

Control Number: 37448



Item Number: 1089

Addendum StartPage: 0

**SOAH DOCKET NO. 473-10-1097
PUC DOCKET NO. 37448**

APPLICATION OF LCRA
TRANSMISSION SERVICES
CORPORATION TO AMEND ITS
CERTIFICATE OF CONVENIENCE AND
NECESSITY FOR
THE GILLESPIE TO NEWTON 345-KV
CREZ TRANSMISSION LINE IN
GILLESPIE, LLANO, SAN SABA,
BURNET, AND LAMPASAS
COUNTIES, TEXAS

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BEFORE THE

PUBLIC UTILITY COMMISSION

OF TEXAS

FILED
MAR 26 2010
10:14
CLERK

**LIMITED EXCEPTION AND MOTION OF J 17 RANCH TO REOPEN AND
SUPPLEMENT THE RECORD AND THE PROPOSAL FOR DECISION**

Intervenor Peggy Jean Mueller, owner of J17 Ranch ("J17 Ranch"), pursuant to Order No. 19 in this case and the March 18, 2010 memorandum for filing exceptions to the Proposal for Decision ("PFD"), files this Limited Exception and Motion to Reopen and Supplement the Record and the PFD.

IV.F.5. Environmental Integrity

Pursuant to the Commission's direction that all exceptions follow the outline of the PFD, this Limited Exception and Motion is directed to part IV.F.5. regarding Environmental Integrity, including an additional requested finding of fact related thereto.

a. Support of the Proposal for Decision

The PFD recommends GN6 as the best route for the CREZ transmission line in this case based on the relevant routing criteria, including the fact that GN6 would have less adverse environmental impact than other alternatives. See proposed Finding of Fact 51. Newly

discovered evidence has come to light that confirms that decision and recommendation of the Administrative Law Judge. J17 Ranch moves that such evidence be admitted into the record in this case and requests that the PFD be supplemented accordingly.

b. Background Facts Regarding J17 Ranch Exhibit 21

The map and supporting affidavit attached hereto as J17 Ranch Ex. 21, document actual occupied habitat of the Golden-cheeked warbler and Black-capped vireo as a result of the “on-ground habitat study” performed by Loomis Partners. Loomis Partners is LCRA TSC’s consultant, whose mapping of potential habitat for such endangered species. LCRA-TSC introduced into evidence the mapping by Loomis Partners based on aerial photographs, showing potential habitat for the endangered Golden-cheeked warbler and Black-capped vireo. LCRA-TSC used this mapping to estimate mitigation costs for harm to endangered species habitat; however, such mapping was not used for routing avoidance on the ground that it showed merely “potential” and not actual “occupied” habitat. As recently disclosed, however, Loomis Partners was also engaged in a study to map habitat confirmed to be occupied by such species based on actual on-the-ground observations. The mapping of that occupied habitat resulting from that study was attached as Exhibit “D” to the Reply Brief of Oakhurst Properties, L.P. (“Oakhurst”) filed on March 12, 2010. Docket Interchange Item No. 1078. As that mapping confirms, “At least two areas of documented heavily occupied habitat, both for Golden-cheeked Warblers and Black-capped Vireos, are directly impacted by the proposed preferred route [GN11].” Oakhurst Reply Brief at 7, as verified by Exhibit B thereto. That map is attached hereto as J17 Ranch Ex. 21 and is hereby offered into evidence in this case.

Specifically, Link C-22 crosses habitat areas found by Loomis Partners, LCRA-TSC's consultant in this case, to be actually occupied—not merely potential as previously mapped by them—by Golden-cheeked warblers and Black-capped vireos. This proof of occupied endangered species habitat crossed by Link C-22 of GN11 and GN10M, confirms the correctness of the selection of the GN6 as the best route in this case.

c. Relevance and Admissibility of J17 Ranch Exhibit 21

Under LCRA-TSC's theory, known occupied habitat is the operative definition for routing avoidance of endangered species areas. Evidence of such a defined area crossed by certain of the proposed routes is therefore clearly relevant.

