



Life's better outside.®

June 23, 2016

Commissioners

T. Dan Friedkin
Chairman
Houston

Ralph H. Duggins
Vice-Chairman
Fort Worth

Anna B. Galo
Laredo

Bill Jones
Austin

Jeanne W. Latimer
San Antonio

James H. Lee
Houston

S. Reed Morian
Houston

Dick Scott
Wimberley

Kelcy L. Warren
Dallas

Lee M. Bass
Chairman-Emeritus
Fort Worth

Carter P. Smith
Executive Director

Ms. Bridget C. Bohac
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR;
Application of Brazos River Authority for Water Use Permit No. 5851

Dear Ms. Bohac,

Enclosed for filing, please find the original of the Texas Parks and Wildlife Department's Exceptions to the Supplement to the Proposal for Decision on Remand in the above referenced matter.

Should you have any questions, please contact me at (512) 389-8899.

Sincerely,

Colette Barron Bradsby

cc: Service List

SERVICE LIST
BRAZOS RIVER AUTHORITY APPLICATION NO. 5851
TCEQ DOCKET NO. 2005-1490-WR
SOAH DOCKET NO. 582-10-4184

FOR THE BRAZOS RIVER AUTHORITY:

Doug G. Caroom
Susan Maxwell
Emily Rogers
Bickerstaff Heath Delgado Acosta, LLP
3711 S. Mopac Expressway, Building One,
Suite 300
Austin, TX 78746
(512) 472-8021
(512) 320-5638 (fax)
dcaroom@bickerstaff.com
smaxwell@bickerstaff.com
erogers@bickerstaff.com

FOR THE ADMINISTRATIVE LAW JUDGES:

William G. Newchurch
Hunter Burkhalter
State Office of Administrative Hearings
300 W. 15th St., Suite 502
Austin, TX 78701
512-475-4993
512-322-2061 (fax)

FOR THE CHIEF CLERK:

Bridget C. Bohac
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
512-239-3300
512-239-3311 (fax)

FOR THE EXECUTIVE DIRECTOR:

Robin Smith
Ruth Takeda
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
PO Box 13087
Austin, TX 78711-3087
512-239-0463
512-239-3434 (fax)
robin.smith@tceq.texas.gov

ruth.takeda@tceq.texas.gov

FOR THE PUBLIC INTEREST COUNSEL:

Eli Martinez
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, TX 78711-3087
512-239-6363
512-239-6377 (fax)
eli.martinez@tceq.texas.gov

FOR GULF COAST WATER AUTHORITY:

Molly Cagle
Paulina Williams
Baker Botts LLP
98 San Jacinto Blvd., Suite 1500
Austin, TX 78701
512-322-2532
512-322-2501 (fax)
molly.cagle@bakerbotts.com
paulina.williams@bakerbotts.com

Ronald J. Freeman
Freeman & Corbett LLP
8500 Bluffstone Cove, Ste. B-104
Austin, TX 78759-7811
512-451-6689
512-453-0865 (fax)
rfreeman@freemanandcorbett.com

FOR THE CITY OF LUBBOCK AND TEXAS
WESTMORELAND COAL CO.:
Brad B. Castleberry
Lloyd Gosselink Rochelle & Townsend,
P.C.
816 Congress Ave., Suite 1900
Austin, TX 78701-2442
512-322-5800
512-472-0532 (fax)
bcastleberry@lglawfirm.com

FOR MATTHEWS LAND & CATTLE CO.:

Leonard H. Dougal
Jackson Walker LLP
100 Congress Ave., Suite 1100
Austin, TX 78701-4072
512-236-2000
512-391-2112 (fax)
ldougal@jw.com

FOR THE NATIONAL WILDLIFE FEDERATION:

Myron J. Hess
Annie E. Kellough
505 E. Huntland Dr.
Suite 485
Austin, Texas 78752
512-610-7754
512-476-9810 (fax)
hess@nwf.org
kellougha@nwf.org

FOR THE FRIENDS OF THE BRAZOS RIVER,
HELEN JANE VAUGHN, D. WILSON, AND
MARY LEE LILLY, BRAZOS RIVER ALLIANCE,
AND KEN HACKETT:

