WATER IN AND OUT OF STREAMS: REUSE AND RETURN FLOWS

TREY NESLONEY, *Austin*
Booth, Ahrens & Werkenthin, PC

State Bar of Texas
19TH ANNUAL
CHANGING FACE OF WATER RIGHTS
February 22-23, 2018
San Antonio

CHAPTER 10

TREY NESLONEY
Booth, Ahrens & Werkenthin, P.C.
206 East 9th Street, Suite 1501
Austin, Texas 78701
512-472-3262
tnesloney@baw.com

BIO

Trey Nesloney is an attorney at Booth, Ahrens & Werkenthin, P.C in Austin, Texas. A native Texan, he grew up on his family's farm and ranch in Mason, Texas. Mr. Nesloney has been practicing water and environmental law for over 10 years. He received his J.D. from the University of Texas in 2006. Before practicing law, he worked as a Civil Engineer in Dallas, Texas. He is a Certified Engineer-In-Training in Texas. Mr. Nesloney graduated cum laude from Texas A&M University with a Bachelor of Science in Civil Engineering and was a member of the Texas A&M chapter of Chi Epsilon, a Civil Engineering Honor Society. He is a member of the American Bar Association, State Bar Association, and the Texas Water Conservation Association.

EDUCATION

Texas A&M University (B.S. in Civil Engineering, graduated Cum Laude, 2000)
University of Texas (J.D., 2006)

OTHER RECENT PUBLICATIONS

"Chapter 36 Groundwater Conservation Districts and Subsidence Districts," *Essentials of Texas Water Resources*, Chapter 16 (2014) (*co-author*)
"Fracking Dry: Issues in Obtaining Water for Hydraulic Fracturing Operations in Texas," *Texas Environmental Law Journal* (May 2015), 45 Tex. Envtl. L.J. 197.
"Texas Water Law Case Update," *2016 Water Law Fundamentals and Texas Water Law Institute* (2016)
"Issues Out of BRA SysOp," State Bar of Texas, *18th Annual Changing Face of Water Rights Course*, Chapter 3 (2017)

TABLE OF CONTENTS

WATER IN AND OUT OF STREAMS: REUSE AND RETURN FLOWS

INTRODUCTION

As Texas' population increases, and existing water supplies are stressed, the practice of water reuse will be a key component of meeting increasing demands. The 2017 State Water Plan states that reuse is expected to provide approximately fourteen percent of the recommended water management strategy supplies in Texas by the year 2070. *See* TEX. WATER DEV. BD., Water for Texas 2017 State Water Plan, Executive Summary at 8 (2017), *available at* http://www.twdb.texas.gov/waterplanning/swp/2017/chapters/00-SWP17-EXEC-SUMMARY.pdf. Water Reuse involves taking water that has been beneficially used for one purpose and using it again for another beneficial use. Specifically, the Texas Water Development Board defines water reuse as "the beneficial use of reclaimed water (domestic or municipal wastewater) that has been purified so that its quality is suitable for the intended use." TEX. WATER DEV. BD., HISTORY OF WATER REUSE IN TEXAS (February 2011) (hereafter "TWDB History of Reuse") at 4, *available at* http://www.twdb.texas.gov/innovativewater/reuse/projects/reuseadvance/doc/component_a_final.pdf. Reclaimed water is "domestic or municipal wastewater that has been treated to a quality suitable for a beneficial use." 30 Tex. Admin. Code § 210.3. Reclaimed water is also sometimes referred to as "recycled" or "reuse" water. *See* TWDB History of Reuse at 5. If treated wastewater is discharged from a wastewater treatment facility and then returned to the watercourse, it is considered "return flows." *Id*.

There are two types of reuse: direct reuse and indirect reuse. Direct reuse is the "use of reclaimed water that is piped directly from the wastewater treatment plant to the place where it is used." *Id*. Direct reuse is explicitly authorized by Chapter 11 of the Texas Water Code. *See* Tex. Water Code § 11.046 (water appropriated under a water right "may, prior to its release into a watercourse or stream, be beneficially used and reused by the holder of" the water right). Indirect reuse is the "use of reclaimed water by discharging to a water supply source, such as surface water or groundwater, where it blends with the water supply and may be further purified before being removed for nonpotable or potable uses." TWDB History of Reuse at 5.

This paper focuses solely on indirect reuse issues involving obtaining authorizations to divert return flows from a state watercourse. There has been much debate in the legal community regarding the correct treatment of return flows based on Texas law. Two cases are currently being argued in the Texas court system that may finally end this debate. Before examining those potentially significant cases, some earlier Texas case law is helpful in establishing the arguments involving indirect reuse and the history of this debate.

EARLY REUSE CASES

Halsell

In *Halsell v. Tex. Water Comm'n*, 380 S.W.2d 1 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.), the Halsells' sued the Texas Water Commission for granting the City of Wichita Falls' permit to impound 63,400 acre-feet of water by constructing a dam on the Little Wichita River, and to take annually 45,000 acre-feet out of the watershed into the Wichita River watershed for use in the City of Wichita Falls. *Id*. at 3. The Halsells owned the land on both sides of the watercourse above and below the proposed dam site. *Id*. On appeal, the Halsells alleged that the application had a defect because "the point of return of 'surplus' water was incorrectly given." *Id*. at 6. The application had identified the point of return at the base of the dam on the Little Wichita River, but the permit that was ultimately granted stated that, "[a]ll water diverted hereunder except that which is consumed as a consequence of the reasonable and beneficial use thereof for the purpose specified herein shall be returned to the Wichita River." *Id*. The applicable statute (Art. 7579 V.A.T.S.) dealing with "Surplus water" stated, "[a]ll surplus water taken or diverted from any running stream and not used by the appropriator or disposed of to consumers for the purposes stated in this chapter shall be conducted back to the stream from which taken or diverted, wherever such water may be returned by gravity flow, whenever reasonably practicable." *Id*. The Halsells essentially were arguing that the City of Wichita Falls' return flows would be discharged into the Wichita River, when the statutory requirement was for this "surplus water" to be discharged back into the Little Wichita River.

The Court of Civil Appeals disregarded the Halsells' arguments and held that the application was correct. In doing so, the court recognized a dichotomy between "return" water and "surplus" water, stating:

> [W]e hold that water which has been used and processed by the City of Wichita Falls is not "surplus" water within the meaning of Art. 7579. It will be "used" water. It will have been disposed of to customers for the purposes authorized by law and the Commission. There is, then, no statutory requirement that this water, if such it be, be returned to the Little Wichita.
> *Id*. at 7.

Therefore, based on the statutes in place at the time, water that was diverted from the watercourse, used by

the appropriator, and then returned to the watercourse was not "surplus water."

Domel

In *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999, pet denied), the Domels owned property along a tributary less than a mile downstream from the City of Georgetown's proposed wastewater treatment plant. *Id*. at 351. The city amended its discharge permit to increase the maximum daily discharge from 250,000 gallons per day to 2.5 million gallons per day. *Id*. The Domels sued the city, alleging that the unnatural flow of effluent through the tributary caused a taking of or damage to their property without compensation. *Id*. at 352. The city argued that the discharge of effluent could not be a taking because the tributary is state's watercourse. *Id*. The city filed for summary judgment and the trial granted the motion.

