

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO. 2010-0837-WR

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IN THE MATTER OF APPLICATION NO. 4340A OF THE CITY OF LUBBOCK TO AMEND WATER RIGHTS PERMIT NO. WRPERM 3985

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BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

REPLY TO RESPONSES TO CONTESTED CASE HEARING REQUESTS

I. INTRODUCTION

The City of Lubbock ("Lubbock") has applied for authorization to convey and divert all of its effluent — 32,991 acre-feet ("ac-ft") — using the North Fork of the Double Mountain Fork of the Brazos River Basin ("North Fork"). Lubbock's proposed diversion includes all of its wastewater — 10,081 ac-ft — that it has been authorized to discharge into the North Fork for nearly 20 years.

R.E. Janes Gravel Co. ("Janes Gravel") holds a senior water right to divert water from the North Fork, and has relied on the full use of this crucial water for over 40 years to stay in business. Because Janes Gravel's diversion point is downstream of Lubbock's proposed junior right to divert water out of the North Fork, Janes Gravel is plainly an affected person and therefore requested a contested case hearing on Lubbock's application.

In response, Lubbock provided no analysis as to whether Janes Gravel was an "affected person," and — based on its assurances alone — Lubbock recommends TCEQ simply deny every hearing request and issue the permit without considering the impacts Lubbock's proposed diversion would have on downstream senior water right holders. In contrast, both the Executive Director ("ED") and the Public Interest Counsel ("OPIC") correctly recognized that because Janes Gravel is a downstream senior water rights holder, it is obviously an affected person entitled to a contested case hearing under the Water Code and TCEQ's rules.

## II. BACKGROUND

Janes Gravel is a family-owned company located approximately ten miles east of Slaton, TX. Janes Gravel and has supplied aggregates to Lubbock and surrounding areas for over 57 years, and employs approximately 35 people. Janes Gravel has been a water right holder on the North Fork over 40 years,<sup>1</sup> and is authorized to annually divert 450 acre-feet ("ac-ft") of water to an off-channel reservoir for use in its sand and gravel mining operations. See **Attachment A** (Texas Water Commission Certificate of Adjudication No. 12-3710 recognizing Permit No. 2377). Janes Gravel uses the water it diverts to clean and process rock and sand. Without this water, the majority of its material cannot be recovered, and Janes Gravel's continued viability and ability to operate would virtually cease to exist.

Lubbock has been authorized to discharge its wastewater into North Fork for nearly 20 years. As early as July 9, 1992, Lubbock has been authorized to discharge up to 10,081 ac-ft into the North Fork. TCEQ issued Lubbock's original water use Permit No. 3985 on May 23, 1983. Permit No. 3985 currently authorizes Lubbock to use, within the Brazos River Basin, 22,910 ac-ft of treated effluent per year created as a result of Lubbock's use of municipal water purchased from the Canadian River Municipal Water Authority ("CRMWA"), of which up to 4,480 ac-ft may be supplied to Southwestern Public Service Co. for industrial use at the Jones Power Plant in Lubbock County, and up to 18,430 ac-ft may be supplied for agricultural use for the irrigation of 10,000 acres of land in Lubbock and Lynn Counties.

On April 27, 2004, Lubbock submitted Application No. 4340A to amend permit No. 3985, requesting authorization to divert and use *all* of its historic and future discharges of surface and

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<sup>1</sup> On August 27, 1967, Janes-Prentice, Inc., R.E. Janes Gravel Co.'s predecessor, first applied for a permit to annually withdraw 450 acre-feet of water from the North Fork of the Double Mountain Fork of the Brazos River to wash mined sand and gravel. The Texas Water Rights Commission issued it Permit No. 2377 on June 20, 1968.

groundwater -based return flows, including up to 10,081 acre-feet per year from its TPDES permit No. 10353-002, and to convey the return flows via the bed and banks of North Fork to two diversion points upstream of nearly every senior permit and riparian right owner that has requested a contested case hearing.

The ED declared Lubbock's application administratively complete on October 12, 2004. Notice was mailed on December 22, 2004 and again on February 10, 2005. The ED mailed its original draft permit to the parties on November 17, 2009. On December 3, 2009, the ED mailed out a significantly revised draft permit. This matter is scheduled for TCEQ's consideration on January 26, 2010.