Richard Lowerre
Marisa Perales
Frederick, Perales, Allmon, & Rockwell, P.C.
707 Rio Grande St., Suite 200
Austin, TX 78701-2719
512-469-6000
512-482-9346 (fax)
rl@LF-lawfirm.com
marisa@lf-lawfirm.com

FOR THE CITY OF BRYAN:

Jim Mathews
Mathews & Freeland LLP
PO Box 1568
Austin, TX 78767-1568
512-404-7800
512-703-2785 (fax)
jmathews@mandf.com

FOR THE CITY OF COLLEGE STATION
AND THE CITY OF LUBBOCK:

Jason Hill
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Ave., Suite 1900
Austin, TX 78701

512-322-5855
512-874-3955 (fax)
jhill@lglawfirm.com

FOR THE CITY OF ROUND ROCK:

Steve Sheets
Sheets & Crossfield PC
309 E. Main St.
Round Rock, TX 78664-5246
512-255-8877
512-255-8986 (fax)
slsheets@sheets-crossfield.com

FOR DOW CHEMICAL CO.:

Fred B. Werkenthin, Jr.
Booth, Ahrens & Werkenthin, PC
515 Congress Ave., Suite 1515
Austin, TX 78701-3504
512-472-3263
512-473-2609 (fax)
fbw@baw.com

FOR BRADLEY B. WARE, ROBERT STARKS,
WILLIAM & GLADYS GAVRANOVIC, AND
COMANCHE COUNTY GROWERS:

Gwendolyn Hill Webb
Stephen P. Webb
Webb & Webb
P.O. Box 1329
Austin, TX 78767
512-472-9990
512-472-3183 (fax)
g.hill.webb@webbwebblaw.com
s.p.webb@webbwebblaw.com

FOR THE CITY OF GRANBURY, LAKE
GRANBURY WATERFRONT OWNERS, AND
HOOD COUNTY:

Jeff Civins
Haynes & Boone LLP
600 Congress Ave., Suite 1300
Austin, TX 78701
512-867-8477
512-867-8640 (fax)
Jeff.civens@haynesboone.com

John Turner
Andrew Guthrie
Haynes & Boone LLP
232 Victory Ave.
Dallas, TX 75202
214-651-5671
214-200-0780 (fax)
John.turner@haynesboone.com
Andrew.guthrie@haynesboone.com

FOR THE CITY OF GRANBURY
AND LAKE GRANBURY COALITION:
Ken Ramirez
Law Offices of Ken Ramirez, PLLC
901 MoPac Expressway South
Barton Oaks Plaza One
Austin, TX 78746
512-329-2722
512-329-2707 (fax)
ken@kenramirezlaw.com

FOR THE POSSUM KINGDOM LAKE
ASSOCIATION:
John J. Vay
Enoch Keever, PLLC
One American Center
600 Congress Ave., Suite 2800
Austin, TX 78701
512-615-1231
512-615-1198 (fax)
john@allawgp.com

FOR THE CITY OF HOUSTON:
Ed McCarthy, Jr.
Eddie McCarthy
Jackson, Sjoberg, McCarthy & Townsend,
LLP
711 West 7th St.
Austin, TX 78701
512-472-7600
512-225-5565 (fax)
emccarthy@jacksonsjoberg.com
emc@jacksonsjoberg.com

FOR NRG TEXAS POWER, LLC:
Joe Freeland
Mathews & Freeland LLP
8140 N. Mopac Expwy.,

Westpark II, Suite 620
Austin, TX 78759
512-404-7800
512-703-2785 (fax)
jfreeland@mandf.com

FOR CHISHOLM TRAIL VENTURES, LP:
Monica Jacobs
Diana Nichols
Kelly Hart & Hallman, LLP
301 Congress Ave., Suite 2000
Austin, TX 78701
512-495-6405
512-495-6601 (fax)
Monica.jacobs@kellyhart.com
Diana.nichols@kellyhart.com

MIKE BINGHAM
(served via U.S. mail)
1251 C.R. 184
Comanche, TX 76442
254-842-5899 (phone)

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

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

**TEXAS PARKS AND WILDLIFE DEPARTMENT'S
EXCEPTIONS TO THE SUPPLEMENT TO THE PROPOSAL FOR DECISION
ON REMAND**

**TO: The Honorable William Newchurch and the Honorable Hunter Burkhalter,
Administrative Law Judges, State Office of Administrative Hearings.**

Comes now Texas Parks and Wildlife Department (TPWD) and respectfully files its Exceptions to the Supplement to the Proposal for Decision on Remand (SPFD) issued by the State Office of Administrative Hearings (SOAH) on June 3, 2016. TPWD was admitted as a party for the limited purpose of addressing the legal treatment of return flows in the application by the Brazos River Authority (BRA) for Water Use Permit No. 5851 (System Operation Permit). This brief addresses only the SPFD's return flows issues related to the System Operation Permit application and incorporated Water Management Plan.