On appeal, the Domels argued that the tributary was not a watercourse, and even it was, the city's discharge of treated wastewater constituted a taking or damaging of their property in violation of the Texas Constitution because the treated effluent was not part of the natural flow. *Id*. at 353-57. The Court of Appeals determined that the tributary was a watercourse. *Id*. at 367. Additionally, the Austin Court of Appeals held that "[o]nce return flows are given back to a watercourse, they become part of the normal flow." *Id*. at 360. The court also dismissed the Domels' arguments that the state cannot authorize the transport of the effluent using the tributary because it was a non-navigable stream. "Although the State did not retain ownership of lands underlying non-navigable water, it does not need title to use the bed and banks of a watercourse for their defined purpose of transporting water." *Id*. at 358. The discharge of effluent was not a constitutional taking, because "[i]n using the tributary to discharge treated wastewater, the City has never flooded the Domels' property or violated the parameters of the discharge permit granted by the Water Commission." *Id*. at 361.

City of San Marcos

In *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied), the Austin Court of Appeals overturned the Texas Commission on Environmental Quality's ("TCEQ") decision to grant the City of San Marcos a permit to convey discharged wastewater effluent into the San Marcos River and to divert water from the river at a point approximately three miles downstream of the discharge point. *Id*. at 265-66. The wastewater was derived from groundwater, specifically from "municipal water supply from wells drilled into a groundwater formation known as the Edwards Aquifer." *Id*. at 266. In 1995, the City of San Marcos submitted to the TCEQ an application for a "bed and banks" permit to "convey treated sewage effluent, created by the City's municipal use of groundwater from the Edwards Aquifer, from the discharge point at the City's wastewater treatment plant to a downstream diversion point." *Id*. The diverted water would be transported to a new water treatment plant, where it would be treated to drinking water standards and then returned to the City of San Marcos' potable water supply system. *Id*. The San Marcos River Foundation and Dr. Jack Fairchild (collectively "the Foundation") sought judicial review of the TCEQ's final order granting the bed and banks permit, and the City of San Marcos sought judicial review of some of the limiting conditions in the permit. *Id*. at 266. The trial court affirmed the TCEQ's order in all respects, and the Foundation appealed. *Id*.

On appeal, "the Foundation argue[d] that the district court erred because no legal authority permits the City to divert state water without an approved appropriative right." *Id*. The City of San Marcos did not seek an appropriation because "all of the water to be conveyed and used is the city's private water." *Id*. The Foundation's argument was that once the City of San Marcos' groundwater based return flows were discharged into the watercourse, they could not be subsequently diverted downstream without obtaining an appropriative right; conversely, the City of San Marcos claimed it did not need an appropriative right to divert this water downstream, and instead only needed a bed and banks permit, because the water being discharged was its privately-owned groundwater based effluent. Whether obtaining an appropriation or bed and banks permit was proper depended on the character of the water once it was discharged back into the watercourse. "One of the principal issues for determination was whether the City would be diverting its private water or state water." *Id*. at 267. The most "crucial issue in determining the nature of the case is defining the legal character of the City's wastewater after it is discharged in the San Marcos River." *Id*.

The Austin Court of Appeals concluded that "there is no common-law right by which the City can retain ownership over its wastewater effluent after discharging it into a state watercourse." *Id*. at 266. The court distinguished prior cases involving using watercourses to transport groundwater from the groundwater-based effluent discharged by the City of San Marcos. "[T]he City is seeking to transport its effluent, which is foreign to the water found in the waterway. Although the effluent is groundwater-derived, it is no longer groundwater." *Id*. at 274. The court, relying on its prior decision in *Domel*, stated that "[o]nce return flows are given back to the watercourse, they become part of the normal flow." *Id*. at 275 (citing *Domel*, 6 S.W.3d at 360). "By intentionally discharging its effluent into the river, where it eventually commingles with the State's water, the City effectively abandons its control over the identifying characteristics of its property." *City of San Marcos*, 128 S.W.3d at 277. The Court of Appeals

reversed the judgment of the district court, rendered judgment that the TCEQ's order granting the bed and banks permit be vacated, and ordered that "the City's application to convey and divert water be denied. At the time that the City filed its application, there was no explicit statutory authority on which the Commission could rely in granting the permit." *Id*. at 279.

Notably, the Court of Appeals found "it necessary to point out that in 1997, while the City's application was pending before the SOAH, the Texas Legislature passed the comprehensive statewide water plan known at Senate Bill 1. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (codified throughout the Texas Water Code)." *Id*. at 269. The court recognized the changes made by Senate Bill 1, but stated that it "can have no effect on the City's application because of its grandfather clause" because the decision must be based on pre-1997 law. *Id*. at 269. Essentially, the Austin Court of Appeals was acknowledging that Senate Bill 1 had added language explicitly authorizing the type of bed and banks permit the City of San Marcos sought in the case, to allow a bed and banks transport of effluent derived from privately owned groundwater. Senate Bill 1 also added other provisions to Chapter 11 of the Texas Water Code that are part of the current debate regarding how reuse should be permitted.

SENATE BILL 1

Senate Bill 1 made three major changes to Chapter 11 of the Texas Water Code that effect how water reuse and return flows are treated and permitted. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610. First, it added explicit bed and banks authorization for the *City of San Marcos* situation in Tex. Water Code § 11.042(b), allowing an applicant to obtain a bed and banks permit to transport his or her "existing return flows derived from privately owned groundwater." This was recognized by the Court of Appeals in *Domel*. *Domel*, 6 S.W.3d at 360 ("Senate Bill 1 expanded the Water Code section on the delivery of water using the bed and banks of a watercourse to include treated wastewater return flows derived from private owned groundwater."). Section 11.042(b) states as follows:

> (b) A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.
>
> Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.06, sec. 11.042, 1997 Tex. Gen. Laws 3610, 3620 (codified at Tex. Water Code § 11.042(b)).

Senate Bill 1 also added another provision to the bed and banks statute as a new subsection (c). The new provision allowed a "person who wishes to convey and subsequently divert water in a watercourse" the ability to obtain a bed and banks permit to discharge, transport, and subsequently divert water. The full subsection states:

> (c) Except as otherwise provided in Subsection (a) of this section, a person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries. Water discharged into a watercourse or stream under this chapter shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered. Authorizations under this section and water quality authorizations may be approved in a consolidated permit proceeding.
>
> Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.06, sec. 11.042, 1997 Tex. Gen. Laws 3610, 3620 (codified at Tex. Water Code § 11.042(c)).

The third major change was an amendment the "surplus water" statute in Section 11.046 of the Texas Water Code. Post Senate Bill 1, the new statute stated:

> Sec. 11.046. RETURN SURPLUS WATER.
> (a) A person who takes or diverts water from a watercourse or stream for the purposes authorized by this code shall conduct surplus

> water back to the watercourse or stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so.
> (b) In granting an application for a water right, the commission may include conditions in the water right providing for the return of surplus water, in a specific amount or percentage of water diverted, and the return point on a watercourse or stream as necessary to protect senior downstream permits, certified filings, or certificates of adjudication or to provide flows for instream uses or bays and estuaries.
> (c) 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 and reused 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.
> (d) Water appropriated under a permit, certified filing, or certificate of adjudication which is recirculated within a reservoir for cooling purposes shall not be considered to be surplus for purposes of this chapter.
> Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.07, sec. 11.046, 1997 Tex. Gen. Laws 3610, 3620-21 (codified at Tex. Water Code § 11.046).

The second and third Senate Bill 1 amendments (adding 11.042(c) and amending 11.046) have been the subject of much debate regarding their purpose and applicability regarding reuse and return flows. While the addition of 11.042(b) made it clear that a person could get a bed and banks authorization to transport effluent derived from privately owned groundwater, commenters argued whether other types of return flow authorizations should be appropriations or bed and banks permits post Senate Bill 1. This debate was a key issue in the Brazos River Authority's ("BRA") System Operation ("SysOps") Permit Application.

