

**SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR**

**APPLICATION BY THE BRAZOS § BEFORE THE STATE OFFICE OF
RIVER AUTHORITY FOR WATER §
USE PERMIT NO. 5851 § ADMINISTRATIVE HEARINGS**

**EXCEPTIONS OF FRIENDS OF THE BRAZOS RIVER,
H. JANE VAUGHN, LAWRENCE D. WILSON, MARY LEE LILLY,
KEN HACKETT, AND BRAZOS RIVER ALLIANCE
TO THE PROPOSAL FOR DECISION
FOR THE SECOND HEARING ON THE MERITS**

Respectfully submitted,

Richard W. Lowerre
State Bar No. 12632900
Marisa Perales
State Bar No. 24002750

FREDERICK, PERALES,
ALLMON & ROCKWELL, P.C.
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346

Attorneys for Friends of the
Brazos River, H. Jane Vaughn,
Lawrence Wilson, Mary Lee
Lilly, Ken Hackett, and Brazos
River Alliance

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Notes on abbreviations and references:

Protestants FBR, Brazos River Alliance and their members who are individual members will be referred to collectively as “FBR.”

The Systems Operation Permit will be referred to as “SysOp” or “SysOp permit”

References to the transcript are provided as the Tr. Vol. X, at (page number(s).)

**SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR**

APPLICATION BY THE BRAZOS RIVER AUTHORITY FOR WATER USE PERMIT NO. 5851 § **BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

I. INTRODUCTION

Since filing its application in 2004, BRA has had ample time to prepare a proper application and do the evaluations required by Texas law and TCEQ rules. It has even been given a second hearing to try. BRA has not done so.

BRA has not met its burden, but has relied on the readings of the law and rules by the ED, which attempt to tailor the requirements of the law to the complexities of BRA's approach. The result is that the PFD ignores clear language in laws and in essence proposes that rules be rewritten in this proceeding. The PFD proposes six to twelve new precedents for water rights permitting on issues ranging from the new SB 3 to the test for historic requirement of beneficial use, from the new requirement for consistency with water plans to the application of the old Stacy Dam case.

Such wholesale interpretation of Texas water law should not be done in one proceeding. Many of the proposed readings of Texas law and TCEQ rules should be subject to rulemaking where the Commission can obtain the input of experts and affected persons across Texas who can explain the implications for the different conditions that exist in this diverse state.

The recommendations by the ALJs not only create a number of new precedents for implementation of Texas law and rules, they do so in ways that ties the hands of this

Commission and future Commissions to find common sense solutions to the diverse types of problems that Commissioners will face with future water right applications from all corners of Texas.

This application should never have gotten to this stage. As with almost all other significant water right applications with these complexities, settlement with all parties was possible and could have provided much better solutions. Settlement is still possible.

Unfortunately, the ED never took the types of positions needed to encourage settlement. BRA was therefore, in effect, encouraged to "go for it all." And the ALJs were left with a very complex set of issues, where everyone agrees some permit could be issued, but the size of the appropriation and conditions in the permit are very controversial and cannot be accepted.

The current proposed permit is not appropriate. It unnecessarily provides a much greater appropriation than is needed and much more flexibility to BRA than is required. Both the amount and flexibility are also in violation of Texas law.

As FBR has always indicated, it can support a permit for 150,000 acre-feet per year (AFY). It could support an appropriation of 157,000 AFY, the figure that Dow's expert Dr. Brandes determined could actually be used by BRA. FBR could support more to provide some additional flexibility for BRA.

For FBR to do so, however, this matter needs be sent to mediation with a figure in the 100,000 to 200,000 AFY range as the acceptable appropriation by the Commission. FBR believes the parties could and would then resolve all other issues and return with an agreed permit and WMP.

That approach would avoid the need for the Commission to decide the many precedent-setting aspects of this matter. It would avoid a court appeal and would provide BRA the water it will need in the short-term much more quickly.

Given the length and costs to all parties of this proceeding, FBR urges the Commission to consider the need to avoid a situation where the matter goes to court and returns for more proceedings.

VIII. JURISDICTION

ALJs' Description of Issue

- A. Settlements Do Not Require Amendments or Additional Notice.
- B. BRA May Seek a New Permit Instead of Permit Amendments.

ALJs' Decision

The ALJs held that Texas Water Code Section 11.122 does not require BRA to seek amendments and thus additional notice. The ALJs also held that BRA's ACR Permit is not being amended in this case and that the notices that have been given are not deficient due to the ACR Permit.

FBR Exceptions

FBR cites Texas Water Code §§ 11.122, 11.124, 11.125, and 11.129 to support its argument that amendments are required. Section 11.122(a) states "All holders of permits, certified filings, and certificates of adjudication . . . shall obtain from the commission authority to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right. . . ." Section 11.124 sets out requirements for water permit applications. Section 11.125 requires applications to be accompanied by a map or a plat that shows and contains certain information. Section 11.129 requires the Commission to determine whether the application, maps, and other materials comply with requirements of Chapter 11 of the Texas Water Code and the Commission's rules, and the section authorizes the Commission to require amendment of those items to achieve compliance.

Texas Water Code §§ 11.124, 11.125, and 11.129 concern the required contents of an application. BRA did not file application amendments for all of the settlements. Discussion as to amendments in accordance with the settlements individually or collectively would be major amendments under the Commission's rules and what notice would be required for those amendments.

BRA must file applications to amend its existing water right permits and possibly other applications for new appropriations. The normal permitting process could have been used and each application would have had a clearer set of issues under Texas Water Code § 11.134. BRA's new-permit approach sets a dangerous and expensive precedent. Relatedly, there is an objection that the Proposed Permit would trump existing permit requirements. FBR proposes that no "trumping" language be included in any permit that might be issued.

FBR objects that BRA is using its current Application to amend its ACR Permit without providing specific public notice and opportunity for a hearing concerning that amendment. BRA must instead separately apply to amend its ACR Permit. Additionally, BRA must file applications to amend its other permits to surrender existing diversion rights before it may obtain the authority that it seeks in this case to divert that same water.

An instream-flow requirement could not be applied to the amounts of water previously appropriated to BRA in a permit, even if BRA were seeking to amend that existing permit in this case. Texas Water Code § 11.147(e-1) contains a "reopener" clause, which states:

With respect to an amended water right, the [protection of instream flows or freshwater inflows] provision may not allow the commission to adjust a condition of the amendment other than a condition that applies only to the increase in the amount of water to be stored, taken, or diverted authorized by the amendment.¹

X. GENERAL REQUIREMENTS OF TEXAS WATER CODE CHAPTER 11 AND TCEQ RULES

ALJs' Description of Relevant Issue

- A. The Requirements of 30 Texas Administrative Code §§ 295.5, 295.6, and 295.7 Are Directory, Not Mandatory.
- B. The Application Identifies the Total Amount of Water to be Used Sufficiently to Satisfy 30 Texas Administrative Code § 295.5.
- C. The Application Now Adequately Identifies Maximum Rates of Diversion as Required by 30 Texas Administrative Code § 295.6.
- D. The Application Now Adequately Identifies Points of Diversion as Required by 30 Texas Administrative Code § 295.7.

ALJs' Recommendation

The ALJs determined that the requirements of 30 Texas Administrative Code §§ 295.5, 295.6, and 295.7 are directory and not mandatory; that specific appropriation amounts for each Demand Level should be explicitly stated in the permit; that the application adequately identifies maximum rates of diversion and substantially complies

¹ Accord 30 Tex. Admin Code § 297.42(b).

with 30 TAC § 295.6; and that adding permit language identifying maximum diversion limitations per reach *substantially* satisfies 30 TAC § 295.7.

FBR Exceptions

BRA has failed to satisfy the requirements of Rule 295.5 because it has not specified the purposes of use for its proposed diversions under the SysOp Permit. Other than BRA's existing water contracts and the needs identified in the applicable regional water plans, BRA has failed to identify any specific uses for the additional firm yield from the SysOp Permit.

Further, BRA's use of aggregated maximum diversion rates by segment is so non-specific that it: (1) does not allow for proper modeling of the potential impacts of the diversions, and (2) is not enforceable.

The ALJs have justified recommending issuance of the SysOp Permit, in spite of these deficiencies, by accepting BRA's arguments that TCEQ's rules are directory, not mandatory, and therefore do not require strict compliance. Substantial compliance is sufficient, according to BRA and the ALJs. But the caselaw does not support this conclusion.

TCEQ's Rules are Mandatory

After having been provided a second bite at the apple, it became clear that BRA could not satisfy TCEQ's regulatory requirements addressing water rights applications. And so BRA argued, for the first time, in its reply to closing arguments, that it need not comply with all TCEQ regulatory requirements because not all of those requirements are mandatory. According to BRA, certain TCEQ rules are merely directory, and BRA need

only demonstrate substantial compliance with those rules. The ALJs have adopted this argument, in contrast to their first PFD.

For instance, in the first PFD, the ALJs found that Rule 295.7 expressly requires applicants to identify real, specific diversion points, where the water will be withdrawn. Because BRA failed to specify real diversion points in its application, the ALJs correctly found that BRA did not satisfy this TCEQ requirement.²

Now, however, the ALJs have changed their interpretation of TCEQ's rules, agreeing with BRA that certain TCEQ rules are merely directory.

But, contrary to BRA's arguments, TCEQ's rules should not be interpreted as directory. The caselaw cited by BRA does not support such an interpretation, and the ALJs and Commission should reject the erroneous legal reasoning presented by BRA.

The ALJs correctly cite and quote *Lewis v. Jacksonville Building & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1974), in explaining that not all rules are mandatory.³ They correctly acknowledge the standard for determining whether a rule is mandatory or directory.⁴ But BRA and the ALJs have taken this standard out of context and misapplied it.

Lewis involved a suit by a building and loan association and savings and loan association, by which the associations (or Respondents) sought to set aside an order of the Savings and Loan Commissioner, approving the charter application of the Cherokee Savings and Loan Association. The Respondents argued that the Commissioner's order

² First *Proposal for Decision*, at 27, 29.

³ *Proposal for Decision* at 26.

⁴ *Id.*

granting the charter application was invalid because, among other reasons, the Commissioner failed to render his decision within the 45-day period, in violation of an applicable rule (Rule 1.9). That rule required a decision on pending applications within 45 calendar days after the date the hearing is finally closed. The question before the Court, then, was whether the 45-day deadline for issuing a decision was mandatory, and thus, whether the Commissioner's failure to act within 45 days invalidated the Commissioner's decision.

The Court held that the 45-day deadline was not mandatory but only directory. In reaching its decision, the Court explained that provisions that do not go to the essence of the act to be performed, but that are for the purpose of promoting the proper, orderly, and prompt conduct of business, are not ordinarily regarded as mandatory. If the provision directs the commission of an act within a certain time without any negative consequences, the "provision as to time" is usually directory.

In the *Lewis* case, the rule at issue—Rule 1.9—did not provide, either expressly or by implication, that if a Commission fails to issue an order within the 45-day timeframe, the order is voidable or invalid. The rule did not, in any way, restrict the Commissioner from acting after the expiration of 45 days after the close of the hearing. The Court further explained that the purpose of the rule was "to promote prompt and orderly consideration and action by the Savings and Loan Commissioner." Because no legal consequences were spelled out for the failure of the Commissioner to render his decision within the specified time, the Court concluded that the rule was directory, not mandatory,

and that the failure of the Commissioner to render a decision within that time period did not, of itself, invalidate the Commissioner's order.

In reaching its decision, the Court contrasted another Supreme Court case, *Bay City Federal Savings & Loan Association v. Lewis*, 474 S.W.2d 459 (Tex.1971). In that case, the Court was tasked with interpreting a statute that required the Commissioner's order to include concise and explicit statements of underlying facts that support findings that are set forth in statutory language. The Court ultimately held that the Commissioner's order approving a charter application was invalid because the Commissioner failed to set forth precise and explicit statements of underlying facts to support the findings that the statutory requirements had been complied with. "This statutory mandate requiring recitation of underlying facts in support of statutory findings in *Bay City* was clearly a requirement of substantive law," explained the Court.

The *Lewis* Court also surveyed a number of other cases from various jurisdictions that were presented with this same issue: whether a statute or rule is mandatory or directory.

Muskego-Norway Consolidated Schools Joint School District v. Wisconsin Employment Relations Board, 151 N.W.2d 84 (Wis. 1967), is a Wisconsin case, wherein the court held that a statute requiring the State Employment Relations Board to file its findings and decision within 60 days after the closing of a hearing was held to be directory and not mandatory.

Similarly, in *Carrigan v. Illinois Liquor Control Commission*, 166 N.E.2d 574 (Ill. 1960), the Illinois Supreme Court considered the implications of a statute providing that

within 20 days after service of any order or decision of the Liquor Control Commission upon any party to a proceeding, such party may apply for a rehearing and the commission shall consider such application for rehearing within 20 days from the filing thereof. The court held that the portion of the statute concerning rehearing within 20 days was merely directory, and failure of the commission to consider the application for rehearing within 20 days did not deprive the commission of jurisdiction.

In *Huffman v. Kite*, 93 S.E.2d 328 (Va. 1956), the Virginia court considered the language of a statute providing that appointments to the School Trustee Electoral Board are to be made by the Circuit Court or judge within 30 days of July 1, 1950, and every four years thereafter, and that vacancies shall be filled within 30 days. That court determined that the statutory deadlines were not mandatory but only directory.

The common thread running through the *Lewis* holding and the holdings from the various jurisdictions cited by the *Lewis* Court is that all of the statutes and rules that were held to be directory, rather than mandatory, imposed deadlines or timeframes within which to act. The only case cited by the *Lewis* Court that addressed a substantive requirement—one that did not impose a deadline or timeframe—was the *Bay City* case, and in that case, the Supreme Court held that the statute at issue was mandatory, rather than directory.⁵

⁵ It should be noted that the Court could have interpreted this statutory provision—requiring underlying findings of fact—as a procedural one that was intended to promote the proper, orderly, and prompt conduct of business. Yet, the Court refused to apply the caselaw in such a way as to render this provision meaningless; the provision is a mandatory one requiring compliance. This demonstrates that the Court was very reluctant to determine that a statutory/regulatory requirement is directory, rather than mandatory, even when those

Indeed, a review of subsequent cases applying the Supreme Court’s *Lewis* holding reveals that appellate courts have reached similar decisions—concluding that a statute or rule is directory rather than mandatory only when those rules or statutes have addressed deadlines or timelines, as in the *Lewis* case.⁶

This makes sense when considered in conjunction with well-established legal principles addressing interpretation of statutes and rules. *See Continental Cas. Co. v. Rivera*, 124 S.W.3d 705, 709 (Tex. App.—Austin 2003, pet. denied) (holding that in construing administrative rules, courts employ well-settled principles of statutory construction); *City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 551 (Tex. App.—San Antonio 2012, pet. denied) (same). Courts look first to the plain meaning of the words. *BFI Waste Sys. of N. Am., Inc. v. Martinez Env’tl. Group*, 93 S.W.3d 570, 575 (Tex. App.—Austin 2002, pet. denied) (“MEG”). If the language is unambiguous, courts interpret the rule using its plain language unless that interpretation leads to absurd results. *Id.*; *City of San Antonio*, 381 S.W.3d at 551; *see also Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

A cardinal rule of statutory construction (and thus, rule interpretations) is that every word, phrase, and expression in a statute should be read as if it were deliberately chosen, and the words excluded from the statute are presumed to have been excluded purposefully. *City of Austin v. Quick*, 930 S.W.2d 678, 687 (Tex. App.—Austin 1996),

requirements could be construed as procedural, not substantive and don't truly address the heart of the issues contemplated.

⁶ *See, e.g., Texas Department of Public Safety v. Pierce*, 238 S.W.3d 832, 836 (Tex. App.—El Paso 2007, no pet.); *Patel v. Tex. Dep’t of Pub. Safety*, 409 S.W.3d 765, 771 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Texas Department of Public Safety v. Guerra*, 970 S.W.2d 645, 650 (Tex. App.—Austin 1998, pet. denied).

aff'd, 7 S.W.3d 109 (Tex. 1999). Courts must take statutes as they find them, giving full effect to all of the statute's terms. *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (quoting *Simmons v. Arnim*, 220 S.W. 66, 70 (1920)).

Furthermore, an administrative agency is required to follow its own rules and procedures. See *City of Waco v. Texas Natural Res. Conservation Comm'n*, 83 S.W.3d 169, 179 (Tex. App.—Austin 2002, pet. denied) (holding that the TCEQ “shall follow its rules as adopted until it changes them in accordance with the Act”). An agency's failure to follow the clear and unambiguous language of the law and its own rules is arbitrary and capricious. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-55 (Tex. 1999).

In their PFD, the ALJs have proposed extending the *Lewis* decision in an unprecedented manner to allow for substantial compliance with clear, mandatory, regulatory requirements. The ALJs have essentially determined that the plain language of TCEQ's rules need not be given full effect, and BRA need not fully comply with TCEQ's rules. This is a significant departure from established precedent and from TCEQ's own application of its rules.

Indeed, TCEQ creates guidance documents to accomplish the prompt and orderly conduct of business; guidance documents are intended to assist applicants in complying with the rules. But even those guidance documents cannot conflict with the express language of a rule.

This new interpretation and application of TCEQ's requirements, as directory rather than mandatory, creates a slippery slope, allowing permit applicants to claim that

they need not comply with every TCEQ regulatory requirement or give effect to the plain language of the agency's rules. This is the definition of arbitrary and capricious.

If the ALJs had properly recognized that TCEQ's rules are mandatory and not directory, then they should have necessarily determined that strict compliance with those unambiguous rules is required, and BRA failed to do so, on a number of counts.

Application fails to sufficiently identify the total amount of water to be used

The ALJs agree that the permit language must be revised to clarify the different appropriation amounts under the different demand scenarios. But this alone does not address the numerous deficiencies related to identification of the total amount of water to be used. In fact, it is not clear at all from the application materials, the evidence presented, or the draft SysOp Permit and WMP that a specific use exists for all of the water requested for appropriation.

This issue is further addressed in various sections below, including the beneficial use discussion, the discussion on consistency with state and regional plans, the drought of record discussion, and the discussion regarding storage capacity.