### III. ANALYSIS.

**A. Consistent with the ED and OPIC's recommendations, Janes Gravel is an affected person entitled to a contested case hearing.**

Consistent with the ED and OPIC's recommendations, Janes Gravel is an "affected person" entitled to a contested case hearing on Lubbock's proposed amendment to its water right authorization. *See* 30 TEX. ADMIN. CODE §55.251. An "affected person" is one who one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. *Id.* § 55.256(a).

In determining whether one is an affected person, all relevant factors shall be considered, including but not limited to, the following: (1) whether the interest claimed is one protected by the law under which the application will be considered; (2) distance restrictions or other limitations imposed by law on the affected interest; (3) whether a reasonable relationship exists between the interest claimed and the activity regulated; (4) likely impact of the regulated activity on the health, safety, and use of property of the person; (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and (6) for governmental entities, their statutory authority

over or interest in the issues relevant to the application. 30 TEX. ADMIN. CODE § 55.256(c). With limited exceptions not applicable here, an application to amend a certificate of adjudication or permit is subject to all prior and vested riparian rights of others using water on the stream. *See id.* §297.44.

The ED and OPIC concluded that Janes Gravel is an affected person entitled to a contested case hearing because Janes Gravel, as a downstream senior water right holder, has an interest protected by the law that could be affected by the application in a manner not common to the general public.

Janes Gravel's authorized diversion point from the North Fork under Certificate of Adjudication 12-3710 is downstream from Lubbock's proposed diversion point. Janes Gravel depends on the full use of its ability to divert and use water from the North Fork of the Double Mountain Fork of the Brazos River for its continued viability and the products, services, and employment it provides to the area. As a result, Janes Gravel's interests are clearly "protected by the law under which the application will be considered" and "a reasonable relationship exists between the interest claimed and the activity regulated." *See id.* §§ 55.256(c), 297.44.

Lubbock's proposed junior right to divert water from the North Fork threatens to: (1) substantially reduce the amount of water available for diversion by Janes Gravel under its Certificate of Adjudication; (2) interfere with Janes Gravel's established priority; and (3) impair Janes Gravel's ability to conduct its operations. Accordingly, the threatened impact to Janes Gravel's "use of property" and "impacted natural resource" show that Janes Gravel is an affected person. *See id.* § 55.256(c).

**B. Burden of Proof & Issues.**

As the applicant, Lubbock has the burden to prove the merits of its proposed amendment. *See id.* § 80.17(a). More specifically, Lubbock must prove its proposed amendment will not

adversely impact other water right holders or the environment. *See id.* § 297.45(d).

The Texas Water Code and TCEQ's regulations characterize the numerous issues that Lubbock must prove to satisfy its burden of proof. First, Lubbock must prove that its proposed amendment "shall not cause adverse impact to the uses of other appropriators." 30 TEX. ADMIN. CODE § 297.45(a).<sup>2</sup> Second, Lubbock must prove that its proposed amendment will not harm surface water and groundwater quality, groundwater uses, existing instream uses of the stream or river, aquatic and wildlife habitat, bays and estuaries, and instream flows necessary to support recreation, navigation, and federally listed species. *See* TEX. WATER CODE § 11.042(c); 30 TEX. ADMIN. CODE §§ 297.47, 297.53-297.56.<sup>3</sup> Third, Lubbock must also prove that the necessary conditions, restrictions, limitations, and/or provisions reasonably necessary for the enforcement and administration of Texas' and TCEQ's water laws have been incorporated into the draft permit. *See* 30 TEX. ADMIN. CODE § 297.59(a).

Fourth, Lubbock must prove its proposed amendment would not be detrimental to public welfare. *See id.* § 297.46. Fifth, Lubbock must also prove that it has provided sufficient evidence "that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 . . ." *Id.* §297.41. Sixth, Lubbock must prove that its has "completed and returned all Texas Water Development Board surveys of groundwater and surface water use required since September

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<sup>2</sup> Adverse impact to another appropriator includes: (1) the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; (2) increasing an appropriator's legal obligation to a senior water right holder; or (3) otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time of the appropriator's water right was granted. 30 TEX. ADMIN. CODE § 297.45(a).