BRA SYSOPS

On June 25, 2004, BRA filed an application seeking issuance of a System Operations Water Use Permit No. 5851 (the "SysOps Application"). BRA's SysOps Application proposed that by operating several reservoirs in the Brazos River Basin as a system, and utilizing available return flows, BRA could make large quantities of water available for use as a reliable supply. Most notably for this discussion, the BRA SysOps Application sought authorization to divert and use large quantities of return flows that were: (1) derived from water supplied by BRA or from wastewater treatment plants owned or operated by BRA ("BRA Return Flows"), and (2) discharged by others that BRA claimed were available for appropriation once they were returned to the watercourse ("Others' Return Flows").

Procedural History

The BRA SysOps Application was declared administratively complete by the TCEQ Executive Director ("ED") on October 15, 2004. On May 5, 2010, the TCEQ issued an order referring the BRA SysOps Application to the State of Office of Administrative Hearings ("SOAH") for a contested case hearing. Several parties protested the application. The first evidentiary hearing (hearing on the merits) on the SysOps Application was held from May 9th to June 2, 2011. On October 17, 2011, the two Administrative Law Judges ("ALJs") that presided over the hearing issued a Proposal for Decision. *See* Proposal for Decision, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184 (Oct. 17, 2011) *available at* http://www.soah.texas.gov/pfdsearch/pfds/582/10/582-10-4184-pfd1.pdf (the "SysOps PFD"). On January 25, 2012, the TCEQ Commissioners considered the SysOps PFD and BRA's SysOps Application at their agenda hearing, and decided to issue an interim order remanding the application to SOAH, pending BRA's development, review, and submission of a Water Management Plan ("WMP") associated with the application.

On November 28, 2012, BRA filed its WMP as an amendment to the application. On June 28, 2013, the amended application and WMP were declared administratively complete by the TCEQ ED. Again, several parties protested the application. A second hearing on the merits was held from February 17-26, 2015, on the amended application including the WMP. On July 17, 2015, the ALJs issued their Proposal for Decision on Remand, recommending the partial granting of BRA's SysOps Application, with suggested changes to the language of the draft permit. *See* Proposal for Decision on Remand, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184 (July 17, 2015) (the "SysOps PFDR"). On January 20, 2016, the TCEQ Commissioners considered the SysOps PFDR at their agenda hearing. The TCEQ Commissioners agreed with the findings and conclusions in the SysOps PFDR on most issues, but remanded the case to SOAH for further consideration of

issues associated with reservoir capacities and return flows. The Commissioners directed that this be a limited remand, meaning that the evidentiary record was not to be reopened.

Pursuant to the TCEQ directive, the parties filed briefs associated with the remanded issues during March and April of 2016. The ALJs considered the arguments, and on June 3, 2016 issued a Supplement to the Proposal for Decision on Remand that addressed the outstanding issues. *See* Supplement to the Proposal for Decision on Remand, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184 (June 3, 2016) *available at* http://www.soah.texas.gov/pfdsearch/pfds/582/10/582-10-4184-pfd2.pdf (the "SysOps Supplement"). At the August 24, 2016 TCEQ agenda hearing, the TCEQ Commissioners considered the SysOps Supplement and adopted the ALJs' proposed findings of fact and conclusions of law with only minor changes to the permit language proposed by the ALJs. On September 16, 2016, the TCEQ issued an order granting the BRA SysOps Application, providing the Commission's current interpretation of the law associated with return flows. *See AN ORDER GRANTING IN PART THE AMENDED APPPLICATION BY THE BRAZOS RIVER AUTHORITY FOR WATER USE PERMIT NO. 5851 AND APPROVING ITS WATER MANAGEMENT PLAN; TCEQ DOCKET NO. 2005-1490-WR; SOAH DOCKET NO. 582-10-4184* (Sept. 16, 2016) (the "SysOps Final Order").

The opposing views regarding the treatment of return flows and interpretation of these statutory provisions were key issues in the administrative case involving the BRA SysOps Application. *See generally* SysOps PFD, SysOps PFDR, and SysOps Supplement. BRA and the TCEQ ED had opposing views as to how discharge, diversion, and use of return flows should be authorized and accounted for under the permit.

Arguments on Return Flows

The TCEQ ED's position was that discharge and diversion of return flows was governed by Tex. Water Code § 11.042 (involving bed and banks deliveries of water). Under the TCEQ ED's interpretation, Section 11.042(b) and (c) allowed potential utilizers of return flows to obtain a bed and banks authorization for indirect reuse. The applicant for the bed and banks authorization had to be the holder of the base water right, the owner or operator of the wastewater treatment facility, or a third party with contractual rights from either of them. However, this interpretation would only allow BRA to obtain an authorization to discharge and subsequently divert its own BRA Return Flows; under the ED's interpretation, BRA could not appropriate Others' Return Flows as it had requested in the SysOps Application.

In contrast, BRA asserted the water code provision involving surplus water, Section 11.046 of the Texas Water Code, authorized it to divert and use of return flows, including Others' Return Flows. BRA's legal interpretation assumed that once discharged, all return flows are available for appropriation pursuant to Tex. Water Code § 11.046(c) for beneficial use by any existing water right holder or future appropriator. *See* SysOps PFD at 137. BRA argued that once discharged, all return flows would be subject to established rules regarding the use and appropriation of state water. *Id.* To the extent return flows make up part of a new appropriation, BRA contended that those return flows would be subject to environmental flow requirements. *Id*. BRA also argued that return flows would only be appropriated to the extent they are available as unappropriated water after meeting the needs of all existing senior water rights. *Id.* at 138.

The ED disagreed with BRA's interpretation, and argued that a Section 11.042 bed and banks authorization for indirect reuse could be obtained by the holder of the base water right, the owner or operator of the wastewater treatment facility, or a third party with contractual rights from either of them. *Id*. The ED stated that this bed and banks authorization, while not considered an appropriation, would be given the priority date of the application insofar as it applies to historically discharged return flows in order to protect existing rights. *Id*. Under the ED's interpretation, historically discharged return flows would be subject to environmental flow and beneficial inflow requirements. *Id*. Discharges in excess of historical amounts would not be subject to call by senior rights and would have no environmental flow requirements. *Id*. The maximum authorization would be limited to the current Texas Pollutant Discharge Elimination System ("TPDES") permitted discharge amount. *Id*. Any increase would be limited to the current TPDES permitted discharge would necessitate an amendment of the bed and banks permit to authorize use of the increased volume. *Id*. The ED disagreed with BRA's interpretation of Section 11.046(c), specifically pointing out the language allows "appropriation by *others*," which would mean BRA could not appropriate its own return flows.

ALJs' Decision in First Evidentiary Hearing

The ALJs analyzed whether return flows should be considered "state water" and, therefore, available for appropriation by anyone (BRA's argument), or remain the property of the original water right holder or discharger (ED's argument). The ALJs examined BRA's reliance on Section 11.046(c), which states that once water has been diverted and is returned to a watercourse "it is considered surplus and therefore subject to…appropriation by others," and the ED's reliance on Section 11.042(c), which states that a person who wants to "convey and subsequently divert water in a watercourse" must obtain a bed and banks permit from the TCEQ. *See* SysOps PFD at 147-48. The ALJs

acknowledged that the "evidence demonstrates that no consistent agency policy exists with respect to these reuse issues." *Id*. at 147. The ALJs then disagreed with BRA's interpretation of Section 11.042(c), stating that the bed and banks authorizations contemplated in Section 11.042(c) apply to a wide array of types of water, including return flows. *Id*. at 148. However, the ALJs also disagreed with the ED's interpretation of Section 11.046(c), stating that the right to appropriate return flows under that section does not extend only to the discharger of those return flows, the owner of the base water right from which the return flows originated, or someone having contractual rights with either of them. *Id*. at 148-49.