Because Loomis Partners is the endangered species consulting expert firm hired and relied upon by LCRA-TSC for habitat mapping in this case, LCRA-TSC cannot complain of the qualifications of Loomis Partners to study and map the actual occupied habitat of the Golden-cheeked warbler and the Black-capped vireo shown in the attached J17 Ranch Ex. 21. This Exhibit is authenticated (see Affidavit included in J17 Ranch Ex. 21) and is admissible as an admission against LCRA-TSC to refute its previous position that all such habitat is merely potential because no one has studied and confirmed the actual presence of endangered species. Tex.R.Ev. Rule 801(e)(2); *Hartman v. Trio Transportation Inc.*, 937 S.W.2d 575, 579-580 (Tex. App. – Texarkana 1996, writ denied). J17 Ranch Ex. 21 is also admissible under Tex.R.Ev. Rule 107 as optional completeness to fully and fairly explain the matter of mapping of endangered species habitat areas, a subject matter opened up and relied upon by LCRA-TSC in this case. *Credille v. State*, 925 S.W.2d 112, 116-117 (Tex. App. – Houston [14th Dist.] 1996, pet. denied).

d. J17 Ranch Exhibit 21 Should be Admitted

All of the requirements are met for reopening the record and admitting J17 Ranch Ex. 21 into evidence in this case. Those requirements are no lack of diligence on the part of the offering party, the evidence is relevant to and decisive of a material issue, admission would not cause any undue delay, and it not work an injustice on the opposing party. *In re A.F.*, 895 S.W.2d 481, 484 (Tex. App. – Austin 1995, no writ); *Word of Faith World Outreach v. Oechsner*, 669 S.W.2d 364, 366-367 (Tex. App. – Dallas 1984, no writ).

It is through no fault or lack of diligence of J17 Ranch that this Loomis Partners study and map were not discovered earlier in this expedited and compressed proceeding. This Motion is filed promptly after the evidence was disclosed. Earlier discovery of this evidence was prevented by LCRA-TSC's failure to give the required notice to Oakhurst to facilitate its timely participation in this case.¹ Moreover, because Loomis Partners is LCRA-TSC's consultant for the specific purpose of endangered species habitat mapping in this case, LCRA-TSC had certain obligations to come forward with this information. See CREZ Application Question 27 and Tr. 1046-1049, 1052-1055.

As referenced above, known occupied habitat of endangered species is LCRA-TSC's proposed definitional test for routing avoidance. J17 Ranch Ex. 21 provides evidence of the presence of such a defined endangered species area which would be decisive for avoidance under LCRA-TSC's routing theory for the line in this case.

Admitting J17 Ranch Ex. 21 will not cause any undue delay of this case. In fact, it will cause no delay at all since it will not require any modification of the schedule in this case.

¹ There appears to be little doubt that LCRA-TSC failed to comply with the Commission's notice Rule as to Oakhurst. See Commission Staff's Response to Oakhurst Properties, L.P.'s Reply at 5 (Docket Interchange Item 1083). Had Oakhurst been properly noticed and intervened timely, this map could have been discovered earlier. See e.g., Commission Staff's Second Set of Requests for Information to All Intervenors (Docket Interchange Item No. 265), and LCRA-TSC's First Request for Information to all Parties (Docket Interchange Item No. 665).

Admitting J17 Ranch Ex. 21 at this time will not cause an injustice but will insure that a full and accurate record is made for the Commission's decision in this case. Therefore it should be admitted as part of the record in this case. *In re A.F, supra; Word of Faith World Outreach v. Oechsner, supra.*

e. Requested Relief

Pursuant to the concluding paragraph of Order No. 19 in this Docket, J17 Ranch moves for an order reopening the record in this case and admitting J17 Ranch Ex. 21 into evidence for all purposes. J17 Ranch also requests that the environmental integrity section of the PFD be supplemented with this endangered species habitat mapping by Loomis Partners and that the following finding of fact be proposed for inclusion in Commission's final order:

- 50A. Proposed routes GN2, GN3, GN4, GN5, GN11, and GN10M using Link C-22 cross known occupied habitat of the Golden-cheeked warbler and Black-capped vireo as mapped by LCRA-TSC's endangered species consultant Loomis Partners.