In addition, FBR excepts to the ALJs' highly deferential standard applied to BRA in addressing the requirement that BRA identify specific uses for the requested water. The ALJs concluded that because BRA included a laundry list of potential uses for the requested appropriation, it satisfied this requirement. But this is not what was contemplated by the rules. Indeed, when Rule 295.5 is read in conjunction with Rule

297.43(c),⁷ it becomes clear that the intention was to require an applicant to specify the amount of water that would be beneficially used for each purpose identified. Even if the requested appropriation amount is intended to be used for more than one purpose, the rule contemplates that a specific amount of water be tied to a specific purpose or purposes. Here, BRA has simply asked for all the water it can create through its system operation, and then listed all of the purposes for which that water *might* be used. This is further addressed in the beneficial use section of this brief.

Points of Diversion are still not adequately identified

FBR supports and adopts the exceptions made by the Lake Granbury Coalition on this issue.

In short, it is beyond dispute that BRA failed to identify specific, realistic diversion points. Even Mr. Gooch acknowledged this.⁸

Yet, the ALJs have determined that BRA substantially complied with Rule 295.7 regarding identification of diversion points, because the rule is not mandatory; it is only directory. The “mandatory v. directory” argument has been discussed above. In short, the caselaw does not support an interpretation of Rule 295.7 as directory. Strict compliance with this rule is required, and because BRA failed to do so, its permit should be denied.

**XI. WATER AVAILABILITY, DROUGHT OF RECORD, AND
IMPAIRMENT OF EXISTING RIGHTS**

⁷ The rule states, in relevant part: “The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. The commission may authorize the appropriation of a single amount or volume of water for more than one purpose of use.” 30 Tex. Admin. Code § 297.43(c).

⁸ Tr. pp. 3141-3142.

ALJs' Description of Relevant Issues

- A) The SysOp Permit Continues to Overstate the Amount of Water Available from BRA's Reservoirs because Storage Capacity in the Reservoirs has been Lost to Sedimentation.
- B) The Drought of Record.
- C) Junior Refills.
- D) Impairment of Existing Water Rights.

ALJs' Recommendation

As a global matter, the ALJs determined that the full amount of water sought to be diverted under the SysOp Permit is available and that the diversion will not impair existing water-right holders. More specifically, and relevant to FBR's exceptions, the ALJs determined that: the WMP has now been prepared and the entire Application is now before the ALJs, mooted any concerns with a two-step process; that because the Application overstates the amount of water available from BRA's reservoirs, the appropriation amounts should be reduced as indicated by the revised modeling utilized by Dow; that the SysOp Permit be issued without a new drought of record-based reduction to the appropriation amount, but with requirements that BRA study the effects of the new drought and that appropriation amounts be lowered if the study shows that the drought decreased the amount of water available for the SysOp Permit; that the water availability analysis is correct, and does not allow unauthorized junior refill of storage under the 1964 System Operation Order and/or SysOp Permit; and that no existing water rights will be impaired if BRA's request for a permit is granted as proposed by the ALJs.

FBR will address each of these issues, in turn, below.

FBR Exceptions

Reservoir Storage Capacity

FBR agrees with the ALJs' conclusion that BRA must reduce the appropriation amounts in the SysOp Permit to account for "actual" storage capacities in its system reservoirs. But FBR shares the concerns expressed by the Lake Granbury Coalition on this point. A corresponding reduction in the maximum authorized diversion by reach is necessary. Once the adjustments have been made, this information should be shared with all parties for review.

Drought of Record

FBR agrees with and adopts the arguments presented on this issue by Dow, the Lake Granbury Coalition, and NWF. More specifically, FBR maintains that the appropriation amounts in the SysOp Permit must be reduced to account for the new drought of record. BRA cannot demonstrate water availability for its requested SysOp Permit without accounting for this new drought of record, because its water availability model was based on assumptions that are now known to be obsolete—*e.g.*, the firm yield in Possum Kingdom, alone, must be significantly reduced because of the most recent drought.

The PFD proposes allowing BRA to evaluate the impacts of the drought of record on water availability at a later date. But, we know now that the drought of record has had

some impact on water availability; the evidence demonstrates this.⁹ BRA must account for this now.

Allowing BRA to address the impacts of the drought on water availability at a later date simply adds another step to this long, drawn-out, multi-step process, and leaves the parties without any “final” determination regarding water availability and the proper appropriation amount. It essentially creates the same finality issue that the ALJs identified in their first PFD.

Junior Refills

FBR supports the arguments presented by Dow on this issue.

Impairment of Existing Water Rights

FBR excepts to the ALJs’ determination that BRA has demonstrated that it will not impair existing water rights, including its own existing water rights.

BRA’s appropriation model, which was used to support the 516,995 acre-feet appropriation request, does not assume full exercise of BRA’s existing water rights. Consequently, granting the SysOp Permit would run afoul of the decision by the Supreme Court of Texas in the *Stacy Dam* case.¹⁰

To be clear, FBR does not contend that BRA cannot, or is not allowed to, rely on its existing water rights to maximize the amount of water available to it, when it operates the system, if this SysOp Permit is granted. In other words, contrary to BRA’s assertions and the ALJs’ explanation in their PFD, FBR’s contention regarding water availability

⁹ See subsection “Impairment,” below.

¹⁰ *Lower Colorado River Authority et al. v. Texas Water Development Board*, 689 S.W.2d at 873 (Tex. 1984) (referred to herein as “*Stacy Dam*”).

(or lack thereof) is not premised on how BRA will operate its system in the future, if this SysOp permit is granted.¹¹

Rather, FBR's concern is that the modeling that was relied on by BRA and the ED to demonstrate water availability fails to fully account for BRA's existing water rights; the modeling fails to assume the full exercise of those water rights. Consequently, those existing water rights are not protected and are in fact double-permitted, which is prohibited by the Supreme Court's holding in *Stacy Dam*.

In the *Stacy Dam* case, the Supreme Court held that "second grants [of water rights] that overlay uncanceled water permits are not authorized, and . . . existing rights may not be impaired or forfeited until cancelled in whole or in part."¹² Although the ALJs correctly cited and quoted from this case, they did not properly apply the holding to the facts presented here.

The problem is that no party—not BRA nor the ED—presented a model that determined water availability assuming the full exercise of BRA's existing water rights. To the contrary, BRA conceded that its modeling did not assume full exercise of existing water rights.¹³

BRA explained, via testimony and in its reply to closing arguments, that it does not intend to fully exercise its existing water rights when operating its system under the SysOp permit.¹⁴ But this does not excuse BRA from *assuming* full exercise of the entire

¹¹ See PFD, p. 106.

¹² *Stacy Dam*, 689 S.W.2d at 876.

¹³ Tr. p. 4289, ll. 8-13; p. 4290, ll. 11-17 (testimony by Gooch).

¹⁴ In their analysis, the ALJs explain that "in wetter years, BRA likely will divert more water under the new permit and less under its currently existing water rights," and because any new permit would be junior to existing permits,

appropriated amount under its existing water rights when determining water availability. Unless it cancels or partially cancels its existing water rights, BRA must continue to assume full exercise of its existing water rights in conducting its water availability modeling. *Stacy Dam* commands this.

BRA conceded, on several occasions, that its modeling did not fully account for its existing water rights.¹⁵

The ALJs appear to have disregarded this evidence, and instead focused on the testimony of Dr. Alexander. The ALJs quote Dr. Alexander's testimony, wherein she stated that the dual simulation model that she used to determine water availability for the SysOp permit sufficiently protected existing water rights. According to Dr. Alexander, in the first round of the dual simulation, "all of BRA's water rights are diverted at their full authorized amount." Having accounted for those existing water rights, Dr. Alexander determined that 1,001,449 acre-feet per year was available for appropriation. And, according to the ALJs' PFD, Mr. Gooch agreed.

It is worth noting that BRA did not attempt to demonstrate, via modeling, that 1,001,449 acre-feet per year was available for appropriation. In fact, by the time of the contested-case hearing, it abandoned its request for this amount of water. Even BRA recognized that this figure was not supportable.

BRA's existing water rights will nevertheless be protected. *Proposal for Decision* at 106. FBR, and presumably all parties, understand that this is BRA's stated intention. But the issue here is water availability, which is determined via modeling, not via anticipated operations.

¹⁵ See, e.g., Tr. p. 2885, ll. 13-18 (testimony by Brunett); Tr. p. 4289, ll. 8-13; p. 4290, ll. 11-17 (testimony by Gooch).

Moreover, Dr. Alexander's explanation of the dual simulation model was overly simplistic. In fact, even BRA's witnesses admitted that the first round of the dual simulation protects and assumes full exercise of all senior, existing water rights, *except* BRA's existing water rights. That's because BRA's existing water rights are returned to the system during the second round of the dual simulation. The model does not assume full exercise of BRA's existing water rights to determine water availability, not even during the first round of the dual simulation. The model merely sets those water rights aside temporarily, during the first round of the dual simulation, so that they can then be returned to the system and used as part of the system operation, but not at the full appropriated amount.

That the dual simulation model fails to fully protect BRA's existing water rights at their fully appropriated amounts was made evident during the first hearing in this matter. The modeling used to support the appropriation request for the first hearing was essentially the same dual simulation model that Dr. Alexander relied on for this second hearing. That is, during the first round of the dual simulation, BRA's existing water rights were set aside, at their fully appropriated amounts; during the second round of the dual simulation, they were returned to the system operation. And yet, the ALJs correctly determined that BRA's existing water rights had not been protected, and in fact, would be double-permitted, in violation of the *Stacy Dam* holding, if the SysOp permit were issued as proposed:

In the modeling used to determine the amount of unappropriated water available for the SysOp Permit, BRA and the ED should have, consistent with *Stacy Dam*, assumed that all existing water rights (including BRA's

water rights) were being fully exercised. Instead, they assumed that 106,039 acre-feet of BRA's existing water rights would not be exercised in the Glen Rose Scenario. As such, the Proposed Permit overstates the amount of unappropriated water available in the Glen Rose Scenario by 106,039 acre-feet.¹⁶

Admittedly, the Glen Rose Scenario no longer exists, because BRA is no longer proposing to divert all of the water under the SysOp Permit at Glen Rose. But the salient point in this discussion of the Glen Rose Scenario is that the dual simulation model failed to protect BRA's existing water rights, even though those water rights had been set aside in the first round of the dual simulation, which is the case here too. So, Dr. Alexander's assurance that the first round of the dual simulation protects BRA's existing water rights is simply wrong, and the ALJs understood this when drafting their first PFD in this case.

To determine whether BRA's existing water rights were adequately protected, one has to focus on the second round of the dual simulation to see whether BRA is assuming full exercise of those existing water rights in calculating the amount of water available for appropriation under the SysOp. During the first hearing, by looking at the second round of the dual simulation, the ALJs observed that BRA was sacrificing some of its existing water rights, but not seeking to cancel those water rights, in violation of *Stacy Dam*. Now, however, the ALJs appear content to simply rely on Dr. Alexander's assurance that the first round of the dual simulation protects all of BRA's existing water rights, even though the Glen Rose Scenario has already shown this to be untrue.

Had the ALJs focused on the second round of the dual simulation, as they properly did in their first PFD, they would have necessarily acknowledged that BRA is not

¹⁶ First *Proposal for Decision* at 62.

assuming full use of its existing water rights in calculating water availability for its SysOp Permit. BRA's witnesses even admitted this. For instance, Mr. Brad Brunett testified that, from his perspective, the *Stacy Dam* principle, described above, does not apply to BRA's proposed SysOp Permit. That is, according to Mr. Brunett, in using the WAM to determine the amount of unappropriated water available for appropriation, BRA need not assume full use of existing water rights for its requested system operation permit.¹⁷

BRA attempted to justify Mr. Brunett's testimony by arguing, in its reply to closing arguments, that Mr. Brunett was referring to "operations" under the SysOp Permit when he testified that existing water rights need not be fully exercised in determining water availability. But this re-characterization of Mr. Brunett's testimony is simply not accurate. Mr. Brunett was pointedly asked whether, "for purposes of a system operation permit such as the one we have here, when conducting a water availability analysis," is TCEQ required "to assume that we're protecting BRA's existing water rights to the full extent -- or to the full amount that's included in their appropriation."¹⁸ And Mr. Brunett responded in the affirmative: "That's my opinion."¹⁹

Mr. Gooch likewise acknowledged that the modeling did not assume full use of BRA's existing water rights.

Q: Okay. And so in those years where the blue part of the bar is not reaching 761,000 acre-feet, doesn't that mean that BRA is not using or fully using its existing water rights?

¹⁷ Tr. p. 2883, ll. 15-23.; 2885, ll. 10-19.

¹⁸ Tr. p. 2885, ll. 13-18.

¹⁹ Tr. p. 2885, l. 19.

A: I think that's true in those years. They're not being used to the permitted value —²⁰

....

Q: [] But at least according to this table, in the year 1973, there's no dispute that this table shows that BRA is not fully exercising or depleting its existing water rights to achieve the maximum use number in 1973?

A: but certainly it doesn't show full use of the existing water rights in 1973.²¹

BRA also argued in its closing briefs that there is no requirement that its existing water rights be fully exercised each year. What BRA failed to grasp is that no one is suggesting that it actually fully exercise its existing water rights every year, or even any year. But, regardless of how BRA intends to *use* its existing water rights, under the *Stacy Dam* decision, it must *model* those existing water rights assuming exercise of the full amount permitted to determine whether sufficient water is available for the requested appropriation. BRA did not do so. It assumed, in its modeling, that existing water rights would not need to be fully exercised. In the real world, this is likely true. But *Stacy Dam* instructs that new permits may not be issued based on an assumption that an existing permittee will not actually need all of its water.²²

Indeed, were BRA's alternative SysOp Permit and WMP issued, as proposed, then, as Mr. Trungale explained: the same water would be "doubly appropriated under two separate permits";²³ the same water "is used to meet the appropriation under the existing permits and that same water is used to meet the appropriation that has been

²⁰ Tr. p. 4289, ll. 8-13.

²¹ Tr. p. 4290, ll. 11-17 (testimony by Gooch).

²² *Stacy Dam*, 689 S.W.2d at 882.

²³ Tr. P. 3494, ll. 8-11; *see also* Tr. P. 3490, ll. 1-24.

sought under this new [SysOp] permit.”²⁴ This contravenes the holding in the *Stacy Dam* decision.

Acknowledging this possibility, BRA proposed in its reply to closing arguments additional permit language that would apply the authorized annual diversion amount as a limit on both the SysOp permit appropriation and its existing water rights.²⁵ The ALJs, correctly, refused to add this provision. For practical purposes, the provision makes sense, and it reflects what BRA is actually attempting to accomplish. But this limit would amount to an amendment or a partial cancellation of BRA’s existing water rights, and BRA cannot accomplish an amendment or a partial cancellation of its existing water rights via this SysOp Permit and WMP proceeding.

Finally, both BRA and the ALJs characterize FBR’s and Mr. Trungale’s concerns regarding “double-permitting” of the same water as a misunderstanding of BRA’s intentions. The PFD suggests that Mr. Trungale has conflated modeling requirements with operation assumptions. But this is the exact opposite of Mr. Trungale’s testimony. Even Mr. Gooch understood this.

As Mr. Gooch acknowledged, neither FBR nor Mr. Trungale suggests that, in the real world, BRA must deplete all of its existing water rights before it can use run-of-river water.²⁶ The problem, here, is that the water availability inquiry does not ask what might happen in the real world. The model is not designed to account for real-world operations

²⁴ Tr. P. 3528, ll. 21-25.

²⁵ BRA’s 2nd Reply Brief at 28-29.

²⁶ Tr. P. 4148, ll. 8-13.

for this type of system operation permit. For a new appropriation, the model simply asks whether sufficient water is available if all existing water rights are fully exercised.

BRA's real issue here is with the water availability model and the legal inquiry that the model is designed to address. But, BRA cannot simply ignore the water availability requirement because it does not agree with its use here. Rather, BRA should have amended its existing water rights and included them in the WMP.²⁷ Or BRA (and TCEQ) should have sought to develop a proper procedure, via rulemaking, to address applications for system operation permits such as the one BRA has requested here.

Conclusion

In sum, BRA failed to satisfy its burden of proving that sufficient unappropriated water is available for its requested appropriation. And the ALJs incorrectly relied on Dr. Alexander's testimony, erroneously describing the function of the dual simulation model, to justify BRA's requested appropriation.

XII. BENEFICIAL USE

ALJs Description of the Issues

Whether BRA must show and has shown that the water authorized in its permit will be put to a beneficial use.

ALJs' Recommendation

The ALJs have taken the position that BRA has met the test for Beneficial Use under Section 11.134 (b)(3)(A) because they found:

- 1) BRA listed the uses it intends, and all are listed in Chapter 11 and none are waste; and

²⁷ See Tr. P. 3494, ll. 12-22 (Trungale explaining that there are other ways of meeting system operation goals without double-permitting the same water).

2) BRA could use the water beneficially sometime in the future.

The ALJs then state that the Texas Water Code does not obligate BRA to prove that every drop of water authorized under the SysOp Permit will instantly be put to use, but rather that the water is only intended for a beneficial use.

FBR Exceptions

Summary:

First, FBR is not concerned with every drop of water requested for appropriation by BRA, but rather with most of the 500,000 acre-feet of water per year (AFY) that BRA could be authorized to appropriate under this SysOp permit. For most of the water, BRA has not presented evidence that it will beneficially use the water in a reasonable time.

Second, while FBR agrees that a showing of good intentions is an appropriate first step, it is not sufficient to prove that BRA's SysOp water will be used to meet any of the needs BRA claims it could supply in a reasonable time, or ever. Such good intentions are not sufficient for granting one water right and denying others the opportunity to seek a right to beneficially use the unappropriated water in ways that benefit the public in a reasonable time.

It may not be BRA's intent to waste water, but that certainly could be the result. For example, all BRA is likely to do for the foreseeable future is hold more water in reservoirs for long periods of time, since the water will not be needed for significant periods of time. This will result in more evaporation of water than would otherwise serve the non-consumptive, beneficial uses of protecting the environment or providing for

instream recreation. It will also require those seeking to beneficially use water to buy the water from BRA, instead of having the opportunity to obtain it from the Commission.