The ALJ's stated that "the legislative intent behind this language was that once a holder of a water right discharges his return flows back into a watercourse, then third parties (i.e. 'others') could seek to appropriate that returned water." *Id*. at 149. "[B]ecause Section 11.046(c) states that discharged return flows are available for appropriation 'by others,' the discharger of the return flows is *not* among those who can seek to appropriate the flows pursuant to Section 11.046(c)." *Id*. (emphasis in original). The ALJs found no conflict between 11.042 and 11.046; they determined that the two sections deal with mutually exclusive scenarios. *Id*. Section 11.042 entitles a person to convey and subsequently divert water for which he or she already holds an appropriative right. *Id*. By contrast, Section 11.046 deals with an appropriative right. *Id*. at 150. The ALJs determined that once return flows are returned to the watercourse, they could be appropriated. *Id*. As explained further in the SysOps PFD:

> This means that the determination of which section is applicable to a request to divert return flows depends upon the relationship of the requestor to the return flows being sought. Based upon the wording of the two statutes, the ALJs conclude that when BRA seeks to reuse its own surface water-based return flows, it need only obtain a bed and banks authorization pursuant to Section 11.042(c), and need not obtain an appropriative right pursuant to Section l1.046(c). Notably, Section 11.046(c) expressly states that return flows, once discharged into a watercourse, become available for appropriation "by others" (i.e., persons other than the discharger). In other words, Section 11.046(c) does not enable a discharger of return flows to obtain a new appropriative right for those discharges. Instead, if a discharger wishes to retain the right to divert its return flows after they have been discharged back into a watercourse, the only mechanism available to the discharger is through Section 11.042(c). In such cases, when BRA seeks to reuse its own return flows, it is seeking to "convey and subsequently divert" water for which it already has a diversion right. The parties agree that BRA could, if it so desired, fully utilize its appropriative right through direct reuse. Thus, by seeking to indirectly reuse its water via a bed and banks permit, it is simply seeking to do what it is otherwise entitled to do via direct reuse.
>
> Conversely, the ALJs conclude that when BRA seeks to divert someone else's surface water-based return flows it need only obtain an appropriative right pursuant to Section 11.046(c), and need not obtain a bed and banks authorization pursuant to Section 11.042(c). In such a case, and consistent with the wording of Section 11.046(c), BRA would clearly be an "other" person seeking to appropriate someone else's return flows. Likewise, BRA would not be seeking to "convey," as required by Section 11.042(c), someone else's return flows, but only to divert those flows.
>
> *Id*. at 150-151 (footnotes omitted).

At their January 25, 2012 agenda hearing, the TCEQ Commissioners considered BRA's SysOps Application, including the findings on return flows in the ALJs' SysOps PFD. The TCEQ Commissioners agreed with most of the ALJs' finding with respect to return flows and their statutory interpretation of Sections 11.042 and 11.046, but expressed concerns over BRA's appropriation of future return flows during the agenda meeting. BRA had attempted to appropriate current and future return flows calculated for the year 2060 based on projected population multiplied by current per capita return flows. The TCEQ Commissioners expressed that only current return flows should be available for BRA's proposed appropriation. Due to other concerns with the SysOps Application, the Commissioners remanded the case back to SOAH for a second hearing on the BRA WMP. Based on the TCEQ Commissioners' comments at the agenda hearing, BRA no longer sought an appropriation for future return flows, and voluntarily limited its application to only current return flows in its new WMP, using the lowest reported monthly discharge amount from 2007 through 2011.

Second Evidentiary Hearing

During the second hearing on the merits in the SysOps case, which focused on BRA's WMP, the ED opposed granting an appropriation of groundwater-based return flows to BRA, because the diversion of those types of flows could only be authorized under Section 11.042(b). *See* SysOps PFDR at 241. The ED also argued Section 11.046 (relied on by BRA in the first

hearing) deals with a situation where a person "diverts water from a watercourse or stream" that is "then returned to a watercourse or stream." If the water was originally taken from the watercourse, as reasoned by the ED, it could not be groundwater based. BRA disagreed, and argued that when an owner without a Section 11.042(b) authorization discharges groundwater-based return flows into a watercourse, the water loses its character as groundwater and becomes state surface water; therefore, it is available for appropriation by BRA. *Id*. at 241. The ALJs agreed with BRA on this argument. Thus, the ALJs determined that BRA (as part of the SysOps Application) was allowed to:

1. appropriate the surface water based return flows of others pursuant to Tex. Water Code § 11.046(c);
2. appropriate the groundwater based return flows of others under Tex. Water Code § 11.121;
3. obtain a bed and banks authorization to transport its own surface water based return flows according to Tex. Water Code § 11.042(c); and
4. obtain a bed and banks authorization to transport its own groundwater based return flows according to Tex. Water Code § 11.042(b).

At the TCEQ agenda hearing on January 20, 2016, the TCEQ Commissioners considered the ALJs' findings in the PFDR and parties' arguments. Based on the discussions at the agenda hearing, the Commissioners issued an interim order concerning the ALJs' PFDR regarding BRA's SysOps Application. *See* AN INTERIM ORDER concerning the Administrative Law Judges' Proposal for Decision on Remand and proposed Order for the Application by the Brazos River Authority for Water Use Permit 5851; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184 (Jan. 29, 2016) (hereafter the "SysOps Interim Order"). "The Commission determined the majority of the ALJs' determinations were supportable; however, the Commission intended to implement two issues in the different manner." SysOps Interim Order at 1. The Commission ordered a "limited remand for the purposes of clearing up the existing record and allowing the Parties and the ALJs to implement the Commission's decisions on two issues regarding reservoir capacities and return flows." *Id*. This limited remand required the ALJs to go back and review these specific issues, allowing the parties to brief on those issues without reopening the evidentiary record.

With regard to the issue of return flows, the Commissioners expressed concerns regarding the pervasive nature of BRA's SysOps Application. The Commissioners seemed to worry about BRA essentially appropriating all the available water in the Brazos River Basin, leaving no water left for future water projects in the basin. The Commissioners wanted to allow current third-party dischargers to be able to come back and obtain 11.042 bed and banks authorizations in the future, even after BRA had appropriated those return flows in the SysOps Application. The Commissioners were also concerned as to whether BRA had satisfied its burden of proof with regard to the bed and banks requirements for its own return flows, and the exact amount of return flows it was attempting to appropriate as part of the SysOps Application.

To that end, the Commissioners drafted the interim order to require the ALJs to "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 surface water/developed water based effluent return flows in BRA's return flows approach." SysOps Interim Order at 3. The ALJs were also to "remove that portion of BRA's own return flows from the appropriation and determine if BRA demonstrated that the amount of BRA's own return flows meets all of the bed and banks application requirements." *Id*. The ALJs were also required to "determine the amount of other entities' return flows that BRA proved as a new appropriation." *Id*. at 3-4.

