, this interpretation is underscored by the fact that, according to the Enabling Legislation, all of LCRA’s powers are to be liberally construed. *See* LCRA Enabling Legislation § 8503.027(a) (stating that all of the terms and provisions of the Enabling Legislation “shall be liberally construed”).

Thus, all of the above-cited provisions, as well as the cited court decisions, offer a strong basis for arguing that extensive discretion exists with LCRA to take any number of factors into consideration in determinations regarding whether water must be allocated and the uses to which the surface water of the state are made.

Of note, any time these general authorities for discretionary authority are brought up, board members and other decision-makers are routinely told that certain existing law prohibits any such interpretation. The basis for such an opinion is a Texas Supreme Court decision involving a dispute between the City of San Antonio and Guadalupe Blanco River Authority. However, upon further review, the fifty-year old case was limited to interpreting a specific statute in a specific situation and, therefore, is not applicable to LCRA’s decision on White Stallion.

**III. The Texas Supreme Court Decision, *City of San Antonio v. Texas Water Commission*, Does Not Alter LCRA’s Discretion in Entering Water Supply Contracts.**

In the case of *City of San Antonio v. Texas Water Commission*, 407 S.W.2d 752 (Tex. 1966), the Texas Supreme Court ruled on a dispute where both the City of San Antonio and the Guadalupe-Blanco River Authority (GBRA) had submitted applications to the Texas Water Commission (a predecessor agency to the TCEQ) to appropriate water for municipal uses. *Id.* at 754. The City of San Antonio was specifically concerned that GBRA might not utilize its new water permit for municipal use but may try to contract the water to more profitable users. *Id.* at

765. Consequently, a central issue in the case was whether GBRA could use the water for something else other than municipal use. *Id.* at 765-66, 768.

The Court held that the Water Commission had broad authority to grant or deny a permit and upheld the Commission's decision denying the permit to San Antonio. *Id.* at 764. Specifically, the Court reiterated a prior ruling that the Water Commission had discretion to issue or deny a water permit within the limits of the statutory directives that such appropriation shall "not impair existing water rights or vested riparian rights, and . . . not [be] detrimental to the public welfare." *Id.* (quoting *Southern Canal Co. v. State Board of Water Engineers*, 318 S.W.2d 619 (1958)).

In addition, the Texas Supreme Court also upheld the Commission's decision to issue a permit to GBRA for municipal use. *Id.* at 764-69. San Antonio challenged the permit to GBRA as a "blanket permit" that improperly delegated the Water Commission's authority to administer water rights. *Id.* at 768. The Court disagreed, finding the water permit to GBRA was subject to the continuing supervision of the Water Commission. *Id.* In refuting San Antonio's claim that GBRA could sell the rights to whomever it wanted, the Court stated that GBRA was under a duty to make the water obtained through a permit specifically for "municipal use" available to municipalities requesting the water, without discrimination. *Id.* The Court stated:

GBRA cannot legally refuse to sell municipal water to any particular municipality. The GBRA is under a duty to serve the public without discrimination. The Texas Statutes, herein discussed, specifically entitle the Water Rights Commission to compel GBRA to furnish municipal water without discrimination. Article 7560 provides that any person entitled to use water from any reservoir can present a petition to the Commission showing that GBRA has a supply of water not contracted to others and available for his use. Upon such showing and upon further showing that GBRA has failed and refused to supply such water to him, GBRA can be compelled to deliver such water in accordance with the Commission's order. Not only that, safeguards are statutorily provided in the event GBRA should seek to supply an unreasonable amount of water to any particular municipality, or should seek to fix an unreasonable price for municipal water.

*Id.* (citations omitted) (emphasis added). With the above case background, it is clear that the context for this case is a permit for municipal water use. The Texas Supreme Court was speaking to a very specific situation where, because of the purpose assigned to the water permit, GBRA was required to make the water available to municipalities that request the water "without discrimination." *Id.* at 768.

The holding of the case only determined that the Guadalupe Blanco River Authority, which had received a water permit for municipal purposes, could not later use that permit for some other water use. Here, LCRA does not have an appropriation that mandates the water be used for any particular purpose, and, therefore, this case does not apply.

There are two additional aspects to this decision that should be kept in mind. First, municipal water use is given the highest preference in the Water Code. Texas Water Code § 11.024. This was the legal context for the case. Second, subsequent decisions interpret *City of San Antonio* as pertaining to the rates that a River Authority may set, but do not apply this case as precedent for compelling a river authority to issue any available water rights. *See Texas Water Rights Com. v. Dallas*, 591 S.W.2d 609, 614 (Tex. Civ. App. Austin 1979) (quoting the above language from *City of San Antonio* and proceeding to discuss the present authority of the Commission to set water rates). These two aspects help demonstrate why the case is inapplicable to LCRA.

Most importantly, nothing in this Supreme Court decision alters or even addresses the broad discretion that is granted to LCRA in the Constitution and its Enabling Legislation and in its court-approved and TCEQ-approved system of “firm” and “interruptible” water rights. Nothing in the *City of San Antonio* decision purports to address the authority that LCRA has been granted in the Enabling Legislation, which, again, states that any limitations on LCRA authority must be stated expressly in the Legislation. The case cannot be read as a limitation on LCRA’s authority. If anything, this case supports an argument that great discretion exists in the LCRA board based on the specific and arguably unique aspects of the management requirements of the Lower Colorado River Basin.