Respectfully submitted,

CARDWELL, HART & BENNETT, L.L.P.
Jeffery L. Hart
J. Bruce Bennett
807 Brazos, Suite 1001
Austin, Texas 78701
(512) 322-0011 Telephone
(512) 322-0808 Facsimile

By: 

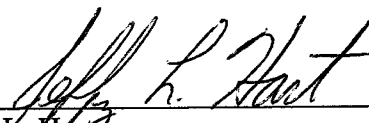
Jeffery L. Hart

State Bar No. 09147300

ATTORNEYS FOR J17 RANCH

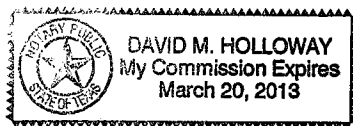
VERIFICATION

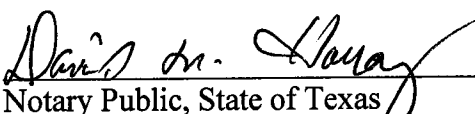
BEFORE ME, on this day personally appeared Jeffery L. Hart, who being first duly sworn on his oath deposed and said that he is one of the attorneys for Intervenor J17 Ranch, that he is authorized and competent to make this Verification, and that all of the statements in the foregoing part d. of this Limited Exception and Motion are true and correct to his knowledge.



Jeffery L. Hart

SUBSCRIBED AND SWORN TO BEFORE ME on this 25th day of March, 2010, to certify which witness my hand and official seal.

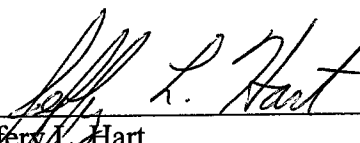




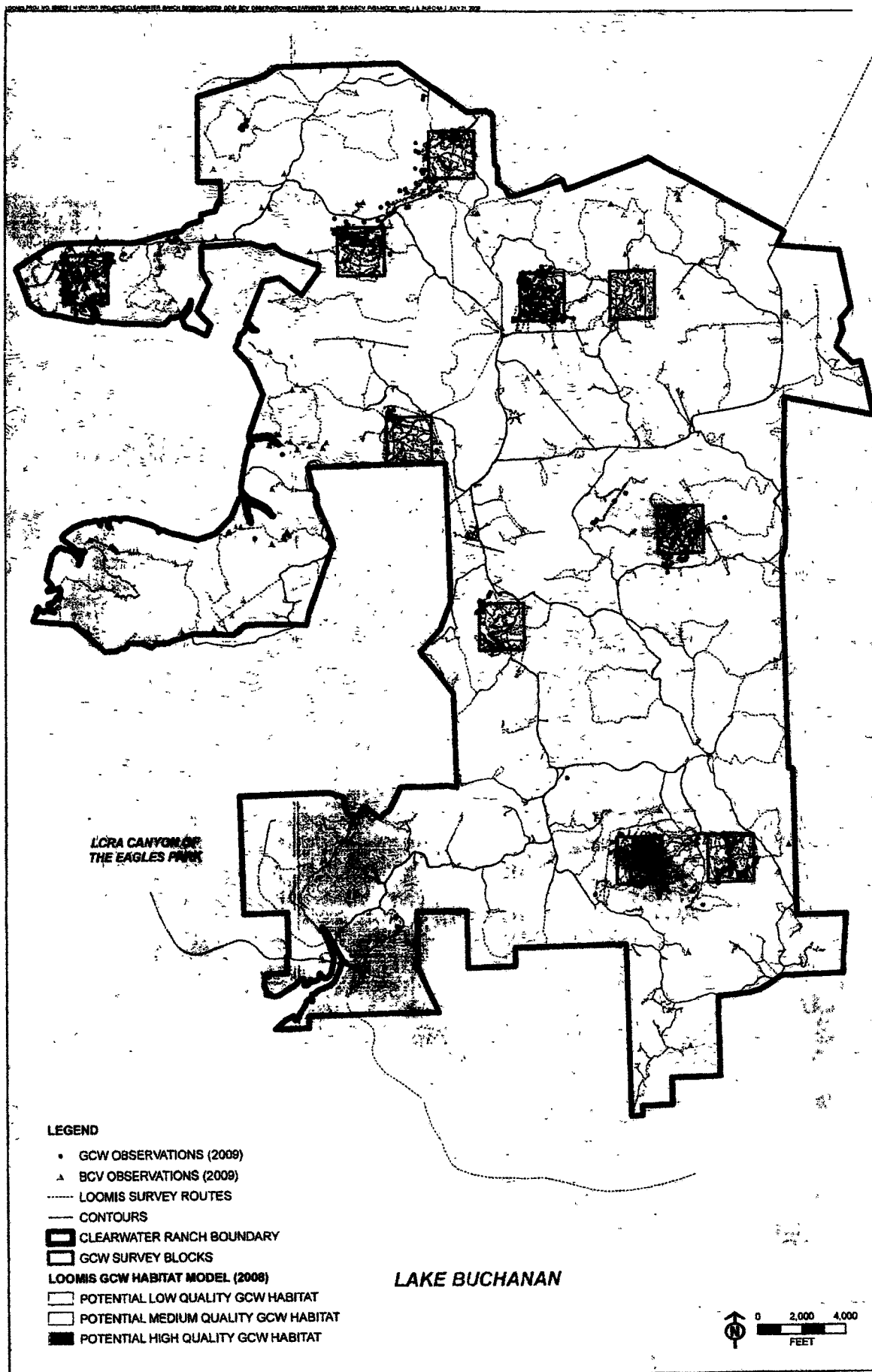
Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March 2010, a copy of the foregoing Limited Exception and Motion was served on all parties pursuant to the Orders of SOAH entered in this proceeding.