Most notably, the Interim Order required that the ALJs add a special condition to BRA's draft permit that allows both surface water-based and groundwater-based effluent dischargers to be able to come back, after this water has been permitted to BRA, and be able to obtain a bed and banks authorization for this water, reducing BRA's appropriation of these return flows. Paragraph 6ii of the Interim Order required the ALJs to:

> Include redrafted Special Conditions in section 5.A. that reduce or terminate BRA's appropriative rights in the return flows of others once another discharger directly reuses *or obtains an indirect reuse bed and banks authorization under TWC § 11.042(b) or (c)* that lessens the availability of the proportionate return flows of others.
> SysOps Interim Order at 4 (Paragraph 6ii) (emphasis added).

In other words, the Commission specifically held that BRA could appropriate Others' Return Flows, but this appropriation could be lost in the future (subject to direct reuse or a Section 11.042 authorization by the discharger).

Return Flow Issues During Limited Remand

Pursuant to the TCEQ's directives in the Interim Order, the parties filed briefs (Proposed Stipulations on

Remanded Issues, Initial Briefs on Disputed Issues, and Replies to Briefs on Disputed Issues) associated with the issues involved in the limited remand during March and April of 2016. The ALJs considered these briefs and issued a Supplement to the Proposal for Decision on Remand addressing these issues. *See* Supplement to the Proposal for Decision on Remand, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184 (June 3, 2016) *available at* http://www.soah.texas.gov/pfdsearch/ pfds/582/10/582-10-4184-pfd2.pdf (the "Supplement").

TCEQ Final Order and Judicial Review

The TCEQ Commissioners considered the Supplement and adopted the ALJs' proposed findings of fact and conclusions of law with only minor changes to the permit language proposed by the ALJs at the August 24, 2016 TCEQ agenda hearing. On September 16, 2016, the TCEQ issued an order granting the BRA SysOps Application. *See AN ORDER GRANTING IN PART THE AMENDED APPPLICATION BY THE BRAZOS RIVER AUTHORITY FOR WATER USE PERMIT NO. 5851 AND APPROVING ITS WATER MANAGEMENT PLAN; TCEQ DOCKET NO. 2005-1490-WR; SOAH DOCKET NO. 582-10-4184* (Sept. 16, 2016) (the "Final Order"). Notably, the Final Order allowed BRA to appropriate the entire permitted amounts of Others' Return Flows (but contained the special condition allowing others to come back and obtain an 11.042 authorization for those flows in the future, which will reduce BRA's appropriation). BRA was also allowed to obtain a bed and banks authorization for the entire permitted amount of the BRA Return Flows. BRA was not limited to only historically discharged flows. *See* Final Order, Findings of Fact 165 and 165A.

Motions for Rehearing were filed on October 11, 2016. The TCEQ denied the motions by operation of law on November 10, 2016. Three district court petitions were filed with the Travis County District Court challenging the TCEQ's issuance of BRA's SysOps Permit. These petitions were filed on December 9, 2016 by: (1) Friends of the Brazos River, (2) Lake Granbury Coalition, and (3) Bradley B. Ware and William and Gladys Gavranovic. Those suits for judicial review are pending consolidation in the 345th District Court in Travis County, Texas.

JANES GRAVEL

Only three months after the Commission's SysOps Final Order was issued in the BRA SysOps case, the Fourteenth Court of Appeals also made a major holding interpreting the law associated with indirect reuse/return flows in the case of *R.E. Janes Gravel Co. v. Texas Comm'n on Envtl. Quality*, 522 S.W.3d 506 (Tex. App.—Houston [14th] 2016, pet. filed) (hereafter "*Janes v. TCEQ*")**.** *Janes v. TCEQ* involved the City of Lubbock's ("Lubbock") attempt to obtain a bed and banks authorization pursuant to Section 11.042 of the Texas Water Code to discharge and subsequently divert its groundwater based effluent and surface water based effluent derived from imported water. The *Janes v. TCEQ* decision could have a significant impact on the treatment of return flows in current and future water rights permitting. It is the first major Texas Court of Appeals decision to interpret the Post Senate Bill 1 Sections 11.042 and 11.046 of the Texas Water Code dealing with return flows/indirect reuse.

Administrative Case on Reuse Amendment

The case involved Lubbock's application to the TCEQ for an amendment to its existing Permit No. 3985. Lubbock's original Permit No. 3985 authorized it to use within the Brazos River Basin not to exceed 22,910 acre-feet per year of sewage effluent created from Lubbock's use of municipal water purchased from the Canadian River Municipal Water Authority ("CRMWA") and diverted from Lake Meredith in the Canadian River Basin. Lubbock's Application No. 4340 sought an amendment (Permit No. 3985A) to authorize the diversion and use of all historic and future discharges of Canadian River Basin surface water-based return flows and groundwater-based return flows for multiple uses, to convey those return flows using the bed and banks of the North Fork Double Mountain Fork Brazos River from the discharge point authorized by Lubbock's TPDES Permit No. WQ0010353002 (authorizing Lubbock to discharge 10,081 acre-feet per year), and to subsequently divert those flows downstream at a most downstream diversion point located approximately 14,300 feet (2.7 miles) downstream of the discharge. This would allow Lubbock to divert and use not to exceed 32,991 acre-feet of historical and future return flows per year (being up to 22,910 acre-feet per year created as a result of Lubbock's use of municipal water purchased from CRMWA, and up to 10,081 acre-feet of groundwater-based return flows) for agricultural, municipal, industrial, and recreation purposes.

In May 2003, Lubbock began discharging a small portion of its treated effluent into the North Fork Double Mountain Fork Brazos River in accordance with its TPDES permit. *See* Proposal for Decision, *Application by the City of Lubbock for Amendment to Water Use Permit No. 3985*, SOAH Docket No. 582-11-3522, TCEQ Docket No. 2010-0837-WR (Tx. St. Off. Admin. Hgs., Oct. 18, 2011) at 3 (May 25, 2004) (the "Janes PFD"). Lubbock did not submit its application for Permit No. 3985A until April 2004. *Id*. The application was declared administratively complete on October 12, 2004. *Id*. The ED of the TCEQ issued the draft permit on August 2, 2006. *Id*. at 4.

Protestant R.E. Janes Gravel Company ("Janes") was a senior right holder that was authorized to divert

and impound state surface water from the North Fork Double Mountain Fork Brazos River downstream from Lubbock's proposed diversion point to be authorized by Permit No. 3985A. Janes protested the application and requested a contested case hearing. A SOAH ALJ established jurisdiction over the case and a hearing on the merits was held October 18-19, 2011. *Id*. at 6.