The Policy Behind the Beneficial Use Test:

As the ALJs correctly acknowledged, the surface water is held in trust by the state for the public. It is a public resource that can and should be put to uses that benefit the state. It is not like groundwater on private property where a person is allowed to buy up large quantities and bank the water until the price rises sufficiently to assure a good return on the investment. That type of banking or speculation is what the beneficial use test is intended to avoid.

Certainly the test should make sure that someone does not intend to waste water, but no permit applicant is going to admit that they intend to waste any state water. Thus, the most significant role of the beneficial use test is to prevent speculation or efforts to bank water until others might need it in the future. Either can result in higher prices for water or even a monopoly in the affected area of the state; these results do not serve the interests of the public.

Texas is not alone in dealing with these issues. The Governor of Texas and this Commission are members of the Western State Water Council, which works on water policy and provides guidance to western states, including Texas. In its summary of water laws for western states the Council has noted:

Chapter 2, Section 1: Prior Appropriation in the West

Prior appropriation is the predominant method for allocating water resources in the West. Historically, prior appropriation required a water user to show (1) intent to apply water to beneficial use; (2) a diversion to

convey water from the stream to the place of use; (3) **timely and beneficial use of water.**²⁸

This requirement is designed to prevent excessive or counterproductive speculation. Excessive speculation could prevent someone else in the community from putting the water to good use who is otherwise capable of doing so.²⁹

Thus, the test is more than intent. It requires proof of a timely use.

A second good source of the policy of western water law is Water Rights in the Western States 407 (3d ed. 1911), by Samuel C. Weil, who notes, "Among reasons this doctrine was developed is to guard against speculation and monopoly." The decisions by the Texas Supreme Court and courts of other western states are consistent with this stated principle, as will be discussed below.³⁰

The Commission can encourage use of Texas surface waters in more competitive and innovative ways by not simply appropriating all or most of the unappropriated water to anyone who could use the water in some unspecified future time period. The time of use is important.

There are uses in the foreseeable future that SysOp water will fill. That figure is clearly within the 100,000 to 200,000 AFY range, as identified by the Region G and H regional plans, with some flexibility for BRA to help solve unanticipated shortfalls. With an appropriation of that size, BRA could, arguably, satisfy the beneficial use test. If and

²⁸ Craig Bell, Executive Director, Jeff Taylor, Legal Counsel, *Water Laws and Policies for a Sustainable Future: A Western States' Perspective*, Prepared by the Staff of the Western States Water Council, page iv (emphasis added).

²⁹ Id. at 67.

³⁰ For the Stacy Dam case, see *Lower Colorado River Auth. v. Texas Dept. of Water Res.*, 689 S.W.2d 873 (Tex. 1984). For the decisions of courts of other western states, see subsection, below, titled "Texas Law is Consistent with all the Laws of other Western States".

when necessary, BRA could then return to seek more water rights in the future, but so could others.

Moreover, with what will obviously be excess water for years to come, BRA could also have proposed including in its WMP use of water to support rural economies. It could have included provisions for release of water for downstream use, when possible, to provide recreational opportunities, as it has in the past,³¹ even when it had sold essentially all of its water. It could do the same to benefit the environment by releasing water in reservoirs for delivery to customers or to move water to a downstream reservoir in ways that also provide instream flows for the environment when needed. There are times when the flows in the rivers and streams cannot meet the environmental flow standards because of over-appropriation in some river segments.

With the smaller appropriation that FBR proposes, if a SysOp permit is issued, more water will clearly stay in the river and streams for recreational uses and the environment.

Unfortunately, it appears that the ALJs have accepted BRA's arguments that if BRA is not authorized the full amount it could use in the future (basically the remaining unappropriated water in the basin), the water will be wasted or not used. On the very first page of the Introduction to the PFD, the ALJs state BRA's argument that someone would need a new large reservoir to take advantage of the unappropriated water that currently exists.³² That is not true, and there is no credible evidence that it is.

³¹ Testimony of Ed Lowe, FBR Ex. 1 at 8-12 and FBR Exs. 1 B & 1 C.

³² *Proposal for Decision at 1.*

First, a percentage of the unappropriated water that BRA is seeking is water that anyone with a bona fide need could request. BRA is not just seeking water that it claims it can "create" through the operation of its reservoirs as a system. Moreover, additional water could be appropriated by others without a large reservoir, possibly in more efficient ways.

For example, aquifer storage capabilities are being developed, sometimes with use of small reservoirs to collect flood flows or water that is not firm. This is done, in part, to avoid waste by evaporative losses in reservoirs. A number of smaller reservoirs closer to the locations of the needs are also reasonable alternatives to one big or several large reservoirs.

Yet, giving BRA water it cannot use for decades, if then, forecloses those options and new technologies that are likely to be developed in the future to help conserve water.

FBR has supported and continues to support an appropriation to BRA in a new effective and flexible permit to serve foreseeable water needs and protect the environment. In the last round of hearings, FBR proposed a permit that would authorize BRA to appropriate 150,000 AFY. If that or some figure in that range were all that BRA was seeking, FBR would likely not be arguing about whether BRA can beneficially use the water. With a reduced appropriation amount, other issues raised by protestants might have also been resolved or become moot. Settlements might have been possible with a number of current protestants.

The ALJs do not give credence to the water policies of western states that FBR uses to support its beneficial use arguments.³³ FBR maintains that the approaches taken by other states using the prior appropriate doctrines are helpful, but FBR has focused its legal arguments on the key decision by the Texas Supreme Court, which is discussed below. That court's holding is not consistent with the test proposed by the ALJs, but it is very similar to what other western states have developed, as policy and law.

In contrast, the ALJs appear to be saying that under Texas law, as long as the intent is not to waste water, all that is needed is 1) a list of beneficial uses and 2) a showing that there could be needs in the future that an applicant could address with its requested appropriation. That is certainly not what other states have set as their test of beneficial use.

There has to be a reasonable time limit on use, i.e., proof of such potential use in a reasonable time to justify cutting off others from using the state's water or taking it out of the river simply to store more of it. FBR is not proposing 10 years, the cancellation period in Texas law,³⁴ but it also cannot be 50 years out, when there is no justification to tie up most of the water for such a long period of time.

The rules of water planning are different than those for water rights permitting as will be explained in detail in the section addressing consistency with water plans. In brief, the legislature provided in statute that it is the Regional Water Planning Groups (RWPGs) that have the authority and responsibility, subject to TWDB approval, to

³³ *Proposal for Decision* at 113-114.

³⁴ Tex. Water Code, Section 11.172.

determine which strategies are appropriate for future needs.³⁵ Those determinations are not left to the water supplier, the entity in need, or the Commission.

It is, therefore, the RWPGs that are required to help set priorities for which strategies are needed now, strategies that can be delayed until there is a better estimate of need and an evaluation of alternative strategies. For all strategies, RWPGs have to consider the full range of impacts of any proposed strategy in the regional water plans, including impacts on agriculture and other rural economic issues. These are issues and impacts that the Commission does not consider in water right permitting. The RWPGs for Region G and H have made their evaluations of impacts and provided their recommendations and prioritizations for strategies in their regional water plans. Those plans have been approved by TWDB and are now part of the State Plan. Thus, the Commission must respect and defer to those plans.

In many cases, the RWPGs' strategies for how and when the regions' needs are to be fulfilled include both primary and secondary strategies. Those recommendations for strategies cannot be ignored because a water supplier or entity with a future need disagrees with the decisions of the RWPG and the TWDB. Thus, if Gulf Coast Water Authority now wants SysOp water, it has to propose that to the RWPG and let the RWPG decide if that is an appropriate strategy, or possibly a fall-back strategy for GCWA's projected need. But that decision is not GCWA's, BRA's, or the Commission's. If this SysOp permit is issued as proposed, however, then, BRA and the Commission will have usurped the decision-making authority of the RWPGs and the TWDB.

³⁵ See Tex. Water Code, Sections 16.053(e)(5)(C) & (e)(9)(B).

Moreover, the PFD's recommended approach to applying the beneficial-use test will open the door to speculation, at least in the basin where there is unappropriated water. Under the ALJs' approach, anyone can apply for a large water right, if that person can show a need and a possibility of sale of large amounts of water some decades in the future.

It should also be noted that the Commission sets time limits on construction of new reservoirs for the same reason that new appropriations cannot be issued without a showing of beneficial use in a reasonable time. The Commission has faced the issue of what is a reasonable amount of time for a reservoir to be constructed. It has set time limits and considered requests to extend those limits. That is, in fact, what the legislature did for the Allen's Creek Reservoir.

As explained above, the beneficial-use test is whether BRA has shown that it will put the state's limited resources to a beneficial use in a reasonable amount of time. There is no evidence of what is reasonable for the Brazos River Basin, or the Region G and H areas. There is no evidence of what is a reasonable time under the current conditions. Thus, for example, it may be consistent with the regional plans to include the 70,000 AFY for the Comanche peak expansion because it is in the regional plan, but given that the expansion has been abandoned, there is no showing of use in any reasonable time for that significant percentage of the proposed appropriation.

Whether BRA is intending to bank water so others cannot obtain it and it will be able to fund a growing organization is really not the issue. The issue is that BRA has not

presented proof that it can satisfy the express statutory language or the underlying policy for the Beneficial Use test.

Texas Law:

In its closing arguments following the contested-case hearing, the ED stated:

There is no set formula, either in statute or rule, for what constitutes an adequate demonstration of meeting the beneficial use requirement.³⁶

FBR agrees that there is no strict test, nor should there be. As with most of the issues presented in this matter, the Commission needs to retain some discretion to address different circumstances across the state.

There is, however, clear guidance for a Commission decision from

- 1) a decision by the Texas Supreme Court,
- 2) several sections of Chapter 11 of the Water Code, and
- 3) TCEQ's historic rules for water rights.

The Executive Director never addressed or even mentioned the reasonable time requirement in the Texas Supreme Court decision on beneficial use or the "necessary" language in Chapter 11's definition of "beneficial use." In arguing that there is no "set formula" for determining beneficial use, the ED simply ignored the significant guidance that exists regarding this issue.

The ALJs recognize that most of the appropriation must be shown as "necessary," but never explain why they have determined that it is necessary. They do not describe the

³⁶ ED 2nd Reply Brief at 8.

evidence to support this determination. They also do not address the reasonable time requirement in the Supreme Court's decision (discussed below).

Instead the ED and the ALJs propose that the Commission set a new precedent that essentially does away with the beneficial use test. But this cannot be what the legislature intended when it enacted the statute requiring a showing of beneficial use. The Legislature did not intend that an applicant need only list the beneficial uses to which the water could be used, show the possibility of such use, and express the intention not to waste water.

The one court case discussed by the ALJs is not relevant for this sysop permit, given the amount of water and the unreasonable amount of time BRA is speculating it could use much of that water. No other cases or legal authorities were cited in the PFD or in the ED's Arguments to support the ALJs' proposed approach to the beneficial use test.

The key decision by the Texas Supreme Court provides the best guidance:

The legislature also recognized the important principle of beneficial use. No person is granted the right to waste water by not using it. *In re Adjudication of the Water Rights of the Upper Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982); *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex.1971). It is for that reason that unbeneficial use can be corrected by cancellation. To order partial cancellation of a permit for nonuse, the Commission must find, among other facts, that the permittee was not justified in his nonuse or **does not have a bona fide intention of putting the unused water to an authorized beneficial use within a reasonable time.**³⁷

³⁷ *Lower Colorado River Authority et al, v. Texas Water Development Board*, 689 S.W.2d 873 (Tex. 1984) (emphasis added).

Thus, the Court made two important holdings. First, "waste" can occur by failure to use the water. It is not just using water in a way that is not beneficial. Second, the water has to be put to use within a reasonable time. Ten years is what the legislature found as the amount of time lack of use becomes waste. The fact that TCEQ and its predecessors have not exercised the authority to cancel water rights does not change that basic legislative guidance.

FBR is not suggesting that the test for cancellation and the test for beneficial use are or should be the same. The cancellation statute simply provides some guidance on what the legislature considered a reasonable time limit on non-use so that others could have a chance to obtain the right to use the water. This cancellation statute is also instructive, as guidance, for purposes of addressing the beneficial use test.

Chapter 11 defines beneficial use in a way that provides additional guidance. Beneficial use is defined as **the amount of water** that is economically **necessary** for a purpose authorized by Chapter 11 of the Water Code.³⁸ Again, this definition requires the use to be one that is authorized by law, but the definition also requires much more. By using the term "necessary" the legislature also must have assumed it would be necessary in some reasonable period of time, as the Texas Supreme Court held in its *Stacy Dam* decision.³⁹ By use of the term "amount of water," the Legislature's intent was

³⁸Tex. Water Code § 11.002:

DEFINITIONS. In this chapter and in Chapter 12 of this code: . . . (4) "Beneficial use" means use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

³⁹ *Lower Colorado River Authority et al, v. Texas Water Development Board*, 689 S.W.2d at 882 (Tex. 1984)

that the Commission must consider the need for the entire amount, not just a need for some percentage.

The Texas Water Rights Adjudication Act⁴⁰ also provides guidance, especially regarding the amount of water that must be shown to be put to beneficial use. The Policy set out in that Act provides:

The conservation and best utilization of the water resources of this state are a public necessity, and it is in the interest of the people of the state to require recordation with the commission of claims of water rights which are presently unrecorded, **to limit the exercise of these claims to actual use, and to provide for the adjudication and administration of water rights to the end that the surface-water resources of the state may be put to their greatest beneficial use.**⁴¹

As this Commission is undoubtedly aware, this Act resulted in reductions in water rights for cities, as well as for agriculture and industries, all across Texas, from arid areas in the west to water rich areas in the east. The definition of beneficial use was the same then as it is now.⁴²

As the predecessor agency to the Commission explained in the order on the adjudication of the Brazos River for the major water right holders (which is also explained in all other adjudication orders):

Where permits were not recognized to the full extent of the original authorizations, in the right or where certified filings were not recognized to the full extent of the declarations contained in the original documents, the Commission determined whether or not the appropriator could develop any further rights under the appropriation beyond the extent recognized in the preliminary determination. Appropriators under

⁴⁰ Chapter 11, Subchapter G, Texas Water Code.

⁴¹ Tex. Water Code § 11.302 (emphasis added).

⁴² FBR Ex. 15 at 2, paragraph 3 (final determination of all claims of water rights in the Brazos River Basin ...by the Brazos River Authority, Ft Bend County WCID No 1, and Galveston County Water Authority, June 1985) (emphasis added).

permits or certified filings were permitted to diligently develop up to the full amount of the authorization or declaration **if justification for the lack of development and a bona fide intention to develop in the foreseeable future were shown.**⁴³

This order was issued soon after the Supreme Court's 1984 decision in the *Stacy Dam* case,⁴⁴ which required a reasonable time for use as part of the beneficial use demonstration.

There are many examples of water rights being cut significantly, resulting in no development of the water resource, and other examples where the water right was reduced such that it allowed some development of water supplies, but for an amount much less than originally authorized. These historical cases provide useful guidance regarding the need to demonstrate beneficial use, within a reasonable period of time, of all the water requested for appropriation.

Thus, this Commission has to determine what is a reasonable time under the circumstances to allow BRA to store water in reservoirs rather than leaving the water in the basin for others to seek permits for beneficial use and in the interim to support the environmental and instream recreational needs.

In doing so, the Commission would also allow the SB 3 process to have time for review of the original recommendations and consider any new studies, experience with the standards, and stakeholder goals at that time. Having some additional unappropriated water could provide that process more flexibility to accomplish the goals of the law.

⁴³ *Id.* at 3.

⁴⁴ *Lower Colorado River Authority et al, v. Texas Water Development Board*, 689 S.W.2d 873 (Tex. 1984).

In addition to the guidance from the Supreme Court, provisions in Chapter 11 on definition and adjudication, and the experience with the application of beneficial use in other western states, the Commission has adopted rules that provide guidance, if not a strict test.

First, FBR joins the arguments of NWF that have noted that the Commission adopted a stricter test for beneficial use than is required by statute when it adopted its rule at Section 297.42(d), addressing special-type projects. The rule states that for those projects, a showing must be made that the water “will be” beneficially used without waste; the rule uses mandatory language.

Even if the ALJs are correct that this rule was not intended to apply to SysOp type permits, it is guidance that the Commission, in general, expected that an applicant show more than the appropriation "could" be used sometime in the future. The rule certainly supports a Commission requirement for more definitive proof on when the water will be used.

In addition, in its Rule 288.7(b), the Commission has provided:

(b) It shall be the burden of proof of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use.

(Emphasis added.)

While this provision is included in the requirement for conservation plans,⁴⁵ it again shows the Commission's historic intent to put a significant burden on an applicant to show the appropriation for a beneficial use is **necessary and reasonable**.

Moreover, the rule clearly intends to encourage conservation, something the SysOp permit will not do, if, as is proposed, BRA can sell water to those in Region G, H or elsewhere, who otherwise would rely upon conservation as their strategies to meet their needs. There are a number of needs in both Region G and H that rely on conservation strategies. These strategies might be more expensive than SysOp water, but the RWPGs have determined these strategies to have less negative impacts or other benefits that outweigh costs.

The record here shows that there are feasible alternatives for much of BRA's requested appropriation, if not the majority of it. BRA included that evidence by including the regional plans. The RWPGs for Region G and H identified the "alternatives," which they labeled preferred strategies. BRA has not shown that any of those strategies are unreasonable, not feasible or even less reasonable or feasible than SysOp water. BRA has not even presented an analysis that would allow the Commission to determine if it is BRA's supplies that are part of reasonable and necessary strategies to

⁴⁵ The rest of the rule is:

§288.7. Plans Submitted With a Water Right Application for New or Additional State Water.

(a) A water conservation plan submitted with an application for a new or additional appropriation of water **must include** data and information which:

(1) **supports the applicant's proposed use of water** with consideration of the water conservation goals of the water conservation plan;

(2) evaluates conservation as an alternative to the proposed appropriation; and(3) evaluates any other feasible alternative to new water development including, but not limited to, waste prevention, recycling and reuse, water transfer and marketing, regionalization, and optimum water management practices and procedures

meet the requirements for strategies that a RWPG can legally include in the regional plan for inclusion in the state water plan.