#### **IV. Among the Many Management Considerations Open to the LCRA Board in its Decision on the White Stallion Contract, the Board May Determine That There is No Available Water for White Stallion Because the Water is Currently Being Beneficially Used.**

During the course of the dispute over this proposed White Stallion contract, the Board of the LCRA has received numerous requests and comments from the citizens of the lower basin requesting that certain considerations be taken into account in any decision regarding this White Stallion permit application. It is our understanding that these concerns have been received sympathetically (at least by some board members) but have not been acted upon due to the perception by the LCRA Board that they lacked the broad authority set out in this letter. Assuming it is accepted at face value that the LCRA Board has broad discretion, questions then emerge as to what information should be taken into consideration in a decision regarding White Stallion. And while the following discussion does not pretend to be exhaustive, some such considerations are set out below.

As a starting point, the Board may determine that there is no water available for White Stallion. In fact, it can reasonably be argued that LCRA does not have uncommitted water available under its water rights to satisfy the requested White Stallion water supply contract. The Texas Supreme Court itself has so said, for periods of low flow conditions. In the 1984 decision, the Texas Supreme Court described the Colorado River:

“The Colorado is an inconstant stream. There is insufficient water to satisfy the existing rights during drought, but the water supply is capable of supplying additional users during times of abundant rain.”

*LCRA v. Tex. Dept. of Water Resources*, 689 S.W.2d at 875. The Court held that “existing rights may not be impaired or forfeited until cancelled in whole or in part.” *Id.* at 876. Arguably, interruptible rights are “existing rights” already granted on the lower Colorado.

Any new firm water supply contract issued by the LCRA will likely, at least in times of shortage in the river basin (or “drought,” as the Texas Supreme Court said), reduce current interruptible water commitments. As current firm contracts draw fully on their commitments and the remainder of the firm water supply is contracted for, interruptible water commitments will likely be significantly curtailed and possibly entirely cut off at times. Indeed, under the consent decree and the approved Water Management Plan, interruptible water commitments are by their very nature based on the fact that the total water supply available under all of LCRA’s water rights is not sufficient to honor the full extent of upstream and downstream water users, supply all LCRA’s contractual commitments, and meet commitments for instream flows and freshwater flows to the bays and estuaries.

It is important to consider what it means to Board members to have discretion regarding this contract to White Stallion. Importantly, the water that is sought by White Stallion is currently being put to beneficial use by other users. It is currently supporting important economic activity. Once the decision is made to issue a “firm” right, all interruptible users will suffer water shortages during drought. For the most part, this burden will fall upon the rice farming industry, an industry that has substantial economic value in the lower basin and an industry that provides excellent waterfowl habitat and consequential inflows into the Matagorda Bay system.

Given that this water is currently being beneficially used, key questions to inform the use of discretion would seem to be: “What are the economic consequences of this decision?” and “What are the ecological costs of this decision?” We urge that answers to these questions should be known and provided as input to this decision.

Moreover, LCRA has the legal authority to manage its water rights in a manner which allows interruptible commitments to get the maximum amount of water available to them after firm demands are met, and interruptible water supply users, such as rice farmers, have historically relied on this manner of water supply management. By providing interruptible commitments with the maximum amount of water available after firm demands are met, LCRA is fully utilizing all the water under its water rights. Under this water supply management scheme, LCRA is simply maintaining more flexibility in managing available water for all users and is supplying its commitments to interruptible users.

There are, of course, other questions that the Board may address. These include: What are the economic benefits of the White Stallion decision, and how many jobs are created? How much water goes into each permanent job? What is the “need” for the electricity that is to be generated?

Finally, the Board may ask: How dependable is the long-term water availability in the Colorado River system? Precisely how secure is the water supply in the basin? Is now the time to be making long-term commitments of “firm” water, or would it be wiser to hold onto this “firm”

water for some period of time to determine if the current drought is perhaps symptomatic of longer term trends in rainfall and water supply? Importantly, if a question such as this is answered incorrectly, it could cripple the basin for decades to come.

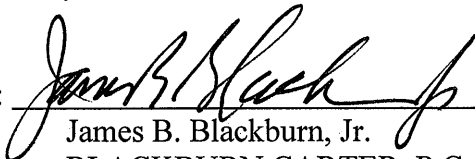
In short, there are some very important questions that should be asked and can be answered. In terms of water availability, we believe there is a sound basis for the Board to determine that no uncommitted water can currently be made available for White Stallion.

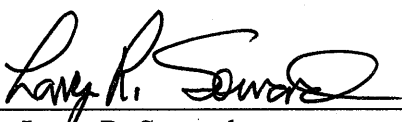
## V. CONCLUSION

In sum, it is important to view LCRA's discretion over its contract through the lens of its posture as a river authority with its own state-approved Water Management Plan and with control over nearly all the water rights in the Colorado River Basin. Unique aspects of LCRA's operations bear on its authority to deny the White Stallion permit. Additionally, LCRA's discretion is grounded in its strongly worded enabling legislation. Further, a close review of the *City of San Antonio* case reinforces that it is not applicable to LCRA. And, as discussed, LCRA's interruptible water contracts may impact the amount of "uncommitted" or "available" water within the basin, in a way that is unique to LCRA.

Finally, LCRA has been designated by the State of Texas as the steward of the water in the Lower Colorado basin and delegated full authority to control, preserve and manage the waters of the Colorado River under its water rights. The LCRA Board has broad discretionary responsibilities and a difficult job. The proper management of water is the key to long-term prosperity for all citizens of the Lower Colorado River Basin. Nothing less than the future for all who live in the basin is at stake.

Sincerely,

By:   
James B. Blackburn, Jr.  
BLACKBURN CARTER, P.C.

By:   
Larry R. Soward  
Former Commissioner, Texas Commission  
on Environmental Quality

c: Rebecca S. Motal, General Manager, Lower Colorado River Authority  
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