Janes argued that that Lubbock's application should be denied or, in the alternative, that a special condition should be added to the permit to require a pass-through of 1,000 acre-feet of Lubbock's discharged return flows sufficient to protect senior water rights and to maintain instream uses, or at least provide a priority call on Lubbock's diversions to satisfy its water right. *Id*. at 13. Janes argued that not all the water captured by Lubbock's wastewater system was developed water (its groundwater and imported water), and that some of the water in the system was native water captured by inflow and infiltration. *Id*. at 14. Janes also argued that for many decades Lubbock's treated effluent provided a significant portion of the base flow of the North Fork. *Id*. Janes provided testimony that prior to the 1930s, Lubbock discharged approximately 1,000 acre-feet of treated effluent to the North Fork. Then in the 1930s, Lubbock stopped discharging into the North Fork and began land application of its effluent for irrigation purposes. *Id.* Janes contended this land-applied effluent went below ground and formed a large groundwater dome resulting in seeps and springs contributing significant flows to the North Fork. Janes PFD at 14. Janes also argued that after 1970, Lubbock pumped the mound of effluent directly into the North Fork. *See* Janes Closing Argument, *Application by the City of Lubbock for Amendment to Water Use Permit No. 3985*, SOAH Docket No. 582-11-3522, TCEQ Docket No. 2010-0837-WR (Tx. St. Off. Admin. Hgs., Oct. 18, 2011) at 9 (December 9, 2011) (hereafter "Janes Closing Argument"). Janes contended that its water right (now a Certificate of Adjudication with a 1968 priority date) was based, in part, on the historic base flow contributed to the North Fork by Lubbock's direct discharges and the groundwater dome created by Lubbock's land application. Janes PFD at 14. Therefore, Lubbock's application threatened to take away this historical base flow from the North Fork without providing any protection for senior water rights. *Id*. Janes also argued that Lubbock used an unrealistically low estimate (0.47%) for carriage losses, inadequately considered potential harm to the environment and instream uses, and its permit is not consistent with the state and regional water plans. *Id*. at 13.

The ED responded that, prior to obtaining its TPDES permit in 2003, Lubbock had not discharged any treated effluent directly through a discrete conveyance since the cessation of direct discharge in the 1930s. *Id.* at 16. The ED and Lubbock also argued that Lubbock had no obligation to maintain any flow in the North Fork attributable to groundwater levels due to Lubbock's land application practices. *Id*. at 17. Lubbock also argued that the amount of native water captured by infiltration and inflow would be *de minimus*, and regardless this water would be either groundwater or diffused surface water that was legally owned by Lubbock under the law and not subject to a priority call. *Id*. at 16. In response to Janes' carriage loss argument, Lubbock argued that the carriage loss calculations were reviewed by a number of qualified professionals at Lubbock and the TCEQ. *Id*. at 18. Lubbock also argued that the TCEQ's technical review of the application, and its expert's opinions based on that review, were sufficient to ensure maintenance of instream uses and the environment. *Id*. at 20-22. Lubbock and the ED also contended that although not specifically mentioned, Lubbock's application was consistent with the state and regional water plan. *Id*. at 23.

The ALJ agreed with Lubbock that "Lubbock has no legal obligation to continue discharging into the North Fork any volumes of (1) groundwater that may infiltrate is sewer system; (2) diffused surface water that may inflow into its sewer system; or (3) groundwater created by its past land application practices." *Id*. at 17. The ALJ also concluded that Lubbock's carriage loss estimate was derived using industry-standard methodology and was reasonable, and noted that Janes failed to submit an alternative loss factor. *Id*. at 19. The ALJ concluded that the "special conditions in draft Permit 3985A are adequately protective of the environment and the maintenance of instream uses." *Id*. at 22. The ALJ also found that "Lubbock's Application and draft Permit 3985A are consistent with the water conservation strategies recommended for Lubbock in the Regional and State Water Plans." *Id*. at 23.

Janes also made a legal argument (along with OPIC) that Section 11.046 of the Texas Water Code applied to Lubbock's application. *Id*. at 8. Janes argued that once Lubbock's wastewater was "returned to the watercourse" it should be "considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others." Janes also made statutory arguments with respect to Section 11.042 of the Texas Water Code. Janes asserted that Tex. Water Code § 11.042(c) requires that Lubbock's diversion be "subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permit, certified filings, or certificates of adjudication." Janes Closing Argument at 44. Additionally, with respect to the groundwater-based effluent in Lubbock's application, Janes disputed that the language contained in Section 11.042(b) meant that Janes' reliance on Lubbock's historic discharges should be ignored as Lubbock had claimed. Section 11.042(b) states, "[t]he authorization…shall be subject to special conditions if necessary to protect an existing

water right that was granted based on the use or availability of these return flows." Tex. Water Code § 11.042(b). Janes argued that Section 11.042(b) did not exist at the time Janes obtained its water right. Janes Closing Argument at 45. Therefore, when Janes obtained its water right, pre-Senate Bill 1 law applied (which meant that the effluent became state water once it entered the watercourse), and return flows were included in the water availability analysis at the time during the water rights adjudication process for the Brazos River Basin. *Id*. at 45-46.

The ALJ determined that Tex. Water Code § 11.046 does not apply. Section 11.046(a) provides that, "[a] person who diverts water from a watercourse…shall conduct surplus water back to the watercourse from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so." Tex. Water Code § 11.046(a). The ALJ reasoned that:

> None of the water being discharged into the North Fork by the City was diverted or taken from the North Fork or any other tributary in the Brazos River Basin. Rather, water discharged by the City is comprised of groundwater-based and imported surface water-based return flows and is not surplus water to which Water Code § 11.046 applies. The City's return flows are not surplus water. "Surplus water" is defined as "water in excess of the initial or continued beneficial use of the appropriator." Use of the term "appropriator" infers that surplus water returned to a watercourse is derived from state water.
> Janes PFD at 8.

Based on the ALJ's findings and conclusions in the PFD, the TCEQ granted the application for Permit No. 3985A.

District Court

Janes filed suit in district court against TCEQ challenging the order granting Lubbock's application for Permit No. 3985A. Lubbock intervened in the suit. In district court, Janes argued that: (1) TCEQ failed to apply Tex. Water Code § 11.046 to Lubbock's application; (2) TCEQ misapplied Tex. Water Code § 11.042 and the Texas Supreme Court's recent precedent in *Edwards Aquifer Auth. v. Day*; (3) TCEQ ignored senior claims to Lubbock's historic return flows in violation of the Water Code, Commission's rules, and case law; (4) TCEQ erroneously concluded that Lubbock provided evidence supporting carriage losses; and (5) TCEQ erroneously failed to consider inflow and infiltration in Lubbock's sewer system. The Travis County District Court affirmed the TCEQ's order. *See R.E. Janes Gravel Company v. Covar et al.*, No. D-1-GN-13-000150 (345th Dist. Ct., Travis Cnty., October 14, 2014). Janes then appealed the district court decision to the Third Court of Appeals and the appeal was transferred to the Fourteenth Court of Appeals.

Court of Appeals

At the Fourteenth Court of Appeals, Janes again argued that the TCEQ misinterpreted Sections 11.042 and 11.046 of the Texas Water Code. However, Janes refined its statutory arguments regarding these provisions from its prior arguments in the administrative case. Janes focused its arguments on Lubbock's bed and banks (indirect reuse) authorization by making a distinction between groundwater-based and surface water-based return flows. "The City neglected to restrict its application to its discharged groundwater." *See R.E. Janes Gravel Co. v. Texas Comm'n on Envtl. Quality, Docket No.* No. 14-15-00031-CV*, Appellant's Brief of R.E. Janes Gravel Company (April 15, 2015) (hereafter* "Janes Appellant's Brief") at 7. Janes noted that groundwater (owned by the landowner) and surface water (owned by the state) are treated differently under Texas law. *See id*. at 13-14. Janes highlighted this distinction, and the difference in language between Section 11.042(b) and (c), to argue that TCEQ cannot grant a bed and banks permit for existing surface water discharges. *See id*. at 14. Janes cited to Section 11.042(c), which states:

> [A] person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the *prior* approval of the commission through a bed and banks authorization.
> *Id*. (emphasis in original) (citing Tex. Water Code § 11.042(c)).