Thus, to make the findings required by agency regulation, were the PFD to be adopted, the Commission would be required to rule that either the water plans for Region G and H are wrong, or the Commission has a better understanding of all the impacts, costs and benefits than the RWPGs. There is no evidence to support any such finding. If there were, the Commission could consider the waiver provision in the statute.

The problem with the BRA "could be used" test of beneficial use is that it is really no test if there are no time limits or way to determine what is reasonable. How does a court or anyone know that the beneficial use test in Section 11.134 is met, if there is no requirement to show the water will be beneficially used in some reasonable time as the Supreme Court required?

Moreover, BRA's approach and the legal analysis by the ALJs will, if accepted, foreclose options that might be more efficient, better located, and tied directly to the specific water need(s) in the very near future.

Texas Law is Consistent with all the Laws of other Western States

A few examples of court cases from three other western states using the prior appropriation doctrine to issue water rights helps illuminate how important the beneficial use test is implemented in those states, as in all western states.

In 2011, the Colorado Supreme Court held in *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794 (Colo. 2011), that the intent to appropriate water for a beneficial use is an integral part of the applicant's obligation, and it "cannot

be based on the speculative sale..." *Id.* at 798. Mere storage of diverted water is not itself a beneficial use, noted the Court. *Id.* at 799. Moreover, the Court held that even the existence of firm contractual commitments are insufficient to satisfy the beneficial use requirement if there is no specific plan and intent for application of the appropriated waters to a beneficial use. *Id.* at 798-99.

The Washington Supreme Court has also interpreted the beneficial use test in a similar way, in *Dep't of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998). **That court addressed the issue of whether a water right may be issued based upon the capacity of a developer's water delivery system or whether a water right may be obtained only in the amount that could be shown to be put to beneficial use.** *Id.* at 1243. The court held that quantification of a water right must be based on actual application of water to a beneficial use, **not system capacity.** *Id.* at 590-92 (quoting *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 468 (1993); *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 237 (1991)).

Texas has followed this approach in the past. It has not automatically given a sponsor or funder of a reservoir project the full firm yield of the reservoir, just because the reservoir creates that capacity. In the current case, BRA's existing water right for Possum Kingdom reservoir is a good example. Even the sponsor of a reservoir has to show beneficial uses of the full amount that is sought, not just that it could put the water to some use in the distant future.

In *Central Delta Water Agency v. State Water Res. Control Bd.*, 124 Cal. App.4th 245 (App. Ct. 2004), a California appellate court construed the beneficial use test and

held that, where no actual purchasers of a proposed water appropriation were identified, the agency could not have analyzed the nature and impact of any specific use of the impounded water, as required by law. *Id.* at 259. The court further concluded that since the permit application failed to set forth the actual use or uses of the impounded water, it was not possible for the agency to estimate the reasonable amount of water that could be put to any specific beneficial use. *Id.* at 261. The court also rejected the argument that, since there is a general shortage of water in California, all of the water impounded could be put to beneficial use by someone for any of the proposed beneficial purposes. *Id.* at 263.

And federal courts have commented on the consistency of the use of the beneficial use test in all western states:

We do not deny or overlook the differences in water law among the various western states. However, on the point of what is beneficial use the law is 'general and without significant dissent.'⁴⁶

Conclusion

Texas should not be the one western state that dissents from the generally accepted policy and law on beneficial use. Historically in Texas, through the adjudication process, through limits on reservoir construction, and by promulgation of rules, the Commission has set requirements for the test of beneficial use that limit the time for use and the amount of banking for future use that should be allowed, based on the Supreme Court's decision in *Stacy Dam* and statutory language in Chapter 11 of the water code.

⁴⁶ See *Alpine Land & Reservoir Co.*, 697 F.2d 851 at 854 (9th Cir. 1983).

The Commission should avoid setting a new precedent allowing anyone to obtain a permit for water that the applicant claims will be needed, according to some regional plan, fifty years in the future. It can do so by limiting any SysOp permit to that amount which has been shown reasonable, possibly necessary, between 100,000 and 200,000 AFY.

XIII. LAWS CONCERNING ENVIRONMENTAL AND INSTREAM FLOWS

ALJs' Description of Relevant Issues

Whether inclusion of the applicable SB 3 environmental flows standards for the Brazos River basin rules satisfies or trumps consideration of all environmental and instream use requirements in Chapter 11 of the Water Code, TCEQ rules, and other laws and rules applicable to issuance of water rights.

ALJs' Recommendation

The ALJs recommend that the Commission rule that, as a matter of law, issuing a water right permit that includes requirements that the permittee comply with the SB 3 flow standards trumps all other considerations of whether BRA's operations under the SysOp permit will

- * maintain water quality,
- * protect fish and wildlife habitat in rivers and streams, in bays and estuaries, in the coastal zone, and even out of river banks,
- * protect recharge of groundwater aquifers, a very thorny issue,⁴⁷ and

⁴⁷ The impact of SB 3 standards on ground water impacts is critical, not because there are significant impacts here, but because the precedent this case will set. Despite not being included explicitly as an issue trumped by SB 3 standards, the ED argues it is. ED's 2nd Reply Brief at 11. The ALJs treat the issue as if it is not. *Proposal for Decision* at 178. Yet, it has to be trumped for there to be a consistent reading of Chapter 11 in the way the ALJs propose that it be read. See discussion below on Groundwater issues.

* impair instream uses such as fishing, boating, and other recreational uses.

FBR Exceptions

Introduction:

This application is the first opportunity for the Commission to consider and set a precedent on the role of environmental flow standards under SB 3 for almost all river basins in the state and for all the considerations listed above and others. Unfortunately, this application is so broad and complex, it makes a difficult case for the Commission to set precedent that will apply to simple one-diversion water rights and to water rights for reservoirs, in addition to permits for systems operations.

It is understandable that BRA and the ED took the broadest possible reading of SB 3 and TCEQ rules to limit the amount of evaluation required here. There are dozens of complex issues involved in this application. Nevertheless, the approach proposed would set a very dangerous precedent statewide.

A decision to adopt the ALJs' approach will greatly limit the Commission's discretion in the future, when it has applications that have significant impacts on important recreational areas of rivers, such as boating areas and trout fisheries on the Guadalupe River. It will limit the options the Commission has to protect commercial and recreational fisheries in the bays and estuaries. It will even apparently prohibit the Commission from protecting a resource such as instream dinosaur tracks that are not even discovered and thus not considered when the SB 3 standards were developed.

It will tie the Commission's hands in many ways for a wide range of considerations that the Commission should have the discretion to address.

The Implications of the ALJs Proposed Reading of Texas Law

BRA, the ED, and the ALJs are arguing that, now that the flow standards have been adopted, the Commission cannot condition permits to address site specific issues involving any environmental or recreational issue. They argue that the SB 3 standard addresses and protect every aspect of the environment and recreational uses of the rivers and streams in basins with flow standards, whether or not the basis for the standards involved any effort to accomplish that level of protection.

Under this approach, the Commission cannot condition water right permits to assure that the 7Q2 flow needed to protect water quality is continued. As the TPWD has pointed out, the permit allows BRA to dry up rivers and streams more than BRA could under its existing permits because there are no measurement points and standards applicable to diversions in those rivers and streams.

Likewise a water right permit can now not be conditioned to protect a rare or endangered species, even one TPWD or the Comptroller is spending money to protect, to allow developments to proceed, or even if the species were not listed until after the flow standard was adopted and thus could not have considered flow levels needed for that species.

There are many examples of where this Commission may want to exercise discretion to avoid other problems, such as creating a toxic algae bloom on a lake, that it can no longer consider under the ALJs proposed reading of Senate Bill 3.

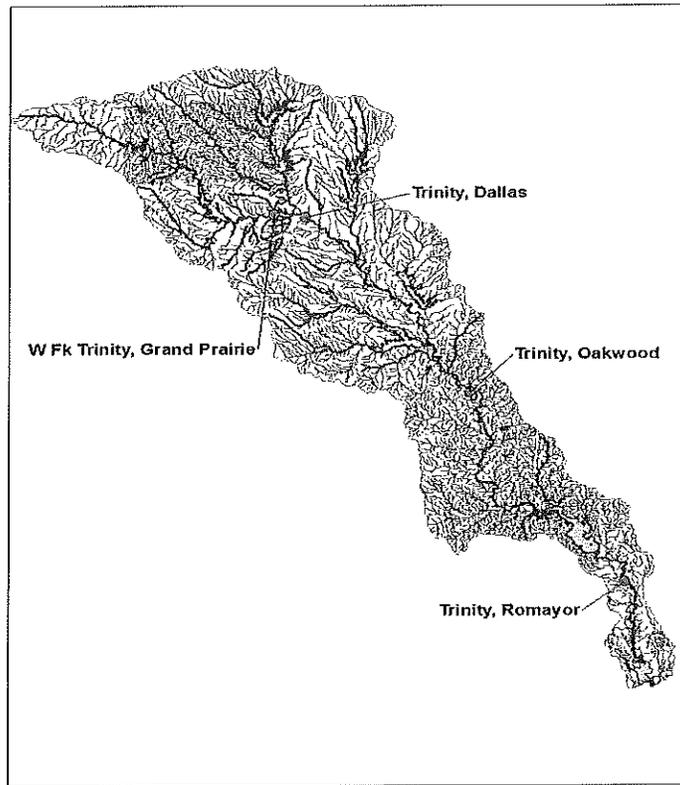
While the environmental flow standards for the Basin River Basin have a number of measurement points and address more stream segments than basin standards, the decision here applies as well to those other basins.

For example, TCEQ's standards set only 4 measurement points for the entire Trinity River Basin.⁴⁸ The four measurement points on the Trinity River and its tributaries are:

West Fork Trinity River near Grand Prairie,
Trinity River at Dallas,
Trinity River near Oakwood, and
Trinity River near Romayor.

Thus, as can be seen in the figure below, there are hundreds of miles of streams **in western parts of Texas that are governed by control points near and downstream of Dallas and Fort Worth. There are dozens or tributaries that cannot be protected with these four measurement points.**

⁴⁸ 30 TAC §298.225(c)(1)-(4).



Consider also the e-flow standards for the Guadalupe River, where TCEQ rules do not include a measurement point below Canyon Dam for approximately 120 river miles until the gauge at Gonzalez.⁴⁹ That measurement point is, however, below the confluence with the San Marcos River. Thus, the ED's approach would allow new permits to refill Canyon Reservoir or divert all unappropriated water below the reservoir without any consideration of the recreational use or trout fisheries below the Canyon reservoir. All that is needed for someone to dry up the river for 100 miles is water flowing in the San Marcos river sufficient to meet the flow standards at the measurement point at Gonzales on the Guadalupe River.

⁴⁹ 30 TAC §298.380(c)(1)-(2).

The e-flow standards in these and other basins should make it clear that the initial round of the SB 3 process was never intended to do what the ED claims it did, that is, provide the type of comprehensive coverage needed to assure a "sound ecological environment" for every point in the basin. The standards may protect enough of the unappropriated water to protect the "ecological environment" generally of the basin. That does not mean that the type of site-specific evaluations that the ED has done regularly for water rights are not needed. There are too many aspects of healthy rivers and streams to have them all covered by flow standards at a few measurement points.

Before SB 3, the impacts on proposed diversions had to be evaluated for all the impacts on the environment. The ALJs approach eliminates that, allowing an overall evaluation of the basin to substitute for the site specific analysis of impacts on a stream segment which is economically very important to the region because of the opportunities for fishing or boating or archeological remains.

The language in Senate Bill 3 should not be read, and certainly does not have to be read, to result in the law damaging the environment or tying the hands of the Commission.

Moreover, there is nothing in TCEQ's guidance or rules for development of environmental flow recommendations by the scientist or the stakeholder groups that suggests that they are directed to address all possible environmental issues in their limited time to develop the recommendations. Nor could they do so, even if they were told that the Commission would read SB 3 in the way the ALJs' propose.

Certainly, it could be tempting to adopt a broad approach such as that proposed in the PFD, especially when faced with a complex application such as BRA's here. Doing so without considering the broader implications would be a mistake. The Commission should seek input from stakeholders, lake managers, bays and estuary experts, and elected officials across Texas before making such a dramatic decision on the implementation of Senate Bill 3.

Implications of the PFD for this case

There are a number of disturbing results from applying the ALJs approach to the SysOp permit in the current case. One of the best examples is the stranded stream situation that TPWD has identified.⁵⁰ TPWD explained that the approach proposed by the ED and recommended by the ALJs leaves the fish and wildlife habitat and water quality streams completely unprotected in many parts of the basin that will be affected by BRA's SysOp diversions. The permit would allow BRA to dry up these streams or do so more frequently than occur under the current conditions. Because of the location of measurement points and the few points in the basin, the standards cannot provide the needed protection for the ecology in those stranded segments.

The special issues associated with protecting groundwater, instream recreational uses, coastal resources, and wetlands are discussed separately in sections below, but they all support the need for the Commission to reject the ALJs' reading of SB 3.

⁵⁰ FBR Ex. 16C.

In fact, FBR believes that neither the ALJs nor the Executive Director are entirely comfortable with this broad interpretation of the SB 3 law and rules. The PFD's discussion of the salinity issue is just one example:

The Commission has recently adopted environmental flow standards for surface water.... the ALJs conclude, as a matter of law, that issuing a water right permit that complies with those standards will maintain water quality while considering all public interests. Accordingly, the ALJs also conclude that BRA's compliance with the environmental flow standards will maintain the WQS for chlorides and TDS for classified segments in the Brazos River Basin.⁵¹

Yet, the ALJs then spend a significant amount of space in the PFD, pages 84 to 97, discussing the evidence and why the permit will not create a water quality problem. This strikes FBR as the ALJs telling the Commission something it cannot consider, as a matter of law.

The ALJs treated impacts on groundwater and groundwater recharge the same. Despite accepting the ED's reading of SB 3 language and agency rules as eliminating the need for them or the Commission to consider impacts on all environmental issues, including groundwater quality or quantity, the ALJs spend a section addressing the evidence on the impacts on groundwater or recharge and proceed to discuss the evidence and conclude there would be no impact. They also say that there is no dispute over groundwater issues, but there is. It is not on the facts but on the law as discussed below.

The same is apparently true on the coastal consistency issue.

The ALJs "as a matter of law reading" has to mean that the Commission need not and cannot consider such impacts once SB 3 standards are in place.

⁵¹ *Proposal for Decision* at 91.

Texas law and TCEQ rules can not read as proposed in the PFD

The PFD suggests that there is only one way to read the law and TCEQ rules. That is true, but not in the way the ALJs suggest. The discussion below in Section XV on groundwater impacts is the clearest proof. But even if that were not true, the reading the ALJs propose certainly does not have to be accepted by the Commission.

The Commission can, and FBR argues, must read laws and its rules that are not clear in ways that are consistent with the intent of those laws and rules.

The basic law is the provision directing when and how the commission can issue water rights:

Section 11.134 ACTION ON APPLICATION . . . (b) The commission shall grant the application only if:...

(3) the proposed appropriation:

(D) considers any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;

And

Section 11.147(e-3) Notwithstanding Subsections (b)—(e) [of § 11.147], for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, the commission shall apply **any applicable environmental flow standard**, including any environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections. (Emphasis added)

The basic disagreement in this case is the meaning of the term "applicable" in both sections of the laws quoted above.

In Section 11.147(e-3), the ALJs' approach assumes the "applicable standard" is the entire rule for the basin involved. The more reasonable reading is that the applicable

standard means one or more of the standards set out at measurement points. In the case of the Brazos River basin there are 20 flow standards at 20 measurement points.

Environmental Flow Standards: The following environmental flow standards are established for the following described measurement points:⁵²

Then there are the 20 measuring points identified, each with a different environmental flow standard. Determining which ones are applicable to any diversion should be a factual issue and depend on a number of considerations, such as which, if any, of the flows at the measurement points could be affected by the diversion. It could be none are affected and, thus, none of the standards are "applicable."

If the flow rule does has one or more applicable standards for a specific diversion, that standard or those standards should be part of the permit requirements for that diversion. If there is no applicable standard for a diversion, or possibly a diversion reach, the Commission falls back to site specific evaluations that it historically has done for such diversions under Sections 11.147, 150, 151 and 152. If there is one or more standards but they do not address an issue, such as the impact on groundwater recharge, the standards should be applied, but the groundwater recharge impacts should be reviewed as they have historically under Section 11.151.

That is exactly how Section 11.134 is also properly read. If those traditional sections are applicable, for one of these reasons, they must be applied.

Again, this becomes even more obvious in the ground water discussion below.

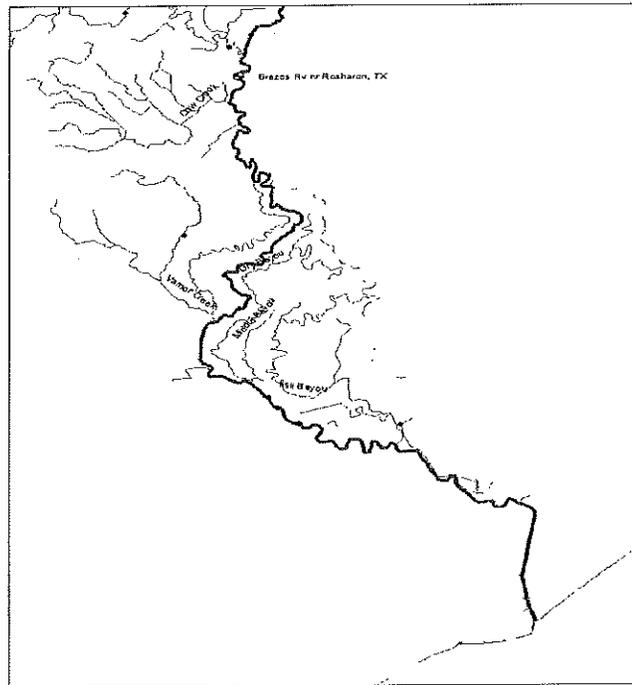
⁵² 30 Tex. Admin. Code §298.480.