<sup>3</sup> Lubbock's proposed diversion is subject to any conditions that may address its impact on existing permits, certified filings, or certificates of adjudication, water quality, and instream uses. TEX. WATER CODE § 11.042(c). Moreover, "[a]ssessment of water quality impacts shall consider the maintenance of State of Texas Surface Water Quality Standards provided by [30 TEX. ADMIN. CODE] Chapter 307 . . . (relating to Texas Surface Water Quality Standards) and the need for all existing instream flows to be passed up to that amount necessary to maintain the water quality standards for the affected stream. Such flows may also be used to protect uses of existing, downstream water rights by providing water of a usable quality and to provide, in part, for the protection of vested riparian water rights and domestic and livestock uses." 30 TEX. ADMIN. CODE § 297.54(a).

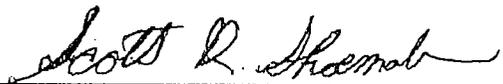
1, 2001" and has "an approved regional water plan in accordance with TWC, §16.053(i) . . . ." *Id.* §297.41. Finally, Lubbock must prove that its proposed amendment meets "all other applicable requirements" in Texas Water Code Chapter 11. TEX. WATER CODE § 11.122(b).

**IV. CONCLUSION.**

Janes Gravel respectfully requests that the Commission find that Janes Gravel is an affected person and refer the matter to SOAH for a hearing on the merits in which Lubbock has the burden to prove whether its proposed amendment meets applicable rules and regulations provided in the Texas Water Code and Texas Administrative Code.

**Respectfully submitted,**

**THE TERRILL FIRM, P.C.**

By: 

Paul M. Terrill III  
State Bar No. 00785094  
Scott R. Shoemaker  
State Bar No. 24046836  
810 W. 10<sup>th</sup> Street  
Austin, Texas 78701  
(512) 474-9100  
(512) 474-9888 (fax)

**ATTORNEYS FOR R.E. JANES GRAVEL CO.**

CERTIFICATE OF SERVICE

I hereby CERTIFY that on January 14, 2011, a true and complete copy of the above was via the method indicated to counsel of record at the following addresses:

TCEQ LaDonna Castanuela via fax to: (512) 239-3311
Chief Clerk - TCEQ
MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-3311

City of Lubbock Brad Castleberry via fax to: (512) 472-0583
Lloyd Gosselink
816 Congress Ave, Ste 1900
Austin, Texas 78701
Fax: (512) 472-0583

TCEQ Executive Director Shana Horton via fax to: (512) 239-0606
TCEQ, MC-173 and (512) 239-1088
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-0606

Ronald Ellis via fax to: (512) 239-2214
TCEQ, MC-160
P.O. Box 13087
Austin, Texas 78711-3087

Cathey Colwell Cathey Colwell via US Postal Service
Forrest Family Partnership CMRRR#
6205 Lynnhaven Dr. 71081853157000102218
Lubbock, Texas 79713-5331

John & Marieann Loveless John & Marieann Loveless via US Postal Service
7106 32nd St. CMRRR#
Lubbock, Texas 79464-4963 71081853157000102232

Martha Jean Forrest McNeely Martha Jean Forrest McNeely via US Postal Service
P.O. Box 64963 CMRRR#
Lubbock, Texas 79401-5039 71081853157000102249

Scott R. Shoemaker
Scott R. Shoemaker

Received:

Jan 14 2011 03:38pm

JAN/14/2011/FRI 03:39 PM The Terrill Firm

FAX No. 512 474 9888

P. 009/011

**Attachment A**

VDL 179 PAGE 972

203218

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION: 12-3710      OWNER: R. E. Janes Gravel Company  
 P.O. Box 2155  
 Austin, Texas 78767

COUNTY: Crosby      PRIORITY DATE: April 17, 1968

WATERCOURSE: North Fork Double      BASIN: Brazos River  
 Mountain Fork Brazos  
 River, tributary of Double  
 Mountain Fork Brazos River,  
 tributary of the Brazos  
 River

WHEREAS, by final decree of the 39th Judicial District Court of Haskell County, Texas, in Cause No. 9356, In Re: The Adjudication of Water Rights in the Salt Fork and Double Mountain Fork Watersheds of the Brazos River Basin dated November 18, 1982, a right was recognized under Permit 2377 authorizing the R. E. Janes Gravel Company to appropriate waters of the State of Texas as set forth below;

NOW, THEREFORE, this certificate of adjudication to appropriate waters of the State of Texas in the Brazos River Basin is issued to the R. E. Janes Gravel Company, subject to the following terms and conditions:

1. IMPOUNDMENT

Owner is authorized to maintain an existing off-channel reservoir and to impound therein not to exceed 196 acre-feet of water. The reservoir is located in the Jno T. Beal Survey 730, Abstract 925 and the E.L. & R.R. RR Company Survey 729, Abstract 402, Crosby County, Texas. This reservoir is also authorized under Certificate of Adjudication 12-3709.