Focusing on this "prior" approval language, Janes argued that, "under Texas law, once a diversion and subsequent discharge of surface water occurs, such discharged quantity has been abandoned to the State, and senior water right holders have priority to such discharged quantity." Janes Appellant's Brief at 14. According to Janes, once surface water discharges occur, Section 11.046 of the Texas Water Code controls, and "senior water rights holders have priority to such discharged quantity." *Id*. Specifically, Janes cited to Section 11.046(c) of the Texas Water Code, which states:

> 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.
>
> *Id*. at 15 (citing Tex. Water Code § 11.046(c)).

Janes argued that Lubbock's surface water-based return flows were "divert[ed] under a permit," and then were "returned to a watercourse" beginning in 2004. Janes Appellant's Brief at 16-17. "By allowing the discharge to commence, the discharger has concurrently allowed the nature of that quantity of discharge to be forever changed to surplus water." *Id*. at 17. Janes summarized its argument by stating, "[u]nder Texas Water Code sections 11.042 and 11.046, the TCEQ cannot give a permit to convey water in a stream for downstream diversion when the discharges to be conveyed are both existing and derived from surface water." *Id*. at 11. "The City commenced its discharges from Outfall No. 001 in 2003, before it applied for a permit amendment to divert those discharges in 2004. Thus, under the plain language of the Texas Water Code, the TCEQ could not grant the City a bed and banks permit unless the discharged water to be diverted was derived entirely from privately owned groundwater." *Id*. at 15 (internal citations omitted). "The amount historically discharged by the City is now state water that could only be withdrawn, going forward, after ensuring that such withdrawal did not interfere with Janes Gravel's superior, senior right to that discharge." *Id*. at 17-18.

Janes also addressed prior arguments by the TCEQ and Lubbock that Lubbock's surface water-based return flows were not "surplus water," and therefore Section 11.046(c) of the Texas Water Code was inapplicable. Janes stated:

> At the trial court, the TCEQ and the City argued that section 11.046(c) was inapplicable. The TCEQ and the City relied on the Third Court of Appeals' *Halsell* opinion, which held that sewage effluent was "used water" and not "surplus water" for purposes of article 7579, the predecessor statute to current section 11.046(a). *See Halsell v. Tex. Water Comm'n*, 380 S.W.2d 1, 10-13 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.). However, when *Halsell* was decided, article 7579 did not contain any of the language now set forth in 11.046(c), which expressly declares that *any* water diverted but then discharged into a stream—used or unused—"*is* considered surplus water." *See* Tex. Water Code § 11.046(c) (emphasis added). *Halsell*, therefore, has been superseded by statute. Section 11.046(c) declares that used water can now be "considered surplus water." *Id*.
>
> Janes Appellant's Brief at 18 (emphasis in original).

Janes also cited to *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999, pet denied), where the Austin Court of Appeals held that "[o]nce return flows are given back to a watercourse, they become part of the normal flow." *Id*. at 360. Thus, Janes argued, the Third Court of Appeals has "reversed course" from *Halsell*, and instead "follows the plain language of section 11.046(c)." Janes Appellant's Brief at 18.

Janes also dismissed the TCEQ's argument that Section 11.046(c) is inapplicable to imported water because the water is not being discharged back into the same watercourse. *See id*. at 19-20. Janes cited to Section 11.046(a) of the Texas Water Code, which specifies that "[a] person who takes or diverts water from a watercourse or stream for the purposes authorized by this code shall conduct surplus water back to the watercourse or stream *from which it was taken if* the water can be returned by gravity flow and *it is reasonably practicable to do so*." Tex. Water Code § 11.046(a) (emphasis added). Janes contrasted subsection (a) to subsection (c), stating that, "subsection (c) states that water is considered surplus water and is subject to others' appropriation whenever it is diverted under a permit and then released or returned to 'a watercourse or stream.'" Janes Appellant's Brief at 19. Subsection (c) does not contain subsection (a)'s modifying language 'from which it was taken.'" *Id*. at 19-20. "[S]ection 11.046 creates a preference for return of water to its original watercourse, but a mandate that water returned to any watercourse is surplus water." *Id*. at 20.

Janes thus argued that the language of Sections 11.042 and 11.046 required the TCEQ to analyze whether Lubbock's diversion of its surface water-based return flows would have impaired Janes downstream senior water right before granting Lubbock an authorization to divert this water. "The TCEQ could not, therefore, grant the City a right to divert water from the North Fork without first determining that Janes Gravel would remain able to divert its annual permitted amount of 450 acre-feet." *Id*. at 22.

In response, Lubbock and the TCEQ argued against Janes' statement of the facts and legal interpretation of Sections 11.042 and 11.046 of the Texas Water Code. Lubbock argued that Section 11.046 of the Texas Water Code governs only "surplus water," defined by Lubbock as "water diverted that is never used." *See R.E. Janes Gravel Co. v. Texas Comm'n on Envtl. Quality, Docket No.* No. 14-15-00031-CV, *Brief for Appellee City of Lubbock (June 12, 2015) (hereafter* "Lubbock's Appellee's Brief") at 9. "The Texas Legislature has defined surplus water to mean 'water in excess of the initial or continued beneficial use of the appropriator.'" *Id*. at 28 (citing Tex. Water Code § 11.002(10)). "By contrast, Lubbock's treated wastewater effluent is the product of Lubbock's initial beneficial use of its

imported Canadian River Basin surface water." Lubbock's Appellee's Brief at 9. "Lubbock's treated wastewater is the product of Lubbock's beneficial use of water; it is not excessive of what Lubbock beneficially uses." *Id*. at 28-29. "The water Lubbock discharges from Outfall 001, therefore, is not surplus water." *Id*. at 9.

Lubbock contended that Janes' interpretation of Section 11.046(c) of the Texas Water Code ignores a key provision in the statute. Section 11.046(c) states that water returned to a watercourse can be appropriated "unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication." Tex. Water Code § 11.046(c). Lubbock contended that there is a permit that expressly provided otherwise in this case—Lubbock's Permit No. 3985. *See* Lubbock's Appellee's Brief at 30-31.

Lubbock also argued that under Section 11.122 of the Texas Water Code, the statute dealing with water rights amendments, none of Janes' substantial rights were prejudiced by the granting of Lubbock's 3985A amendment. *Id*. at 24-25. Specifically, Lubbock cited to 11.122(b) (the provision detailing the full-use assumption), which states as follows:

> Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.
> Tex. Water Code § 11.122(b).

Lubbock argued that under its original Permit No. 3985, "Lubbock—not Appellant—is authorized to use all of Lubbock's treated effluent that began in nature as Canadian River Basin surface water." Lubbock's Appellee's Brief at 25. "Before the 3985-A Amendment, when Lubbock fully exercised its rights under the terms and conditions of Permit 3985, if fully consumed all of its sewage effluent." *Id*. at 26. "Stated simply, the 3985-A Amendment authorizes Lubbock to use no greater amount of water than did Permit 3985. Section 11.122(b) says that the requests in the 3985-A Application did not adversely impact Appellant's water right." *Id*. The TCEQ agreed with Lubbock, stating, "Lubbock already was authorized to fully reuse and consume all 22,910 acre-feet of the surface water it purchases from the Canadian River Municipal Water Authority (CRMWA) without any discharge into the North Fork of the Brazos." *See R.E. Janes Gravel Co. v. Texas Comm'n on Envtl. Quality, Docket No.* No. 14-15-00031-CV*, Brief of Appellees Texas Commission on Environmental Quality and its Commissioners and Executive Director in their Official Capacities (June 12, 2015) (hereafter* "TCEQ's Appellee's Brief") at 12-13. "Therefore, amending the permit to allow Lubbock to add and subtract a specific amount of that surface water each day (up to 10,081 acre-feet per year) would have no different impact on existing rights than the full exercise of Lubbock's un-amended permit would have." *Id*. at 13. "[T]he Commission must evaluate stream conditions as they would exist if everyone fully used their water rights." *Id*. at 16. "[I]f the amended permit would affect other water-rights holders to the same degree as the fully exercised, un-amended permit, then the Commission shall approve the amendment." *Id*. at 18.