FBR urges the Commission to read that language of these two provisions of Chapter 11 in light of the intent of SB 3, which was to use the unappropriated water to help protect the ecological environment that exists in the rivers and streams at the time the set of flow standards is adopted. Also the Commission should consider the process for developing the environmental flow recommendations by the science and stakeholder committees in the expedited process required by SB 3. There is no way they could perform the analysis the ALJs suggest they must have done to make recommendations that protect every unique environmental aspect of every tributary of the basin. The SB 2 environmental flow studies show the complexity of trying to do so even over a number of years.

Basically, if there are one or more standards that are "applicable", they should be applied. That can be the end of the discussion. But the rules do not create one standard applicable to the entire basin. Here, they create 20 standards, 10 of which are applicable to the part of the basin to which the SysOp permit applies. They create 20 because of differences in the basin. But 20 does not assure protection of the entire basin, and 4 certainly does not do so for the Trinity basin.

Consider the stream segment that has no measurement point on it or downstream all the way to the Gulf. For some tributaries there will be no measurement point upstream either. That is obvious on both the maps above of the Trinity River Basin and that just below for the Brazos. None of the standards are applicable on tributaries that enter the rivers below the lowest measurement point.

Decisions to set standards in the permit could be made using the watershed for a similar tributary that has a standard and scaling based on the different sizes of the watershed. That is not allowed, however, under the ALJ's approach.



Thus, any important environmental feature in any of tributaries below the Rosharon gage are left completely without protection if someone is granted a water right in those tributaries. That is true for many tributaries all throughout the basin.

The stranded stream segment problem that TPWD identified is another good example. TPWD argues in essence that there is no applicable measurement point and, thus, none of the standards listed in the rule are applicable.

These examples are just two of many that show the problems with the approach the ALJs propose. They show why this approach cannot be what the law intended. It is not what the law says.

In a normal application for a water right, there is one diversion. It is fairly easy to determine if there is one or more applicable measurement points and standards. But there is no hard and fast rule, as it depends upon the circumstances. With the one diversion water right, there could be disputes over whether a diversion could affect the flows at one or more measurement points, or none. That is the type of factual evaluation that the Commission has to do for many issues.

The complexity of the SysOp application, with its many existing diversion points and more to come, makes it look like the application of the standards would be very difficult. It is not.

As with the application with one diversion point, an assessment would have to be made for each of the SysOp's diversion points to determine if there is one or more applicable standards. If there is, that reduces staff and applicant's time. If there is not, the ED falls back on the approach for those diversions that it had to do in the first stage of this hearing, when there were no SB 3 rules. BRA and the ED did that work. FBR disagreed with the results, but at least there was an evaluation of the impacts and decisions made based on expert opinions and the application of Sections 11.147, 11.150 – 152.

FBR's reading of the law is what was intended. It is the only approach consistent across the relevant provisions. It is certainly more in keeping with the goals of SB 3 than the approach proposed by the ED and BRA and adopted by the ALJs.

Conclusion: FBR urges the Commission to reject the approach proposed by the ALJs for reading the scope of the SB 3 standards as trumping all aspects of instream uses, needs for fish and wildlife habitat, and water quality. Depending upon the Commission's ruling on other issues, a very limited remand would allow the parties to properly address the law as it should be read.

XIV. APPLICATION'S COMPLIANCE WITH ENVIRONMENTAL FLOW RULES

ALJs' Description of Relevant Issues

Whether SB 3 standards are protected with a requirement in the permit that a diversion is authorized if only one flow standard in the whole basin is being met;

Whether SB 3 standards are protected if an upstream measurement points is used with additional language proposed by the ALJs;

Whether the permit's treatment of high flow pulses protects the flow standards; and

Whether BRA has the burden of proving it can meet the requirements in the permit for the environmental flow standards.

ALJs' Recommendation

The ALJs concluded that the proposed SysOp permit with some additional language protects the SB 3 environmental flows standards.

FBR's Exceptions

FBR excepts to the ALJs recommendation on all four aspects of this compliance issue, if FBR understands the PFD.

There is one issue, the 4th issue, that may require clarification. The language in the PFD makes it appear that the ALJs propose that the Commission take the position that applicants do not need to prove that they can comply with the standards, only that they accept a permit with the standards in them.

This would mean that a permit could be granted if it simply includes the language from the applicable flow standards for the relevant portion of the basin. That would appear to protect the standards, but would not if, as here, the applicant cannot comply with any of the standards or if the applicant proposes to comply through a process that is contrary to the language of the standards.

While there is a discussion in the PFD of the ability of BRA to comply with some aspects of the permit, the PFD states in the second paragraph of Section XIV on "Application's Compliance with Environmental Flow Rules" that:

The ALJs conclude that BRA's and the ED's environmental flow review was sufficiently complete and the environment flow provisions in the Proposed Permit and WMP comply with all applicable law, including the SB 3 rules.⁵³

The ALJs also argue that the permit will be enforceable against BRA, so BRA must comply with the strict standards in the permit. Yet the ALJs have accepted a non-strict approach to the rules for pulses. Moreover, the permit includes and is clearly

⁵³ *Proposal for Decision* at 126.

subject to the approved WMP and the proposed implementation of that WMP. The WMP includes the representations in the application materials upon which it is based as well as the language of the WMP. TCEQ has always accepted, if not required, representations in the application to be part of its permits.

Moreover, there is nothing in the WMP that requires strict compliance with the standards as written. Instead, the WMP and the basis for it give BRA flexibility to operate so it does not have to pass pulses as they occur or at all if its reservoir cannot pass the pulse. BRA has a valid basis to avoid enforcement of the standards as written.

FBR urges the Commission to read the SB 3 rules as requiring that the applicant prove the ability to comply, not just that the permit can reference or quote the rules.

BRA proposes to capture rather than pass pulse flows. That is contrary to the language and the intent of SB 3 and Commission rules. Moreover, BRA cannot prove, or at least has not proven, that it can pass pulses at all the reservoirs it or the Corps of Engineers operate. Release structures in many of the reservoirs do not permit passing water at all lake levels. Thus, pulses that are captured may not be released for months, if not years, after the pulse occurred during times of drought.

If the Commission takes the position and sets precedent that an applicant does not have to show that compliance is possible, only the first two of the issues listed above need be considered.

The other issues are related to the proper reading of SB 3 and Commission rules. They do not constitute a challenge to those rules themselves. As discussed above, the significant role that the flow standards play, regardless of how the Commission rules on

the issue immediately above, is very significant, as it will determine where the Commission no longer has to address site specific issues of impacts on the environmental and instream recreational uses. Thus, FBR believes the rules need to be applied as they and the other protestants propose.

Doing so is not a big burden on BRA. For example, there is a dispute over whether the use of the flow standards at an upstream measurement point can, alone, be the protection of the standards required by law. It cannot be in many cases. But that should not be a big burden.

If the flows at the downstream gage can be affected by the diversion, and the permit requires use of the upstream gage, the standards at the flows at the downstream gage are not necessarily protected. In this case, the permit needs to require an applicant to look at both the upstream and downstream gage and make sure that the standards are being met both before diverting or before full diversion is allowed. That is not a significant burden of work. Moreover, if the flow standards at the downstream gage are not being met, BRA's diversion should be limited so it does not add to the problem.

The burden of going to the USGS website to examining conditions at two gages is not significant. It may only be in very rare cases that the standards at both measurement points are not being met. It is at those times, however, the water that is currently unappropriated should remain in the river.

The same is true with the BRA proposal to only meet the flow standard at one downstream measurement point. Is it that much more complex to look at two downstream measurement points, if flows could be affected at both gages by the

discharge? There are times when a permit can be justified as having only one downstream standard apply. That is a fact question. The ALJs and ED see it as a legal question. They argue the rules limit the number of applicable measurement points to one, regardless of the location of other measurement points, the size of the diversion, or flow conditions of the river or stream.

That is not consistent with the intent or language of SB 3. Commission rules do not require that reading. They clearly focus on applicable measurement points, one where the diversion can affect flows and thus, the standards must apply.

BRA did not prove it could meet the flow standards. Thus, BRA's witness, Mr. Osting, was very careful to say the permit protects or meets the standards, not that BRA can comply with the standards. He did not even look at the issue discussed below of how BRA will pass pulses that are required to be passed.

Texas law

Again returning to the language of the statutes it is clear how the Commission rules should be read:

Section 11.134 ACTION ON APPLICATION . . . (b) The commission shall grant the application only if: . . . (3) the proposed appropriation: (D) considers **any applicable environmental flow standards** established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; (emphasis added)

And

Section 11.147(e-3) Notwithstanding Subsections (b)—(e) [of § 1 1.147], for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and

aquatic wildlife habitats, the **commission shall apply any applicable environmental flow standard**, including any environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections. (Emphasis added)

These provisions require the Commission to consider and apply **any applicable environmental flow standard or standards**. There are two key words, "applicable" and "standard."

Here the use of these words are clearly not intended to refer to the Commission's basin rule, but the actual flow standard(s) applicable to any diversion in any basin rule. That is consistent with how FBR reads the law in the discussion above, but not the ALJs approach.

Again the basin standard or rule defines the standards that are applicable within the rule at the various measurement points. That is clearly what the law requires, and when there is a specific flow standard that applies, it is used instead of the other provisions in the statute, to the extent the standard addresses the issues in those provisions.

Any Applicable Standard

The first three issues listed above involve the issue as to which standard or standards to apply. The ED and the ALJs read Commission rules to limit the basin rules to requiring the use of only one measurement point. The ALJs propose language that adds another condition, if the measurement point is upstream. This would certainly help protect the environment, but it is not consistent with their reading of the rules. If they can add the language that the flows must be met just below the diversion point, the

Commission can require the flows to be met at the next diversion point downstream, and the next, etc., wherever the diversion could affect flows.

The ALJs approach is not consistent with the law above. Moreover, those rules do not have to be read that way. The reading by all other protestants is the proper reading. It is also much more consistent with the language and intent of SB 3 to use unappropriated water to protect the ecological environment.

As with an application for a water right at one diversion point, an application with multiple diversion points has to be evaluated to determine which of the specific flow standards apply. Again, that is not a simple cookbook approach. Nor should it be for the basic or complex water right permit application.

Which standards apply depends upon the facts. A large diversion in a small stream could affect flows many miles downstream. If there are intervening diversions or tributaries that enter, the facts can be more complex. As long as there is one downstream measurement point that can actually be affected by the diversion, it is applicable. If there are two downstream measurement points that can be affected by the diversion, there must be two. Both are applicable. TCEQ rules provide that, as does the law.

If there are no downstream measurement points that are applicable, an upstream measurement point might be used. There are serious problems, however, on the use of just one upstream measuring point, as will be discussed below.

FBR's reading complicates the evaluation, but protection of the environment in streams already significantly appropriated has never used a cookbook approach. Again, because this first case for Commission consideration of the flow rules is a very complex

application, there could be a tendency to simplify the application of the rules as much as possible.

That would be a mistake and is not consistent with the law or rules. First, the basic Commission rules provide:

The commission will incorporate into every water right permit **any condition, restriction, limitation, or provision**, . . . that is reasonably necessary to protect environmental flow standards.⁵⁴

The Commission rules do not contemplate a cookbook type of approach under SB 3 either. The rules assume there will be some needed conditions.

Yet, the ALJs accept the cookbook approach for subsistence and base flows. They then propose a complex approach, not laid out in the rules, when it comes to pulse flows. For pulse flows, the PFD proposes that BRA can capture and retain the pulse flow for an undesignated period of time. There is nothing in the rules that even suggests that anything but passing the pulse is required.

Both the cookbook reading for the low flows and the flexible reading for pulse flows helps BRA, but hurts the environment. Yet, SB 3 was intended to maximize the use of unappropriated water to protect what is left of a sound ecological environment in the basins.

The recent drought conditions could also have affected the thinking of the ALJs that their role was to get as much water to BRA as possible for future use. Again, that is not what SB 3 was intended to do. It requires a balancing, an encouragement of

⁵⁴ 30 TAC §298.15 (c).Emphasis added.

conservation, and other strategies to help avoid further damage to the ecology of the basin.

One standard is not sufficient under SB 3 and TCEQ rules.

By ruling that BRA can divert, if the standards at one measurement point are being met, is not using the unappropriated water to provide a sound ecological environment. It is easy to understand the basic theory under SB 3. If someone proposes to make a diversion that is large enough to reduce the flows in the river below the flow required by the standard at any measurement point downstream, the diversion cannot be made at that time. The water is needed in the river to help meet the flow standards, probably because of other diversion by senior water right holders.

Again, take this basic case on a new water right at one diversion point. If the flows at the downstream measurement points meet the standards there, the water right holder should be able to divert as much water as allowed under the water right while still assuring that the flows at that first gage still meet the standard. That is simple. It is not complex, even for this systems operation WMP, given the more complex issues that have to be addressed to keep track of old versus new water.

All of this can be done by simply looking at the USGS gage data online for such a basic case. During wet years, diversions are likely possible. During drought years, there will likely be more times when full diversions cannot take place.

If the process FBR proposes is too complex, which it was never shown to be so by any factual presentation or as a basis of any opinion, BRA could have focused on fewer reservoirs or a smaller system and still obtain sufficient water to serve all foreseeable

needs in the next 10 to 20 years (or probably much longer). If it had done that, it could have gained experience that this Commission needs to evaluate how the SB 3 standards can and should be used, without tying up essentially all the unappropriated water. BRA could have given the Commission an opportunity to implement the SB 3 rules and the flexibility to make needed adjustments in the future. It still can. A limited appropriation in any permit, such as 150,000 AFY, would do that.

The upstream standard is not sufficient under SB 3 and TCEQ rules

The Commission should also reject this approach that the one standard can be upstream as BRA and the ED propose. The ALJs agreed that the one applicable measurement point can be upstream of the diversion. The ALJs do propose some additional protection, but not one that assures that the flows for the next one, two, or three measurement points will be met.

Moreover, there is no guidance on when the Commission can decide to use an upstream standard as the measurement point. It would again be a fact situation. A measurement point 200 miles above a diversion is not likely to be applicable. One closer may be the applicable one if there are no downstream measurement points.

SB 3 and TCEQ rules clearly intend to limit diversions that could reduce flows **below** the diversion point and interfere with the efforts to provide a sound ecological environment downstream in the basin, not just the stretch from discharge to the next measurement point or some other location immediately downstream.

FBR agrees there can be times when the only applicable measurement point is upstream, but that is a rare case, and certainly has not been proven for all of the 9 such diversion points or reaches here.

But the major problem is the precedent, even if BRA had met the burden that FBR argues it has. The ALJs approach limits the Commission to use only one measurement point as a matter of law, regardless of the facts.

Pulse flows requirements will not be protected

Certain pulse flows are also required to be passed by TCEQ rules. They were recommended by the science and stakeholder committees because of the role they play. They inundate areas of the river that need periodic inundation. They help with channel maintenance, which allows stabilization of the banks and creation of habitat for the native fish and wildlife in the system.

Often the pulse that needs to be passed is only part of a larger flood flow, and BRA is allowed to capture flows above the pulse that need to be passed. Thus, the pulse flow requirement is intended to avoid capture of all of the flood flows, when a pulse is needed under the standard.

It is obvious that pulse flows can move well downstream, often aided by runoff in tributaries that help maintain the peak needed in the pulse to inundate floodplain habitat. Those peak pulse flows can be needed to meet the standards for many downstream measurement points. A rain event in an upper part of the basin can provide high flows well down the river where there may not be any rain.

The approach proposed by the ALJs will not assure that pulse flows will serve those benefits downstream. As previously discussed, the ALJs approach is to require a permittee to meet the standard for the pulse at only one measurement point. That is certainly significant precedent to limit the Commission in other basins where the facts may be very different than in the Brazos basin.

Moreover, the ALJs approach will allow BRA to capture the entire pulse or flood flow in a reservoir and later release the water needed to meet the pulse standards, **if BRA has the ability to do so.**

As mentioned above, there is nothing in SB 3 or TCEQ rules that contemplated or even hinted at the idea that a pulse need not be "passed." Certainly capturing the entire pulse or larger flood flow allows BRA and others to avoid passing more than is required. Once in the reservoir, BRA may be able to meter out the water to provide the pulse precisely, but that does not mean the pulse provides the benefits it would if passed during the rain event that created it.

If the Commission believes that BRA or others need to have the flexibility to be able to capture pulse flows to release them later, the Commission needs to propose an amendment to the environmental flow standards to let those affected or with expertise in the role of flow regimes, including TPWD, university scientists and stakeholders, participate in a rulemaking process.

Such a rule may make sense for certain conditions, but not others. It should not be developed ad hoc as part of one permit proceeding, especially one as complex as the current one.

Again, FBR urges the Commission not to tie its hands by reading its rules and SB 3 as requiring only one standard for any diversion, regardless of the facts and potential impacts of that diversion. This approach would then have to apply to a new reservoir, clearly a situation where the capture of flood flows can affect flows a long way downstream. The legislature recognized that diversions could affect flows to bays and estuaries 200 miles downstream.⁵⁵

BRA did not prove it can meet the flow standards in the permit.

There is one more serious problem with the ALJs' approach. BRA has not proven it can meet the language of the Brazos basin standards at any of the measurement points, especially for pulse flows. The ALJs have taken the position that they do not have to do so, or that is at least what the PFD says. It is also shown by the evidence that BRA is not required to pass pulses as they occur and in some cases never.

The easiest example is a reservoir such as Proctor Lake. Some lakes release water from the bottom, and thus, a pulse could be passed or released under any condition. A reservoir that only releases from the top can only pass a pulse if the reservoir is full. If the reservoir has gates between the top and bottom of the dam, it has other options, but again only if 1) the lake level is up to those gates and 2) those gates are large enough to pass the required pulse.

Those facts are easy to evaluate. All BRA needed to do was provide the stats on the design of the release capabilities of its dams and any operation issues, such as a gate no longer being operable.

⁵⁵ Section 11.147(b), Texas Water Code.