I. EXCEPTION TO SCOPE OF THE RETURN FLOWS ISSUE

The January 29, 2016 Texas Commission on Environmental Quality (TCEQ) Interim Order (Interim Order) provides that the Commission requested on remand that the Administrative Law Judges (ALJs) and the Parties address several issues, including:

- 1.) Interim Order Issue (5)(i): Determine if the existing record includes persuasive evidence that BRA has requested and sought to obtain authorization of its own groundwater based effluent or its own surface water/developed water based effluent return flows in BRA's return flows approach; and
- 2.) Interim Order Issue (5)(ii): If BRA did seek an authorization for its own return flows in its requested appropriation, then the ALJs should remove that portion of BRA's own return flows from the appropriation and determine if BRA demonstrated that the amount of BRA's return flows meets all of the bed and banks application requirements. The ALJs should make a recommendation on whether the Commission can approve a bed and banks authorization for BRA's own return flows; but the Commission will not authorize this amount as a new appropriation in the SysOp Permit.

TPWD respectfully disagrees and excepts to the ALJs finding that the scope of the question of the amount of BRA's own return flows as presented in Interim Order Issue (5)(ii) cannot include a consideration of whether BRA in fact owns the return flows generated by BRA. SPFD at 6. For the following reasons, TPWD respectfully request the ALJs reconsider and find that the ownership (expressed in a water right) of BRA generated return flows is relevant to the determination of the amount of return flows to be removed from the appropriation amount in the draft BRA System Operation Permit and therefore relevant to whether the Commission can grant a bed and banks authorization for BRA generated return flows in this permit application.

A. Relevance of Ownership of Surface Water Based Return Flows

Interim Order Issue (5)(i) requires a review of the record to determine the sources of water BRA sought to appropriate. The ALJs find that the record shows that BRA sought to appropriate return flows in the Brazos River from multiple sources, including groundwater and surface water based return flows generated by BRA. SPFD at 4-5.

Interim Order Issue (5)(ii) is predicated upon an affirmative answer to Interim Order Issue (5)(i), and it directs the ALJs to remove "that portion of BRA's own return flows from the appropriation" and determine if BRA demonstrated that the amount of BRA's return flows meets all of the bed and banks application requirements. Then, after the bed and banks application requirements determination, the ALJs are to recommend whether the Commission can approve a bed and banks authorization for BRA's own return flows.

TPWD's briefs responsive to the Interim Order centered on identifying BRA's "own return flows" in order to determine the amount of return flows that should be removed from the appropriation as directed by the Commission. Ownership and control over water is an essential element for approval of a bed and banks authorization to convey the subject water through a state watercourse. The ALJs previously found that a bed and banks authorization can only be issued to a person who already has the right to use the water sought to be conveyed and that an original surface water right holder discharger is excluded from receiving bed and banks authority through a new appropriation.¹ All water that is the subject of a Texas Water Code (TWC) §11.042(a) (b) or (c) bed and banks application must be owned by the bed and banks applicant. In the Proposal For Decision on Remand, the ALJs stated, "...when BRA seeks to reuse its own surface water based return flows, it must obtain a bed and banks authorization pursuant to §11.042(c) **and it must have an appropriative right to the return flows.** If BRA's existing water rights allow it to indirectly reuse water, then BRA has the necessary appropriative right to the return flows. If BRA's existing rights do not authorize indirect reuse, then BRA must obtain a permit amendment authorizing direct reuse."² (Emphasis added). TPWD continues to support this finding and has based its

¹ Proposal For Decision on Remand at 227. TPWD's arguments are slightly different; TPWD has argued that the water right holder may either seek amendment of her underlying permit OR seek a new appropriation to authorize indirect reuse of her return flows.