Jeffery L. Hart

**FIGURE 1**

OVERVIEW OF SURVEY RESULTS
CLEARWATER RANCH GCW & BCV SURVEY (2009)

AFFIDAVIT

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Before me, the undersigned authority, appeared Steve Mills who, being first duly sworn, states the following:

"I am an authorized representative for Oakhurst Properties, L.P. I am over the age of twenty-one and am competent to make this affidavit.

"Oakhurst Properties, L.P. ('Oakhurst') is the owner of 21,304.716 acres of land in Burnet County, Texas located on the Colorado River north of Lake Buchanan where the preferred route proposed by the LCRA in this proceeding crosses the river. Oakhurst acquired this property from the Goodrich Ranch Company on January 12, 2007, in a deed recorded in Volume 0700684, Page 0800010, Instrument Number 200700684 of the Official Public Records of Burnet County, Texas.

"The January 1, 2008 and January 1, 2009 Burnet County Appraisal District tax rolls contained in Exhibit 'A' to this Reply correctly reflect Oakhurst's ownership of the 21,304.716-acre property referenced above. This property is the only property in Burnet County, Texas, owned by Oakhurst.

"Exhibit 'C' to this Reply contains a true and correct copy of the Burnet County Appraisal District tax card as of January 1, 2010, which correctly reflects Oakhurst's ownership of this property.

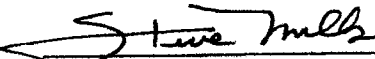
"Exhibit 'D' to this Reply contains a true and correct copy of the map depicting the results of the on-ground habitat survey performed on the Oakhurst property by Loomis Partners for Oakhurst. Oakhurst is currently in negotiations with U.S. Fish and Wildlife regarding the creation of a conservation bank on some or all of this property. LCRA's preferred route in this proceeding directly impacts this property.

"I have read the factual allegations contained in the foregoing Reply of Oakhurst Properties, L.P. to the Responses of LCRA Transmission Services Corporation and Commission Staff, and they are each within my personal knowledge and true and correct."

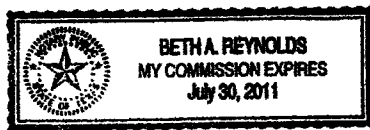
Further the affiant sayeth not.


OAKHURST PROPERTIES, LP
A Texas limited partnership

By: Oakhurst Properties GP, LLC
A Texas limited liability company
Its: General Partner

By: 
Steve Mills
Its: Executive Vice President

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for the State of
Texas, this 11th day of March, 2010.




Notary Public, State of Texas