BRA did not. It is asking the Commission to assume it can pass a pulse in the period of season that the pulse is needed under the standards. It is doing so, because it is asking the Commission not to require such proof. It reads the rules as only requiring that the permit reference or recite the pulse standards.

BRA likely cannot meet the standards, but it certainly has not shown it can meet the requirements. If it showed its actual capabilities, it would then likely have to remove one or more reservoirs from the SysOp permit, or further limit the SysOp water it could capture during some storm events. Of course, BRA could still use the reservoir to capture water under its existing rights so a limit on the use of one or more reservoirs from the SysOp permit may not have any significant effect on its ability to capture all of the appropriation. We do not know, because BRA never did that evaluation.

Once again, if BRA is limited to 150,000 AFY, and told that they must pass pulses as they occur, FBR is confident that BRA can still obtain the full appropriation and would withdraw its objection on the issue of whether BRA has to prove it can comply.

Lake Proctor illustrates the point. FBR asked BRA's expert on flows, Mr. Osting, about this problem and he stated that he did not look at the issue.⁵⁶ BRA, however, argued that it could operate around this problem. The ALJs discuss BRA's proposal in the PFD at pages 174 and 175. BRA's argument is only that. There is nothing in the Permit, WMP or application materials that requires BRA to do what it proposes here. To the contrary, the application and WMP clearly allow BRA to capture pulses and hold them, possibly never having to release them at all.

⁵⁶ Tr. 3197, lines 3-16.

Even if the WMP or accounting plans provided a way to account for these pulse flows such that they would not be counted as SysOp water when captured, the capture of the pulse, if it cannot be released, means that the following year, if not sooner, BRA will be able to take advantage of the water since it can sell up to its full appropriation each year. The accounting restarts every year, and the water in the reservoirs determines how much water BRA can sell, either under long-term contracts, or short term sales. The only limit is the total appropriation for that year under the WMP.

The ALJs argue that this will be a rare occasion. But rarely does not matter. The issue is compliance with Commission rules, and there can be no excuse that a violation will rarely occur. The permit and WMP still give BRA the right to violate the standards, at least occasionally. FBR does not agree that the violations will occur rarely, given the number of reservoirs BRA operates and the type of multi-year drought conditions that Texas recently experienced.

Most if not all of BRA's reservoirs were low. How many of them could have passed a pulse as it occurred or within months of the event is not known because BRA did not present the evidence needed by the ALJs, the Commission or anyone to evaluate the potential for violations. If the Commission grants a permit to anyone with the record showing that there will be violations, it will be impossible for the Commission to go to court and seek penalties for violations. The permit record is clear evidence that the violations were known by the Commission, acceptable and in essence exceptions to strict compliance.

While this is a complex set of issues, what is simple and clear is that the ALJs are recommending that the Commission read its rules as allowing the capture of pulse flows rather than the passage of them as required by the rules. That precedent will apply to all future water right applications.

Again, if the Commission is going to make that type of amendment to its rules, it is required to do so through rulemaking, not by ignoring clear language in the rules.

Conclusion

The ALJs' recommendations on how the Commission should implement its environmental flow rules for this and other basins must be rejected. They are contrary to the language of the Commission rules, the language of Chapter 11 and the intent and goals of SB 3.

The Commission must require that any new appropriation in a basin with flow standards be limited by the standards to assure that

1. any diversion that could affect the flows at any measurement point downstream must comply with the standards for any such point, and
2. the applicant is able to pass a pulse flow at the time the pulse occurs before it can divert or capture any of the appropriation that would be part of a pulse or flood flow.

In addition, the Commission should reject the proposal that the standard at an upstream measurement point can serve as the requirement in the flow standards for a diversion downstream unless there is strict proof that such a limited role of the rules does what SB 3 intended and the law requires.

Finally, the Commission should make it clear that an applicant must prove that it can release pulse flows at the time of the pulse if the applicant intends to capture pulse flows in a reservoir.

FBR is willing to accept a SysOp permit that 1) limits the new appropriations to 150,000 AFY or so and 2) makes it clear that the approach proposed by the ALJs that limits the role of the standards is not adopted.

XV. THE SIGNIFICANCE OF THE GROUNDWATER ISSUE

ALJs' Description of Relevant Issues

Do the Senate Bill 3 environmental flow standards eliminate the requirement for consideration of impacts of a proposed appropriation on ground water and groundwater recharge?

ALJs' Recommendation

The ALJs evaluate the impacts on ground water and groundwater recharge as they would without any SB 3 standards.

However, the ALJs recommendation, like that of the ED, appears to be that the SB 3 standards trump the groundwater issues of Section 11.151, Texas Water Code.

FBR Exceptions

Summary

While FBR agrees with the ALJs that there is no factual dispute, there is clearly an important legal dispute. FBR has raised the issue numerous times in this proceeding.

That legal dispute is mentioned briefly in the footnote on the first page of the discussion of the Law Concerning Environmental and Instream Flows. The approach proposed by the ALJs for reading the SB 3 rules as trumping Chapter 11's directives to

consider impacts on the environmental and instream uses is inconsistent with the way the law treats groundwater. FBR's approach is not.

The Law

Texas Water Code §11.134(b)(3)(D) provides:

The commission shall grant the [water right] application only if . . . the proposed appropriation . . . considers any applicable environmental flow standards established under Section 11.1471 **and, if applicable,** the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, **11.151**, and 11.152 . . .(Emphasis added)

As FBR argues above, the phrase "if applicable" here means if the facts indicate that there are environmental resources, such as groundwater recharge, that were not considered in the standards or for which no standard can protect, the Commission is required to fall back on these other sections to protect the resources.

That is the only way the reference to 11.151 can be read, since it is not included in section 11.1479(e-3). If there are groundwater recharge issues, a factual question, Section 11.151 describes how the Commission must consider them.

The same is true with water quality. If that is an issue that has been raised and there are impacts on water quality not addressed by a flow standard, again section 11.150 explains how the Commission must consider them.

The ED and the ALJs argue, however, that because of Texas Water Code §11.147(e-3), the Commission cannot use Sections 11.147 (d) and (e) or Sections 11.150, 11.152 to protect such environmental resources once there is an environmental flow standard in place for a river basin. They argue that the standards do the job of protecting all environmental resources throughout the entire basin, even though it is clear

that such standards cannot and the development process of the recommendations for those standards never could allow for such widespread protection.

Section 11.147(e-3) provides:

Notwithstanding Subsections (b)-(e) [of § 11.147], for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, the commission shall apply any applicable environmental flow standard, including any environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections.

Subsections (b)-(e) do not mention impacts on groundwater or recharge. Thus, these two sections of Chapter 11 not being applied consistently under the ALJs' proposed reading, while they are consistent under FBR's reading of them.

Conclusion

The Commission should use the groundwater issue as a clear directive from the Legislature of how the legislature intended the SB 3 standards to be used and when they do not trump the Commission's role in protecting important environmental and instream resources under Sections 11.147 and 11.150-152.

XVI. PUBLIC WELFARE, PUBLIC INTEREST, AND INSTREAM USES

ALJs' Description of Relevant Issues

Whether BRA has met its burden of proof on the recreational use aspects of the public welfare considerations.

ALJs' Recommendation

The ALJs recommends the Commission rule that

1. of the interests to local communities, adjacent property owners, recreation, tourism, culture, aesthetics, and the economy, only recreational uses of water is within the scope of public welfare, public interest and non-environmental instream use issues; and
2. the Commission's consideration of recreational use is trumped by the SB 3 standards and the impacts on boating, fishing and other recreational uses cannot be considered by the Commission.

FBR Exception

FBR disagrees with both recommendations of the ALJs. FBR relies on the exceptions of others, such as the Lake Granbury Coalition, regarding the first recommendation as it applies to use of a lake. FBR urges the Commission to recognize how much the ALJs are proposing to take away from Commission consideration, for this and all future water right permits. FBR continues to believe the Commission needs to retain its discretion in the law and not tie its own hands more than the law requires. This one case is not representative of the range of issues the Commission could face on other water right permits across Texas.

On the second issue, FBR's exceptions to Section XIII on the laws concerning environmental flows and instream uses and Section XV on groundwater, provide FBR's analysis and recommendations, which apply equally to the role of the Commission in protecting instream recreational uses.

Conclusion

The Commission should reject the ALJs' broad reading of Chapter 11 that limits the Commission's ability to consider important impacts that were not, and in many cases, could not have been considered as part of the SB 3 process for developing the flow recommendations that the Commission used to develop its flow standards.

XVII. CONSISTENCY WITH WATER PLANS

ALJs' Description of Relevant Issues

Whether the proposed permit is consistent with state and regional water plans as required by Section 11.134(b)(3)(E).

ALJs' Recommendation

The ALJs concluded that the proposed permit would be consistent because:
The relevant regional plans have been approved, and
There is no requirement that the demands or needs that the water right would serve are identified in the regional plans as being served by the permit.

FBR Exceptions

Summary:

Again, the Commission is faced with interpretation of Section 11.134 with no rules, precedent or court opinions to assist.⁵⁷ Here again, however, the law is clear. The Commission must find that the application:

addresses a water supply **need** in a manner that is consistent with the state water plan and the relevant **approved** regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement.⁵⁸

⁵⁷ This issue is discussed briefly in the section on Beneficial Use above and like that issue, is one with little or no precedent.

⁵⁸ Section 11.134 (b)(3)(E), Texas Water Code, emphasis added.

It is not, however, just this provision that must be considered when applying this requirement for issuance of water rights. The Commission must consider what the Legislature provided in its water planning statute, Chapter 16 of the Water Code, and how TWDB has read and applied that statute in its rules.

The issue here is really whether the Commission can ignore the bottom-up planning process and the determinations of the regional water planning groups, without first finding a valid basis to waive the requirement of consistency with what the regional groups have decided.

The answer is clearly "No." Water rights may be issued only if they reflect the determinations made in the regional plans, determinations which involve evaluations of impacts of potential strategies on agricultural and rural economies in the region. The Regional Water Planning Groups (RWPGs) are given board responsibility for crafting their regional water plan, which once approved, becomes part of the State Plan.

In crafting the regional plans RWPGs are required to evaluate impacts that are not factors that the Commission is required or allowed to take into account in issuing water right permits. RWPGs can reject proposed strategies, be they use of BRA's water, a new reservoir, an interbasin transfer, etc. The reasons could be one of many authorized under TWDB rules, such impacts on the economy or an area, loss of prime farmland or valuable timber, or the risks of transporting new invasive species from one basin to another.

The Commission's determinations, therefore, must be consistent with such determinations in the regional plans. The water right must be for the strategy or at least one of the back-up strategies that the RWPGs determined was the right strategy for any

specific need, given the other needs and other consideration for the region. BRA (an entity with future needs) and the Commission are not allowed to trump the regional plan by making a new decision for the regions on their strategies, timing of the strategies, or priority of the strategies, as discussed below.

Texas laws and rules on water planning and consistency.

There are clearly two requirements in Section 11.134(b)(3)(E). First, the relevant regional plan must be approved. There is no dispute about that. The ALJs correctly found that the plans are approved.

Second, the application must "address a water supply need in a matter that is consistent" with the plan(s). The legislature clearly intended the test not to just be whether there is an approved regional plan.

TWDB has defined the term "need" to be the difference between the projected demand for water and the projected supply anytime in the future. Thus, for example, it requires that regional water plans "include comparisons of existing water supplies and projected water demands to identify water needs."⁵⁹ The relevant regional water plans here do identify the needs.

TWDB rules then require submission of strategies to fill those needs. Several of the needs identified in the plans for Region G and H propose a strategy to use the SysOp permit. FBR has no objection to the Commission issuing a water right permit to BRA to "address" those needs. FBR also accepts the idea that the water right can provide more water to provide some flexibility. Thus FBR has consistently proposed 150,000 AFY.

⁵⁹31 Tex. Admin. Code §357.33(a).

The other needs in the two regional plans are proposed to be filled with other strategies, including conservation, other water supply projects, etc. Those decisions are properly the role and responsibility of the regional water planning groups. **Texas law and TWDB rules do not let a water supplier or an entity with a need for water in the future to be the ones that identify the strategy for the water plan.** The RWPGs must do so after an exhaustive evaluation of a number of factors, including impacts on agriculture and rural economics, again issues that are not part of TCEQ's water right permit evaluations. For example,

TWDB rules require that in their regional plans, RWPGs must **identify and evaluate** potentially feasible water management strategies for all ... identified water needs.⁶⁰

Thus, Texas law provides that it is the regional water planning groups that first identify and evaluate the potential strategies, not TCEQ, an applicant or an entity that projects a demand or need for the water in the future.

The TWDB rules then provide for the manner and extent to which strategies must be identified and evaluated in several pages of subsections to Section 357.34, including the following

(e) RWPGs shall evaluate and present potentially feasible water management strategies with sufficient specificity to allow state agencies to make financial or regulatory decisions to determine consistency of the proposed action before the state agency with an approved RWP.

(Emphasis supplied)

⁶⁰ 31 Tex. Admin. Code §357.34(a).

Thus, TWDB requires regional plans to identify the "strategies" for addressing "needs" to allow the Commission to determine consistency with an approved plan. TWDB rules allow plans to include primary and back-up strategies (really a list of strategies to fill possible needs). TWDB rules state:

Fully evaluated Alternative Water Management Strategies included in the adopted RWP shall be presented together in one place in the RWP.⁶¹

Thus, a regional plan can have alternatives, but again the strategies must be fully evaluated. Region G and H plans could have had the SysOp permit as alternatives for strategies that did not have the SysOp permit as its primary strategy. The plans did not. It is possible that the SysOp permit options did not pass the test that the RWGPs applied because of the impacts, or because of the alternatives. That does not matter. The point is that the SysOp permit is neither a primary nor secondary strategy under the regional water plans for most of the water needs that BRA claims it could fill.

Clearly, in adopting its rules, TWDB did not read Chapter 16 of the Water Code to require or even allow the Commission to be the one to determine which strategies should be considered for the various needs. TWDB's approach is consistent with Section 11.134 (b)(3)(E), which provides that the Commission may grant a water right even if the application does not fill a need consistent with the plan, but only if **"conditions warrant waiver" of that requirement.** Here, BRA has not asked for or provided any basis for a waiver.

⁶¹ 31 Tex. Admin. Code §357.35(g)(3).

This reading of Section 11.134(b)(3)(E), Water Code, and the water planning provisions of Chapter 16, Water Code, are supported by the detailed requirements in TWDB rules for which strategies can fill needs. The RWPGs cannot simply propose any strategies. They must identify and evaluate the impacts of any proposed strategy. TWDB rules require, for example:

(b) RWPGs shall identify potentially feasible water management strategies to meet water supply needs identified in §357.33 ... in accordance with the process in §357.12(b)....

(d) Evaluations of potentially feasible water management strategies shall include the following analyses: . . .

(2) An equitable comparison between and consistent evaluation and application of all water management strategies the RWPGs determine to be potentially feasible for each water supply need.

(3) A quantitative reporting of:

(A) The net quantity, reliability, and cost of water delivered and treated for the end user's requirements during drought of record conditions, taking into account and reporting anticipated strategy water losses, incorporating factors used calculating infrastructure debt payments and may include present costs and discounted present value costs. Costs do not include distribution of water within a WUG after treatment.

(B) Environmental factors including effects on environmental water needs, wildlife habitat, cultural resources, and effect of upstream development on bays, estuaries, and arms of the Gulf of Mexico.

(C) Impacts to agricultural resources...

(5) A discussion of each threat to agricultural or natural resources identified pursuant to §357.30(7) of this title ... including how that threat will be addressed or affected by the water management strategies evaluated...

(7) Consideration of third-party social and **economic impacts resulting from voluntary redistributions of water including analysis of third-party impacts of moving water from rural and agricultural areas.**

(8) A description of the major impacts of recommended water management strategies on key parameters of water quality identified by RWPGs as important to the use of a water resource and comparing conditions with the recommended water management strategies to current conditions using best available data....

(10) Other factors as deemed relevant by the RWPG including recreational impacts.⁶²

RWPGs are required to make the determination of which strategy or strategies are appropriate for any need, given a number of considerations including the impacts on a range of issues including ones that the Commission has no authority to consider.

It is no wonder the ALJs found that a decision that the SysOp permit is consistent with regional water plans is "troubling."⁶³

Conclusion:

The water planning process is a bottom- up process, and the Commission cannot trump that process without a valid justification. Without the Commission's determination that a waiver is justified, something that was neither requested by BRA nor considered by the ALJs, no water right can be or should be granted that does not reflect the determinations made at the regional level. The appropriation for the SysOp permit must be limited to an amount consistent with the regional water plans. That number should be no more than about 150,000 AFY.

⁶² 31 Tex. Admin. Code §357.34 (emphasis supplied).

⁶³ *Proposal for Decision* at 199.

XVIII. CONSERVATION AND DROUGHT PLANNING

ALJs' Description of Relevant Issues

Whether BRA's Drought Contingency Plan and Water Conservation Plan comply with Texas law and are enforceable permit conditions.

ALJs' Recommendation

The ALJs concluded that BRA's WCP meets the applicable requirements of the rules and is enforceable.

FBR Exceptions

It is FBR's position that BRA has failed to show that its Drought Contingency Plan and Water Conservation Plan, which become part of the permit, comply with Texas law or are enforceable.

The PFD sets out the arguments. The ED has even agreed that targets in the plan are not enforceable. The bigger issue is FBR's disagreement with the ALJs reading of the *Martinez* case.⁶⁴ FBR again argues that plans to develop plans are not the type of "plans" required by TCEQ rules. FBR also agrees with the arguments of NWF.

BRA's DCP is too discretionary and does little to ensure conservation of water resources. BRA's DCP provides its general manager with complete discretion to determine when circumstances warrant curtailment. BRA has failed to present an enforceable plan. At the time of the Second Hearing, BRA was under only Drought Contingency Stage 2 (of four stages), even though Possum Kingdom Reservoir was experiencing a drought of record.

⁶⁴ *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*, 93 S.W.3d 570 (Tex. App. Austin 2002, pet denied).

XIX. RETURN FLOWS

FBR is not providing any exceptions to the PFD on this issue, but relies on the arguments of NWF.