² PFDR at 228.

briefs upon this statement of the law. The identification of the ownership interest through a specific appropriative right is necessary to address the bed and banks requirements.

B. Application of the PFDR and the Commission's Interim Order

TPWD did not except to certain return flow findings in the Proposal For Decision on Remand because all return flows were treated as a new appropriation in the System Operation Permit. The PFDR found that TWC §11.042(c) works as an exception to the general rule in TWC §11.046(c) that once return flows are discharged into a watercourse, the discharger loses claim to those waters. PFDR at 227. However, even applying this exception still requires an express authorization to divert and use specific return flows in accordance with an appropriative right. In the previous ALJ recommended draft permits, the appropriative right utilized was the System Operation Permit. After the Commission's Interim Order denying appropriation of BRA generated surface water return flows in the System Operation Permit, the appropriative rights are BRA's existing water rights that generate the return flows. These are the rights that control the purpose and place of use and other conditions of the already appropriated water, and under the Interim Order, BRA generated return flows are characterized as part of that appropriated water. But a specific provision in a water right is necessary to secure authority to use surface water return flows *after discharge into a watercourse*. The plain language of TWC §11.046(c) cannot be ignored:

Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used by the holder of a permit, certified filing, or certificate of adjudication for the purposes and locations of use provided in the permit, certified filing, or certificate of adjudication. Once water has been diverted under a permit, certified filing, or certificate of adjudication and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.

The Commission's Interim Order indicates the Commission agrees with the ALJs' approach. The Commission also found that TWC §§11.042 and 11.046 are reconcilable based on the plain language of the statutes and that the two subsections "address mutually exclusive scenarios."³ The statutes authorize separate actions and only TWC §11.046 speaks to necessary provisions in water right permits. As stated before, TPWD is concerned, that there is an inconsistency in *applying* the ALJs' and Commission approach to the BRA application; there has been no evidentiary finding that BRA's existing rights specifically authorize indirect reuse, and the Commission has determined that it will not authorize the use of BRA generated surface water return flows as a new appropriation in the System Operation Permit. Therefore, BRA has no permitted right to its generated surface water return flows, and, therefore, BRA does not have the express ownership right necessary to secure a bed and banks authorization for that water.

³ Interim Order at 3.

Unless expressly prohibited by permit, all water right holders may make direct reuse of water prior to returning the water to a state watercourse.⁴ Indirect use does require express authorization in a water right, otherwise the return flows simply become state water in the watercourse and available for appropriation or reservation for instream uses.⁵ TPWD agrees with the ALJs that an appropriative right is a necessary element for indirect reuse but such a right can only be gained through *express* authorization in the base water right.⁶ Read broadly, the findings in this case suggest that because direct reuse of appropriated water is authorized (i.e., not expressly prohibited) to a water right holder, indirect reuse is also authorized by implication. This implied right by the base water right holder then appears to make surface water return flows discharged into a state watercourse unavailable for appropriation by others and unavailable to the Commission for reservation for instream uses, even in the absence of a bed and banks authorization. It is this set of implied appropriative rights to water returned to a state watercourse that is at odds with the plain language of TWC §§11.021, 11.022, and 11.046 and is the source of concern to TPWD. It is the protection of state water, especially as it relates to return flows available to protect the state's fish and wildlife resources, that has drawn TPWD into this hearing. In participating in this hearing, TPWD hopes to avoid a decision that may nullify a critical source of water the Commission is statutorily authorized to reserve to provide flows for instream uses and freshwater inflows.

TPWD respectfully requests the ALJs approve this exception and consider TPWD's Brief on Disputed Issues and Reply to Parties' Disputed Issues Brief fully in determining the amount of return flows to be removed from the appropriation amount in the draft BRA System Operation Permit and determining whether the Commission can grant a bed and banks authorization for BRA generated return flows in this permit application.