2. USE

Owner is authorized to divert and use not to exceed 450 acre-feet of water per annum from the North Fork Double Mountain Fork Brazos River for mining purposes (sand and gravel washing).

3. DIVERSION

A. Location:

(1) At a point on the North Fork Double Mountain Fork Brazos River in the E.L. & R.R. RR Company Survey 15, Abstract 240, Crosby County, Texas.

(2) At the perimeter of a small off-channel lagoon authorized under Certificate of Adjudication 12-3709.

B. These diversion points are also authorized under Certificate of Adjudication 12-3709.

C. Maximum combined rate: 1.33 cfs (600 gpm).

4. PRIORITY

The time priority of owner's right is April 17, 1968.

5. SPECIAL CONDITIONS

A. This Certificate of Adjudication shall expire and become null and void upon the cessation of mining and gravel washing.

B. Owner is authorized to store water diverted from the North Fork Double Mountain Fork Brazos River in the aforesaid reservoir for subsequent diversion and use to the extent authorized herein.

VOL 179 PAGE 973

Certificate of Adjudication 12-3710

The locations of pertinent features related to this certificate are shown on Page 6 of the Salt Fork and Double Mountain Fork Watersheds Certificates of Adjudication Maps, copies of which are located in the offices of the Texas Department of Water Resources, Austin, Texas and the Crosby County Clerk.

This certificate of adjudication is issued subject to all terms, conditions and provisions in the final decree of the 39th Judicial District Court of Haskell County, Texas in Cause No. 9356, In Re: The adjudication of Water Rights in the Salt Fork and Double Mountain Fork Watersheds of the Brazos River Basin, dated September 18, 1982, and supersedes all rights of the owner asserted in that cause.

This certificate of adjudication is issued subject to senior and superior water rights in the Brazos River Basin.

This certificate of adjudication is issued subject to the Rules of the Texas Department of Water Resources and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code.

TEXAS WATER COMMISSION

*Paul Hopkins*  
Paul Hopkins, Chairman

DATE ISSUED:

FEB 20 1985

ATTEST:

*Mary Ann Hefner*  
Mary Ann Hefner, Chief Clerk

FILED FOR RECORD  
at 9:30 o'clock A M.

MAR 8 1985

*Floyd McGinness*  
COUNTY CLERK, CROSBY COUNTY, TEXAS  
BY *Jessie Elizabeth Craig* DEPUTY

STATE OF TEXAS  
COUNTY OF CROSBY

I, FLOYD MCGINNES, Clerk of the County Court in and for Crosby County,

Texas, hereby certify that the foregoing instrument of writing dated on the 20 day of Feb,  
A.D. 1985 together with its certification and authentication was filed for record in my office this 8 day  
of March 1985 at 9:30 o'clock AM and duly recorded this 12 day of March  
1985 in the Book Records of Crosby County, Texas.  
Volume 179 Page 972

Witness my hand and seal of said court, at Crosbyton, Texas, the date last written.

By \_\_\_\_\_ Deputy

*Floyd McGinness*  
FLOYD MCGINNES  
County Clerk, Crosby County, Texas

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

# THE TERRILL FIRM

A PROFESSIONAL CORPORATION

810 West 10<sup>th</sup> Street  
Austin, Texas 78701  
Tel (512) 474-9100  
Fax (512) 474-9888

2011 JAN 14 PM 3:38

CHIEF CLERKS OFFICE

## FAX COVER SHEET

DATE : January 14, 2011

TIME : 2:31pm

PLEASE DELIVER TO:

NAME :	LaDonna Castanuela Chief Clerk - TCEQ	FAX NUMBER :	(512) 239-3311
	Brad Castleberry		(512) 472-0583
	Shana Horton		(512) 239-0606 (512) 239-1088
	Ronald Ellis		(512) 239-2214
FROM :	Macy Minze, Paralegal		
CM #	9399		
TOTAL NUMBER OF PAGES SENT (Including coversheet) :	11 pages		
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REMARKS : <i>R.E. Janes Gravel Co.'s Reply to Responses to Contested Hearing Requests</i>			
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