XX. BED AND BANKS AUTHORIZATION

FBR has no exceptions to this section.

XXI. INTERBASIN TRANSFERS

Description of the Issue

Whether BRA can be granted as part of its SysOp permit and WMP authority to sell or otherwise transfer water outside the Brazos River Basin and that

- 1) is outside the area of the permit application to basins such as the Red River basin, and
- 2) includes water authorized in existing BRA permits, which water is not authorized for use in a number of the basins BRA seeks to include.

ALJs' Recommendation

The interbasin transfer authorization fits within the proper exemptions, because

- 1) the water authorized for interbasin transfer does not have to meet all of the tests of 11.134, and
- 2) the permit does not authorize the use of existing water rights in ways not currently authorized.

FBR Exceptions

Summary

First, FBR disagrees that the SysOp permit can be issued to authorize diversion of new water in a segment of the Brazos River without consideration of the tests of Section 11.134 of the Water Code. For example, there is no basis to find that many of the proposed interbasin transfers (IBTs) would be consistent with an approved state water

plan, given that some basins, such as the Red River basin, are not in either Region G or H, and there is no evidence of any needs in such basins.

BRA has never argued that there are any needs it might ever serve, ever. Thus, in addition to the fact that a number of IBTs are not consistent with the state water plan, BRA has also not met the test of showing a beneficial use of water for such IBTs. BRA essentially admits that some of these IBTs are pure speculation, claiming the approval of them provides it with flexibility, if there becomes a need for its water in these basins. There is not even a showing of an intent to put the water to a beneficial use in a reasonable time in such areas of Texas.

The current limits in BRA's existing permits on the location of the IBTs and the amount of water that can be transferred under authorized IBTs in existing permits make it clear that, in the past, the Commission has considered more than just the tests in Section 11.085(v) to determine if and under what conditions an IBT can be made. The Commission has required applicants to prove that such transfers meet the test of Section 11.134 of the Water Code. BRA has shown no precedent established in any contested permit decision or court case to the contrary.

Second, FBR disagrees with the ALJ's second argument because FBR reads the proposed permit in conjunction with the WMP to allow BRA to use its existing water rights to provide water for any IBT authorized in the SysOp permit, which include such transfers not now authorized in existing permits. Existing permits have specific limits on the basins to which water authorized by the permits can use and how much of the authorized amount can be transferred to any other basin.

BRA's response to FBR's arguments in this case is:

BRA's understanding of the proposed new interbasin transfer authority ... is that it encompasses only water appropriated under the System Operation Permit, this authorization would have no effect on BRA's existing water rights, certainly not to amend or enlarge them.⁶⁵

An understanding is not the same as a permit term. Thus, since BRA is willing to accept the limit FBR urges on this part of the IBT issue, it will be easy for the ALJs to draft a permit limit. Clarity in TCEQ's permits is a good goal.

Moreover, while the ALJs point out that FBR is the only protestant to raise the issues, they fail to explain why. It is FBR's members who own lands along the river below the dams for Possum Kingdom and Granbury reservoirs or who use the segments of the river for recreation that will be most affected. They see a serious threat with the unlimited authority in the SysOp Permit for BRA to transfer water for use in the Red River basin by pipeline from Possum Kingdom reservoir or by a contract that allows water in BRA's water rights to be diverted upstream of the reservoir. That type of use has never been discussed or evaluated in this permit proceeding, yet it is allowed by the permit, possibly with no amendment to the WMP or one without public notice.

Discussion

As the ALJs indicated, the IBT law provides:

(a) No person may take or divert any state water from a river basin in this state and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a permit, certified filing, or certificate of adjudication from the commission authorizing the transfer.⁶⁶

⁶⁵ BRA's 2nd Reply Brief at 72.

⁶⁶ Section 11.085, Texas Water Code.

Thus, the law requires, for example, a person with a water right to obtain an amendment to add IBTs. All water amendments require approval under Section 11.134. Thus Section 11.134 applies to amendments for IBTs. That section clearly also applies to applications for new authorizations that include IBTs, such as BRA's application here.

BRA complains in its reply brief that FBR has presented no authority for its position.⁶⁷ Yet neither BRA nor the ALJs present any authority for their position. There is none, creating one more issue where the Commission's decision will set precedent that applies statewide, in a case that is very atypical.

If subsection (a) does not require a full consideration under Section 11.134 of exempt IBTs, it could not do so for standard IBTs either. The rest of Section 11.085 that applies to the non-exempt IBTs does not set out tests similar to 11.134 such as a showing that the water will be put to a beneficial use, or that the water will address needs identified in approved regional plans. Apparently, for exempt or regular IBTs, a water right holder could take an existing water right and seek authority to transfer it to another basin, in another region, and be in direct conflict with that region's water plan.

Focusing on the exempt IBT, there is no aspect of the law that provides an exemption from any aspect of Section 11.134. Instead, subsection (a), the provisions of which are not exempt for subsection (v) of Section 11.085, makes it clear that the Commission must authorize the specific transfer as part of the Section 11.134 review.

The only exceptions to the full test for IBTs are in Subsection (v) that reads:

(v) The provisions of this section, except Subsection (a), do not apply to:

⁶⁷ BRA's 2nd Reply Brief at 71.

- (1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same permit, certified filing, or certificate of adjudication;
- (2) a request for an emergency transfer of water;
- (3) a proposed transfer from a basin to its adjoining coastal basin; or
- (4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and the municipality's retail service area not within the basin.

Again, there is no exemption from the basic requirements of Subsection (a) or Section 11.134.

Clearly, the first two provisions under subsection (v) do not apply. FBR has no objection to transfers to the adjoining coastal basins under subsection (v)(3).

It is the exempt IBTs under subsection (v)(4) that are at issue.

The most significant issue for future water rights involves the amendment of the existing water rights here to allow expanded IBTs. The ALJs' reading of the permitting requirements of Section 11.134 has broad implications for future Commission decisions. It basically takes away all discretion, making exempt transfers automatic, as will be explained below.

The WMP here is complex document. FBR does not, however, see provisions to limit the use of existing water for IBTs authorized by the SysOp permit. Nor are there clear accounting provisions for such transfers that would allow TCEQ to monitor and enforce the limits on the use of water authorized in BRA's existing water rights. Thus, a simple permit provision to do what the ALJs say the permit does, i.e., limit use of water

under existing water rights to the limits in them, would be beneficial. That provision should also limit any water in existing water rights with no IBT from any interbasin use.

That still would not resolve FBR's concerns that the water authorized in the SysOp permit could be used in a number of basins for which there has been no showing of needs or impacts. While an amendment to the WMP might be required for some future uses, it is not clear that it would be under this permit for most proposed IBTs, or that it would be an amendment that required public notice or public participation.

The PFD, at page 6, summarizes BRA's existing water rights, and shows two with authority for and limits on diversions for IBTs. There are three permits that FBR identified in the record that allow IBTs. Thus, it appears that the vast majority of BRA's existing permits do not authorize any IBTs. These permits allowing IBTs and their limits are discussed below.

First, it should be noted that the application for the SysOp permit requests authorization for an IBT to the Red River Basin. BRA apparently does not have any authority for such a transfer in any existing permit. It has never been clear why BRA included a request for an exempt IBT to the Red River Basin in this permit application, given that the reservoirs involved here are divided from the Red River by the Trinity River Basin.

BRA has never provided any evidence to show that there is a need for any water from the SysOp permit in the Red River basin. If it is going to transfer water to that basin, the closest reservoir is Possum Kingdom, well south and east of the location where the Red and Brazos River basins come together.

The same is true for much, if not all, of the Guadalupe River Basin, completely divided from the Brazos by the Colorado River basin, with its own regional plans not even part of the evidence in this hearing to support a finding that there is even any need in those regional plans, much less a need that BRA can address.

If there were a need, even a far off need, that BRA is anticipating that it may address, BRA should be required to identify it to allow the Commission and others a chance to consider the implications of such a transfer during this comprehensive look at the proposed permit and WMP. If there is no anticipated need, the request to include the Red River basin for IBTs should be rejected.

If BRA can be issued an exempt IBT in the Red, Guadalupe, or any other river basin in Texas, others can also. Under the ALJs reading, the Commission has to grant any such requests without conditions.

Under the ALJs' reading, speculation is fine, since the beneficial use test does not apply. Likewise, the TWDB could find that the proposed use creates an interregional conflict with the regional plan under Section 16.053(h)(6), Texas Water Code,⁶⁸ and that would not block permit issuance, since the test of consistency with regional plans is not required under the ALJs proposed reading of Section 11.085.

If the ALJs' approach to exempt IBTs is adopted, none of the requirements in Section 11.134 for issuance of a permit apply. If that is so, there is no test to apply for an

⁶⁸ Section 16.053(h)(6), Texas Water Code:

If an interregional conflict exists, the board shall facilitate coordination between the involved regions to resolve the conflict. If conflict remains, the board shall resolve the conflict. On resolution of the conflict, the involved regional water planning groups shall prepare revisions to their respective plans The regional water planning groups shall consider all public and board comments; prepare, revise, and adopt their respective plans; and submit their plans to the board for approval and inclusion in the state water plan.

exempt IBT. Nothing in subsection (v) of Section 11.085 requires any evaluation or decisions by the Commission.

FBR does not believe that the Legislature intended to add the burden of applying for approval of an exempt IBT if all that is required is that the water right holder comply with one of the 4 provisions of subsection (v). The legislature would not have required authorization from the Commission if what it intended to do was simply set limits on the use of water authorized in water right permits.

Yet that is how BRA and the ED have argued the law reads. Under this analysis, the Commission apparently has no discretion to consider any aspect of the proposed IBT.

Yet, again, the Commission has limited IBTs, the location, and the amounts.

For example, BRA's Possum Kingdom Water Right Permit 1262A states:

Permittee is authorized an interbasin transfer of up to 5240 acre-feet of water per annum of the municipal authorization from Possum Kingdom Reservoir to the service area of permittee's customers in the Trinity River Basin.

All other existing permits involved here have specific limits on the amount of BRA's IBTs. An early Lake Granbury permit (#2111E) granted an IBT to the Trinity River Basin, pursuant to § 11.085 of the Texas Water Code, of up to 2600 ac-ft/yr of water of the municipal authorization from Lake Granbury. That permit was amended later in permit #12-5156A to allow diversion of water from the Lake:

of which amount no more than 20,000 acre-feet of the municipal authorizations may be transferred to the Trinity River Basin for municipal use by the Authority's service area customers within Johnson County.

Conclusion

There were obviously reasons why the Commission limited the location and amounts for IBTs in the past, whether exempt or not. Otherwise, there would be no limits in existing permits.

Under the ALJs' analysis, the Commission cannot, however, use Section 11.134 to do so for any type of IBT. That is a significant and new limit on the discretion and ability of the Commission to limit IBTs as it has in the past. There is no requirement in Section 11.085 that an IBT has to be consistent with the state or any regional water plan. There is no requirement that an applicant show a beneficial use. There is no requirement that the Commission can consider the impacts of the location or amount of the diversion on ground water recharge under Section 11.151. There is not even a requirement like the one in Section 11.134 (b)(1) to assure that the fee has been paid.

The ALJs position would eliminate all authority for the Commission to take such matters into consideration when a current water right holder applies for an IBT, exempt or full, as well as when a new water right is sought.

There is a simple solution. The Commission should reject the ALJs' analysis, and if it issues any permit, it could include IBTs that allow use in only Region G or H and only in amounts identified in the relevant regional plans for the SysOp Permit.

XXII. OTHER CONCERNS REGARDING THE PROCESS

FBR is not providing any exceptions to the PFD on this issue, but relies on the arguments of NWF and other protestants.

XXIII. BEFORE AND AFTER CONSTRUCTION OF THE ALLENS CREEK RESERVOIR

FBR has no exceptions to this section.

XXIV. COASTAL MANAGEMENT PLAN

ALJs' Description of Relevant Issues

Have the requirements for issuance of a water right under Texas coastal management law and TCEQ rules been met?

ALJs' Recommendation

1. Since the Commission's SB 3 environmental flow standards trump all other environmental requirements, those for protection of the Texas coastal zone have been met, as a matter of law.
2. Testimony of Mr. Geeslin in the first hearing is evidence that the SysOp permit is consistent with Texas coastal management requirements. And
3. A finding that the environmental flow standards are consistent with the state's coastal management plan is a valid substitute for a finding that any permit issued under the standards is also consistent with the plan.

FBR Exceptions

If the Commission adopts the ALJ's position that the SB 3 standards for a river basin trump all other environmental considerations in Chapter 11 Texas Water Code **and** any other Texas law, the Commission need not consider FBR's argument further on this or the next issue on wetland protection.

It is not clear what the ALJs are recommending, as they evaluate the facts in the record and make legal arguments that suggest they do not believe the SB 3 rules trump the requirement for a coastal consistency determination.

If the Commission does not find that the SB 3 standards trump environmental considerations, the ALJs' second and third arguments cannot support the required finding of coastal consistency.

On the second argument, FBR agrees that Mr. Geeslin did testify that the environmental flow regimes developed by TPWD and BRA would protect coastal resources. FBR strongly disagreed that Mr. Geeslin's testimony actually said that, however that no longer matters. Mr. Geeslin did not testify at all in the second hearing. Neither he nor anyone else testified that the new flow standards protect coastal resources or are consistent with the specific resources in the Brazos coastal basin.

The ED and BRA took the position that they do as a matter of law and presented no new evidence.

As discussed above, FBR disagrees. The flow regimes that were the basis of Mr. Geeslin's testimony in the original hearing have been replaced by less protective flow standards, at least in some locations as the TPWD stranded stream memo explains.⁶⁹

The new standards, under the ALJs' analysis, require protection of a flow regime at only one measurement point. The prior regimes are not limited in that way. Moreover, the regimes are clearly different.

Mr. Geeslin's testimony in the prior hearing is no longer valid evidence because it is no longer based on evidence of the provisions for protection of the environment. BRA or the ED could have called Mr. Geeslin back or put someone else on to testify about the new regimes, but they did not, apparently because of their view of the broad role of the SB 3 standards.

The ALJs argue in their PFD that "FBR points to no evidence to contradict Mr. Geeslin."⁷⁰ Yet, FBR did point and does point to evidence that contradicts Mr. Geeslin in

⁶⁹ FBR Ex. 16-C.

its arguments. The new proposed permit is one piece of such evidence. The new proposed permit reflects the new flow standards, not those that TPWD and BRA developed. The testimony of Dr. Alexander as to how those standards are to be applied is additional new evidence. It is her testimony that provides evidence of how the ED applies the flow standards - at only one measurement point for each diversion point.

The ALJs make two other arguments in support of their position. First, they state:

The permits proposed in the Second Hearing state, "the issuance of this permit is consistent with the goals and policies of the Texas CMP."⁷¹

A statement in the permit that the permit is consistent with the coastal management plan is not evidence of consistency. There is no testimony or any evidence to support that statement. That is why the ALJs had to point to Mr. Geeslin's testimony.

Second, the PFD argues that in adopting the flow regimes for the various basins, including the Brazos, the Commission found that the standards are consistent with the coastal management plan program. Again, that is not sufficient. The Commission rules on the program require consistency decisions for water right applications for appropriations over 5,000 AFT, not just the rules for the applications.⁷² The fact that the ED has proposed a coastal consistency determination is also a clear sign that it is this permit, not the underlying rules, that have to be evaluated for consistency.

⁷⁰ *Proposal for Decision* at 259.

⁷¹ *Id.*

⁷² 30 Tex. Admin Code §281.45(a)(2).

Finally, it should be clear that the burden to present evidence on the impact of a proposed water right permit on coastal resources and evidence to support a finding of consistency is on the applicant not protestants.

Protestants repeatedly raised the issue, even providing detailed legal briefing in their arguments and exceptions in the first hearing.

Conclusion

This issue is one more reason why the Commission must reject the recommendation of the ALJs on the role of the SB 3 rules.

XXV. WETLANDS

ALJs' Description of Relevant Issues

Have the requirements for protecting wetlands under Chapter 11, Texas Water Code and the policies in Commission rules and elsewhere to "achieve no overall net loss" of the existing wetlands functions been met by BRA.?

ALJs' Recommendation

There is no authority for FBR's proposition that the Commission must consider the impacts on or include provisions for protection of wetlands in issuance of a water right permit such as BRA's SysOp permit in basins with SB 3 standards.

FBR Exceptions

While this issue is similar to the issue of protecting other fish and wildlife habitat discussed above in Section XIII, it is also different.

First, TCEQ's environmental flow standards were never intended to protect wetlands that are out of the banks of a river or stream, wetlands that are maintained by periodic flooding. Yet, BRA's proposed permit will clearly reduce the frequency and extent of such inundation of these wetlands. BRA seeks and would be authorized under

this permit to take more flood flows, as long as it passes the smaller amounts that could be required under the pulse flow provision of the flow standards.

As the ALJs state, the ED maintains that nowhere in the Commission's rules or the Texas Water Code is there any requirement for the Commission to require overbanking or any similar type of extra condition to be placed in this type of permit.⁷³ It is not clear if the ALJs agree. FBR does not agree.

There are clear requirements on protecting fish and wildlife habitat, which includes wetlands. There is nothing in those legal requirements, such as Section 11.147(e) or 11.152, to suggest that the fish and wildlife habitat required to be maintained or protected are only those instream. In fact, for reservoirs permits, the Commission clearly has to consider impacts on those wetlands and other habitats that will be inundated outside the banks of the river.

The ED and the ALJs suggest that FBR did not present any evidence of the wetlands out of the banks that would be impacted. That of course is not FBR's responsibility. FBR identified the issue during the last hearing and BRA was on notice that FBR would again argue that BRA needs to present evidence on locations of significant wetlands and the potential impacts on such wetlands, unless they are instream and subject to an applicable flow standard or standards.

BRA does propose to consult with the Army Corps of Engineers on reservoirs it operates, but makes no commitment to agree to make releases or ask the Corps to make

⁷³ *Proposal for Decision* at 261.

releases for out of bank wetlands. This is no evidence of protection, certainly none for non-Corps reservoirs, where decisions on operations belong to BRA.