II. EXCEPTION TO CHARACTERIZATION OF TPWD STIPULATION

TPWD respectfully excepts to SPFD language suggesting that TPWD conceded that BRA proved its entitlement to the [bed and banks] authorizations in TPWD's Proposed Stipulations, independent of whether BRA demonstrated ownership of BRA generated surface water based return flows. SPFD at 5 and 7. The full text of TPWD's stipulations make it clear that, based upon BRA's *appropriation request*, TPWD stipulated that BRA met all bed and banks authorizations:

⁴ PFDR at 227. BRA's usufructuary right to control and use water pursuant to its existing water rights is extinguished once that water is returned to a state watercourse. See TEX. WATER CODE §§11.021 and 11.046(c); Hutchins, *The Texas Law of Water Rights* 551 (1961); and *South Tex. Water Co. v. Bierie*, 247 S.W. 2d 268 at 272 (Tex.Civ.App.--Dallas 1952, writ ref'd).

⁵ TWC §11.046(c); TWC §11.021. See also *South Tex. Water Co. v. Bierie*, 247 S.W. 2d 268 at 272 (Tex.Civ.App.--Dallas 1952, writ ref'd).

⁶ Again, TPWD acknowledges that the ALJs have ruled that a new appropriation is not an avenue for the base water right holder to authorize use of the generated return flows but TPWD (and other parties, including BRA) has argued that a new appropriation is an alternate means to secure express authorization for indirect reuse.

TPWD also stipulates that BRA, in its permit application, sought a bed and banks authorization to convey and divert all of its requested appropriation, including water derived from groundwater based and surface water based return flows, and that BRA met all bed and banks application requirements.⁷

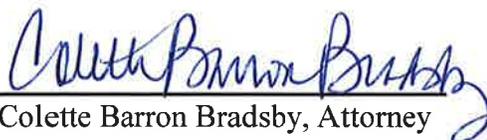
TPWD's stipulation was predicated upon BRA appropriating surface water based return flows generated both by BRA and others as specifically requested in its permit application. In its application, BRA requested authorization to "use the bed and banks of the Brazos River, its tributaries, and the Authority's reservoirs for the storage, conveyance and subsequent diversion of **water appropriated by this application** and from other sources."⁸ (Emphasis added.) BRA's request clearly seeks a bed and banks authorization separate and apart from a new appropriation, and the bed and banks request is conditioned upon receiving the new appropriation.

In the SPFD, like in the previous decisions, non-BRA generated surface water return flows are appropriated to BRA, and therefore, TPWD agrees that BRA is entitled to a bed and banks authorization for those flows as BRA has ownership of the water and demonstrated compliance with bed and banks regulatory requirements. Again, TPWD believes that BRA has met its burden to *appropriate* BRA generated surface water based return flows, but with the ALJs and Commission direction to deny that appropriation, TPWD must respectfully disagree that a bed and banks authorization can be granted to BRA for that water.

III. CONCLUSION

For the reasons stated above and within its Brief on Disputed Issues and Reply to Parties' Disputed Issues Brief, Texas Parks and Wildlife Department respectfully requests the Administrative Law Judges accept TPWD's Exceptions and make conforming changes to the Supplement to the Proposal For Decision on Remand. To effectuate the law and the Commission's specific direction in the Interim Order, BRA generated surface water based return flows should be removed from the appropriation amount in the System Operation Permit. Because use of BRA generated surface water based return flows is not expressly authorized in an appropriative right, the ALJs should recommend that the Commission cannot approve a bed and banks authorization for these surface water based return flows.

Respectfully submitted,


Colette Barron Bradsby, Attorney

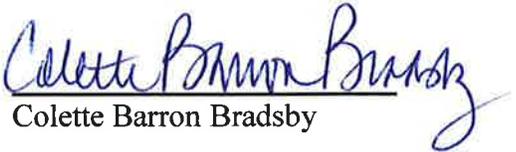
⁷ TPWD Proposed Stipulations and Disputed Issues at 2

⁸ Exhibit 7A-1 at 7.

Legal Division
Texas Parks & Wildlife Department
State Bar No. 00783607
4200 Smith School Road
Austin, Texas 78744
512.389.8899 PHONE
512.389.4482 FAX

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2016, the original of the Texas Parks and Wildlife Department's Exceptions to the Supplement to the Proposal for Decision on Remand was served by electronic filing upon the Chief Clerk of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, and a copy was served upon all persons listed on the attached service list via hand delivery, facsimile transmission, electronic transmission or deposit in the U.S. Mail.


Colette Barron Bradsby