Second, protection of wetlands is not just a requirement in Chapter 11, it is the state policy found in other laws and regulations. For example, for its Section 401 certifications, Commission rules state:

Purpose and Policy. (a) This chapter establishes procedures and criteria for applying for, processing, and reviewing state certifications under [Federal Clean Water Act, §401, for activities under the jurisdiction of the agency. It is the purpose of this chapter, consistent with the Texas Water Code and the federal CWA, to maintain the chemical, physical, and biological integrity of the state's waters.

(b) It is the policy of the commission to achieve no overall net loss of the existing wetlands resource base with respect to wetlands functions and values in the State of Texas.⁷⁴

This rule is a clear statement of Commission policy. There is no legal or factual basis for the Commission to apply its policy selectively and to ignore its policy in issuing water rights, water rights which clearly can affect wetlands. To the contrary, the relevant statute for water rights requires the Commission to **maintain** fish and wildlife habitat to the extent practicable. Section 11.147 (e) requires the Commission to

include in the permit, to the extent practicable when considering all public interests, those conditions considered by the commission necessary to maintain fish and wildlife habitats.

Maintaining wetlands is one way the Commission avoids a net loss of fish and wildlife habitat.

⁷⁴ 30 TAC §279.2.

Certainly the protection of wetlands above the banks are not excluded from fish and wildlife habitat or wetlands the Commission policy seeks to protect. Yet, none of the SB 3 flow standards for the Brazos River basin require any overbank flows. In-bank pulse flows are required. Some pulses might result in out of bank flows when added to other flows downstream, as when there is a high flow in a tributary that enters downstream. That is not what the standards protect, however.

Moreover, wetland evaluation is common in many environmental permitting decisions, state and federal. There are wetland maps created by US Fish and Wildlife Service that could be used to identify the significant wetlands. Then BRA would need a wetland expert to evaluate the impacts and determine if some impacts should be avoided with limits on the operations under its proposed SysOp permit. The application process started in 2004. BRA has had plenty of time to get this work done to allow the Commission to make a decision on maintaining the wetlands in a large segment of the Brazos River basin and the state.

Conclusion

Significant wetlands need to be protected under Chapter 11 and Commission policy of avoiding loss of wetlands if they are outside of the banks of rivers and streams in the basin and are periodically inundated due to the periodic over bank flows. These are some of the flows that BRA now proposes to capture under the SysOp permit that it cannot capture now.

There is no evidence or testimony that the SB 3 standards will protect such wetlands. The standards were not established to do so. There is no evidence that there

are no such wetlands. There is no evidence that BRA's operation will maintain these wetlands. There is no way the Commission or anyone else can evaluate the extent of the impacts of the SysOp permit on such wetlands and determine how to "maintain" them given no information in the application or record about those wetlands and any potential impacts.

That is one more good reason why the Commission should reject the ALJs' reading of the SB 3 requirements and Commission standards and use the reading that FBR has shown to be the proper reading. Otherwise, the Commission will lose its ability to avoid loss of significant wetlands in future water right permit decisions in almost all river basins in Texas.

XXVI. WATERMASTER

FBR is not providing any exceptions to the PFD on this issue, but relies on the arguments of Dow and other protestants.

XXVII. POSSIBLE FUTURE LOSS OF USGS GAGES

ALJs' Description of Relevant Issues

Should the permit require BRA to replace a designated USGS gage used for the measurement points or provide for other contingencies if a gage is removed or inoperable for long periods of time?

ALJs' Recommendation

The ALJs concluded that no permit condition is required.

FBR Exceptions

Summary

Whether or not a provision is required, the Commission can and should include a permit provision to address the contingency that the USGS will be forced to remove a gage, USGS is not able to repair a gage that is not working for a reasonable time, or there are other significant limits on use of the measurement points to protect environmental flows.

There is certainly no limit, "as a matter of law," on the Commission's discretion to add this type of provision to protect environmental flow standards.

FBR believes the evidence in this hearing not only supports such a provision, but requires one under Commission rules.

Commission rules place a very significant burden on the environmental flow standards to protect instream uses and the ecological environment in the affected basin. For example, the Commission chose not to set aside water for the environment, but instead rely solely on the standards. The role of the standards becomes even more important if the Commission adopts the ALJs' proposal that the standards trump all other environmental and instream conditions. The rules require the Commission to add all necessary permit provisions to protect the standards.

Adding a permit provision to the SysOp permit will not set a precedent for other applications. Any BRA SysOp permit and WMP approved by the Commission will be complex and comprehensive. This application is a very different situation from a standard application with one diversion or even one reservoir, and the Commission order with such a provision can make that clear.

BRA should be required to assure that the environmental flow standards can be implemented, especially since it is its permit that triggers their use and there are not likely to be any more significant water rights in the affected basin.

Discussion

Commission rules require that

The commission **will** incorporate into every water right permit any condition, restriction, limitation, or provision, as provided in Chapter 297 of this title (relating to Water Rights, Substantive) that is reasonably necessary to protect environmental flow standards.⁷⁵

In the referenced Chapter 297 rules, the Commission also has required permit provisions:

The commission **will** incorporate into every permit or certificate of adjudication any condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.⁷⁶

It is very clear in these two rules, that the Commission can, if not must, do whatever is reasonably needed to assure the enforceability of the environmental flow standards.

The evidence in this case supports a permit provision. Given the scope of the SysOp permit, and the possible use of just one measurement point for any diversion, there is more than adequate evidence to show a reasonable need for a permit provision to assure that flows can be monitored at the measurement points.

The measurement points that are used in the environmental flow standards are at USGS gages. Since the initial hearing, the problem with assuring adequate measurements at gages has been in issue.

⁷⁵ 30 Tex. Admin. Code §298.15(c), emphasis added.

⁷⁶ 30 Tex. Admin. Code §297.59(a), emphasis added.

This is in part because USGS announced on its website that cuts in federal funding and other factors may require the agency to remove gages in rivers, including therefore, gages in the Brazos River Basin. Now, the website does not include gages in the Brazos River Basin, but it still highlights the problems with USGS funding, showing 77 gages that have been removed or are threatened across the country.⁷⁷

In the initial hearing, BRA and TCEQ proposed provisions in the various permits that recognized that some gages or other flow measuring devices in the Brazos basin may need to be added or replaced, since the devices are critical to the implementation and enforcement of provisions of the SysOp permit.

For example, the following permit provision was proposed by BRA for return flows:

Prior to diversion of the water authorized herein as attributable to return flows, if sufficiently accurate measuring devices are not available, Permittee shall install and maintain measuring device(s) capable of measuring within plus or minus 5% accuracy, at the discharge point of each wastewater treatment plant (WWTP) to record the amount of return flows discharged into the Brazos River or its tributaries on a daily basis. If Permittee does not, or cannot, install such metering devices at specific discharge points, return flows from those discharge points cannot be included in the return flow accounting plan and the additional water supply attributable to those return flows shall not be available for storage, diversion and use pursuant to this permit, unless an alternate method for measuring or estimating return flows from those discharge points is approved by the Executive Director.⁷⁸

⁷⁷Available at: http://streamstats09.cr.usgs.gov/ThreatenedGages/ThreatenedGages_str.html (last accessed August 20, 2015).

⁷⁸ BRA's proposed permit example provides this language in BRA's Ex. 8B at Provision 5.A. 4, page 9.

As a result, FBR proposed a similar permit provision during the initial hearing to assure that the flow monitoring equipment is available to protect the environmental flows regimes proposed jointly by TPWD and BRA.

In the proposed permit now, the ALJs find it appropriate, if not reasonably necessary to add a provision that states:

Upon implementation of the Brazos Watermaster Program the diverter . . . shall install a measuring device which accounts for, within 5% accuracy, the quantity of water diverted from the diversion point.⁷⁹

While the requirement for adding or replacing measurement capabilities for return flows is not in BRA's proposed permit now, or the permit recommended by the ALJs, that permit does include several provisions that appear to require BRA to maintain accurate flow measuring devices:

Permittee shall maintain a record of return flows as a part of its accounting plan required by Special Conditions 5.C and 5.D (return flow accounting plan). The return flow accounting plan must account, by source, for all return flows discharged. The return flow accounting plan shall include amounts discharged by outfall.⁸⁰

There is no flow measurement now, presumably because TCEQ will rely upon the measurement of the entity discharging, measurements required to be taken in discharge permits.

Certainly BRA and TCEQ can likewise rely upon USGS gages, but they cannot require USGS to maintain those gages.

Conclusion:

⁷⁹ See BRA's current proposed permit, BRA Ex. 132B (attached to the PFD), Provision 5. F. 1, page 10

⁸⁰ Id, Provision 5. A. 2. page 6.

FBR continues to take the position that the Commission not only should, but must, include a provision in the SysOp Permit to protect the enforceability of the flow standards. FBR believes it should be BRA's responsibility to do so, not TCEQ.

Clearly the environmental standards cannot be protected without the some devices capable of measuring flow and providing that information simultaneously to BRA, TCEQ and others who may need to comply with the flow standards. Those gages or devices are also important to other aspects of the permit and WMP.

FBR proposes the following provision based on the provision in the earlier permit:

Prior to diversion of the water authorized herein, if sufficiently accurate measuring devices are not available, Permittee shall install and maintain measuring device(s) capable of measuring within plus or minus 5% accuracy, at the applicable measurement point(s), recording such flows, and providing access to the results simultaneously on a publically available website. If Permittee does not, or cannot, install such devices, no diversions can be made under this permit unless Permittee requests in writing to use an alternate method for measuring or estimating flows at those points until Permittee can comply with the requirement for a use of a device above and that request is approved in writing by the Executive Director.

XXVIII. ADDITIONAL PERMIT CONDITIONS PROPOSED BY OTHER PARTIES

FBR is not providing any exceptions to the PFD on this issue, but relies on the arguments of NWF and other protestants.

XXIX. TRANSCRIPT COSTS

FBR takes no exception to this section.

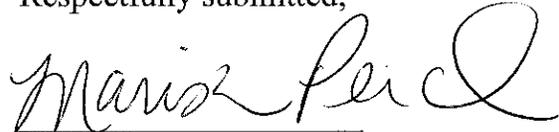
XXX. RECOMMENDATIONS

For the reasons stated in the introduction and other sections above, FBR recommends that the Commission either set the possible appropriation in the 100,000 to 200,000 acre-feet per year range and send the application to mediations or deny this permit application.

XXXI. PRAYER

FBR prays that the PFD be rejected and that the Commission proceed as FBR proposes in its Introduction and Recommendations sections.

Respectfully submitted,



FREDERICK, PERALES,
ALLMON & ROCKWELL, P.C. by:

Richard W. Lowerre, SBT# 12632900
Marisa Perales, SBT# 24002750
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 469-6000
(512) 482-9346 facsimile

COUNSEL FOR FRIENDS OF THE
BRAZOS RIVER, H. JANE VAUGHN,
LAWRENCE WILSON, MARY LEE
LILLY, KEN HACKETT, AND
BRAZOS RIVER ALLIANCE

CERTIFICATE OF SERVICE

By my signature below, I certify that on this 20th day of August, 2015, copies of the foregoing document were served upon the parties identified on the attached service list via electronic mail or deposit in the U.S. Postal Mail.



Marisa Perales

SERVICE LIST

FOR THE ADMINISTRATIVE LAW JUDGES

(via efilng)

The Honorable Judge William Newchurch
The Honorable Judge Hunter Burkhalter
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Phone: (512) 475-4993
Facsimile: (512) 322-2061

FOR DOW CHEMICAL COMPANY

Fred B. Werkenthin, Jr.
Booth, Ahrens & Werkenthin, PC
515 Congress Ave., Suite 1515
Austin, Texas 78701
Phone: (512) 472-3263
Facsimile: (512) 473-2609
fbw@baw.com

FOR POSSUM KINGDOM LAKE ASSOCIATION

John J. Vay
Enoch Keever PLLC
600 Congress Ave., Ste. 2800
Austin, Texas 78701
Phone: (512) 6151231
Facsimile: (512) 615-1198
john@allawgp.com

FOR THE PUBLIC INTEREST COUNSEL

Eli Martinez
Texas Commission on Environmental
Quality
P. O. Box 13087 MC-103
Austin, Texas 78711-3087
Phone: (512) 239-3974
Facsimile: (512) 239-6377
elmartin@tceq.state.tx.us

FOR THE EXECUTIVE DIRECTOR

Robin Smith
Ruth Ann Takeda
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P. O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239- 0463
Facsimile: (512) 239-3434
rsmith@tceq.state.tx.us

FOR THE CITY OF BRYAN

Jim Mathews
Mathews & Freeland LLP
P.O. Box 1568
Austin, Texas 78767-1568
Phone: (512) 404-7800

FOR THE CITY OF COLLEGE STATION

Jason Hill
Lloyd Gosselink Rochelle & Townsend,
P.C.
816 Congress Ave., Suite 1900
Austin, Texas 78701
Phone: (512) 322-5855
Facsimile: (512) 874-3955
jhill@lglawfirm.com

FOR CITY OF HOUSTON

Ed McCarthy, Jr.
Jackson, Sjoberg, McCarthy & Townsend,
L.L.P.
711 West 7th Street
Austin, Texas 78701-2785
Phone: (512) 472-7600
Facsimile: (512) 225-5565
emccarthy@jacksonsjoberg.com

FOR WILLIAM AND GLADYS
GAVAROVIC, COMANCHE COUNTY
GROWERS AND BRADLEY B. WARE

Gwendolyn Hill Webb
Stephen P. Webb
Webb & Webb
211 E. 7th St., Suite 712
Austin, Texas 78701
Phone: (512) 472-9990
Facsimile: (512) 472-3183
g.hill.webb@webbwebblaw.com

FOR THE CITY OF LUBBOCK AND
TEXAS WESTMORELAND COAL
COMPANY

Brad B. Castleberry
Lloyd Gosselink Rochelle & Townsend,
P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Phone: (512) 322-5800

Facsimile: (512) 703-2785
jmathews@mandf.com

FOR THE CITY OF ROUND ROCK

Steve Sheets
Sheets & Crossfield PC
309 E. Main St.
Round Rock, Texas 78664-5264
Phone: (512) 255-8877
Facsimile: (512) 255-8986
steve@scrllaw.com

FOR THE NATIONAL
WILDLIFE FEDERATION

Myron Hess
44 East Ave., Suite 200
Austin, Texas 78701
Phone: (512) 610-7754
Facsimile: (512) 476-9810
hess@nwf.org

Annie Kellough
National Wildlife Federation
44 East Ave., Ste 200
Austin, Texas, 78758
Phone: 512-610-7551
kellougha@nwf.org

FOR MIKE BINGHAM
(By U.S. Mail)

Mike Bingham
1251 C.R. 184
Comanche, Texas 76442
Phone: (254) 842-5899

FOR THE CHIEF CLERK

(via e-filing)
Bridget Bohac
Office of the Chief Clerk, MC 105
Texas Commission on Environmental
Quality
P.O. Box 13087
Austin, TX 78711-3087

Facsimile: (512) 472-0532
bcastleberry@lglawfirm.com

Phone: (512) 239-3300
Facsimile: (512) 239-3311

FOR NRG TEXAS POWER, LLC

Joe Freeland
Mathews & Freeland, L.L.P.
Westpark II, Suite 260
8140 N. Mopac Expressway
Austin, Texas 78759-8884
Phone: (512) 404-7800
Facsimile: (512) 703-2785
jfreeland@mandf.com

FOR TCEQ

Kyle Lucas
Texas Commission on Environmental
Quality
P.O. Box 13087 MC-222
Austin, Texas 78711-3087
Phone: (512) 239-0687
Facsimile: (512) 239-4015
klucas@tceq.state.tx.us

FOR THE CITY OF GRANBURY

Ken Ramirez
Shana Horton
Law Offices of Ken Ramirez, PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
Phone: (512) 681-4456
Facsimile: (512) 279-7810
ken@kenramirezlaw.com

FOR CHISHOLM TRAIL VENTURES,
L.P.

Monica Jacobs
Kelly Hart & Hallman, P.C.
301 Congress Ave., Suite 2000
Austin, Texas 78701
Phone: (512) 495-6405
Facsimile: (512) 495-6601
monica.jacobs@kellyhart.com

FOR GULF COAST WATER
AUTHORITY

Molly Cagle
Paulina A. Williams
Baker Botts L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
Phone: (512) 322-2532 (512) 322-2543
Facsimile: (512) 322-2501 (512) 322-3643
Molly.cagle@bakerbotts.com
paulina.williams@bakerbotts.com

Ronald J. Freeman
Freeman & Corbett LLP
8500 Bluffstone Cove. Suite. B-104
Austin, Texas 78759
Phone: (512) 451-6689
Facsimile: (512) 453-0865
rffreeman@freemanandcorbett.com

FOR TEXAS PARKS AND
WILDLIFE DEPARTMENT

Colette Barron-Bradsby
4200 Smith School Rd.
Austin, Texas 78744
Phone: (512) 389-8899
Facsimile: (512) 389-4482
Colette.barron@tpwd.state.tx.us

FOR BRAZOS RIVER AUTHORITY

Douglas Caroom

Emily W. Rogers
Susan M. Maxwell
Bickerstaff Heath, Delgado Acosta LLP
3711 S Mopac Building 1 Suite 300
Austin Texas 78746
Phone: (512) 472-8021
Facsimile: (512) 320-5638
dcaroom@bickerstaff.com
erogers@bickerstaff.com
smaxwell@bickerstaff.com

FOR HOOD COUNTY, CITY OF
GRANBURY AND LAKE GRANBURY
WATERFRONT OWNERS
ASSOCIATION

Ken Ramirez
ken@kenramirezlaw.com
Shana L. Horton
shana@kenramirezlaw.com
LAW OFFICES OF KEN RAMIREZ,
PLLC
901 Mopac Expressway South
Barton Oaks Plaza One
Austin, TX 78746
Phone: (512) 573-3670

Jeff Civins
John Turner
Haynes & Boone, LLP
600 Congress Ave., Suite 1300
Austin, Texas 78701
Phone: (512) 867-8477
Facsimile: (512) 867-8460
jeff.civins@haynesboone.com
John.turner@haynesboone.com