In reply, Janes argued that Lubbock's amendment falls into one of the exceptions to Section 11.122(b), because it "increases the amount of water authorized to be diverted." Tex. Water Code § 11.122(b). "Because the City's existing return flow derived from surface water *is*—under section 11.042 and 11.046—state water, the City's requested amendment to its water right *does* increase the amount of water authorized to be diverted from the North Fork." *See R.E. Janes Gravel Co. v. Texas Comm'n on Envtl. Quality, Docket No.* No. 14-15-00031-CV*, Appellant's Reply Brief for R.E. Janes Gravel Company (July 16, 2015) (hereafter* "Janes Appellant's Reply Brief") at 15. Therefore, as Janes argued, the "shall be authorized" language in Section 11.122(b) was not applicable to Lubbock's amendment because Lubbock's requested authorization falls into one of the stated exceptions of that provision.

Additionally, Lubbock argued that its imported water is not subject to water rights in the Brazos River Basin. Lubbock stated that, "Permit 3985 is not subordinate to any water right in the Brazos River Basin." Lubbock's Appellee's Brief at 27. Therefore, Lubbock argued that Janes "does not have a right to Canadian River Basin water." *Id*. Lubbock also noted that Permit 3985, by its terms, "is issued subject to all superior and senior water rights *in the Canadian River Basin*." Id. at 31 (emphasis in original). The TCEQ agreed that "Lubbock's discharge of treated effluent derived from Canadian River water is not part of the 'normal flow' of the North Fork of the Brazos." TCEQ's Appellee's Brief at 27.

On December 15, 2016, less than a week after district court petitions were filed in BRA SysOps, the Fourteenth Court of Appeals issued its opinion in *Janes v. TCEQ*. Most notably, the Fourteenth Court of Appeals emphasized that because of the transfer of the case from the Third to the Fourteenth Court of Appeals,

it "must decide the case in accordance with Third Court of Appeals' precedent if [the court's] decision otherwise would have been inconsistent with that court's precedent." *Janes v. TCEQ*, 522 S.W.3d at 509, fn. 4. This makes the opinion especially valuable because it is precedential with respect to future Third Court of Appeals decisions, which include most appeals from TCEQ water right permitting matters.

As to the holding of the case, the Court of Appeals determined that it was not necessary to address the parties' disputes as to whether Lubbock's treated effluent was "surplus water," because the case could be decided solely on the basis of its analysis of Sections 11.042, 11.046, and 11.122 of the Texas Water Code. "[W]e need not decide whether the discharged effluent would ever become surplus water because the Order may be affirmed under the statute governing bed-and-banks permits and the statutory standard for evaluating a request for an amended permit." *Janes v. TCEQ*, 522 S.W.3d at 516.

The Court of Appeals determined that Section 11.042(c) of the Texas Water Code governed the activities planned by Lubbock, and the language of Section 11.046(c) does not prevent Lubbock from obtaining an authorization to discharge and subsequently divert its return flows. "As we construe section 11.042(c), the Commission's authority to grant a party the right to use a stream to convey surface water from a discharge point to a point downstream, where it will be diverted for re-use, would be meaningless if, under section 11.046(c), the water became surplus water available for appropriation by senior rights holder upon being discharged into the stream." *Janes v. TCEQ*, 522 S.W.3d at 516. The Court also addressed Janes' argument that Lubbock's return flows became available for appropriation by third party water rights because Lubbock failed to obtain "prior approval" under Section 11.042 before discharging its treated effluent:

> Nothing in section 11.042(c) precluded the City from obtaining a bed-and-banks permit although it already had been discharging the effluent. The statute requires a party who wishes to convey and divert the same amount of water to obtain "prior approval" from the Commission. But the statute does not require "prior approval" before making the discharges that might ultimately be diverted. It is clearly the diversion that is the hallmark of a bed-and-banks permit because the discharge alone would not constitute a conveyance to a diversion point. We see no difference in effect on the ultimate transportation via the bed and banks between obtaining the permit after the discharge but before the diversion or obtaining the permit before both the discharge and the diversion, as long as no more water is diverted than discharged. Consequently, we disagree that the fact the City had discharged effluent before seeking permission to divert precluded the Commission from allowing the conveyance and diversion via a bed-and-banks permit.
>
> *Janes v. TCEQ*, 522 S.W.3d at 517 (internal citations omitted).

Thus, the Court of Appeals held that the "prior approval" language contained in Section 11.042(c) of the Texas Water Code does not prevent an applicant from obtaining a bed and banks authorization to discharge and subsequently divert its return flows, even if it has already been discharging those flows. The court interpreted the "prior approval" language as being specific to only those return flows that would be discharged in the future after a bed and banks authorization is obtained. "[T]he Commission was not required to evaluate whether senior rights holders, including Janes, would be able to satisfy their permitted amounts from the discharged effluent if there were insufficient water in the North Fork to otherwise satisfy their permits." *Id.*

The Court of Appeals also agreed with Lubbock's interpretation of Section 11.122(b) of the Texas Water Code. The court found that other Brazos River Basin water rights, including Janes, could not be harmed by Lubbock's amendment because its original direct reuse permit already authorized Lubbock to use all the imported surface water obtained from CRMWA. "[T]he effect on other water rights holders in the North Fork, including Janes, if the City discharges 10,081 acre-feet of effluent into the North Fork and then diverts it downstream is the same as the effect on such water rights holders if the City had fully exercised its rights under the original permit." *Id.* at 518. The Court also did not agree with Janes' interpretation that Lubbock's amendment increased the amount diverted, which would fall into one of the exceptions to Section 11.122(b) because the original permit did not authorize a diversion, so there was not an "increase in the amount of water authorized to be diverted" in this case. "Although the bed-and-banks permit would authorize the City to divert water, it would not authorize any increase over an existing diversion." *Id.* "Contrary to Janes' suggestion, the exception under section 11.122(b) does not apply to any request to divert water but to an 'increase[]' to the amount diverted." *Id.* The Court of Appeals also agreed with Lubbock and the TCEQ that the language in the permits made Lubbock's authorization subject to water rights in the Canadian River Basin, not the Brazos River Basin. "Further, the original permit was expressly issued subject to all superior rights in the Canadian River Basin and not subject to such rights in the Brazos River Basin." *Id.* For those reasons, the court held that "Janes has not

shown that the Commission improperly granted the City's request for the amended permit or that the Commission violated any statute or committed any legal error in granted this request." *Id*.

Texas Supreme Court Petition and Briefing

Janes filed a petition to appeal the Fourteenth Court of Appeals decision to the Texas Supreme Court. The petition filed by Janes has not yet been granted. Janes filed its Petitioner's Brief on the Merits on October 23, 2017. Lubbock and the TCEQ filed their Respondent's Briefs on the Merits on December 13, 2017. Janes filed its Reply Brief on the Merits on January 4, 2018.

CURRENT STATE OF TEXAS LAW ON REUSE

Examining both the *Janes v. TCEQ* Court of Appeals decision and the TCEQ's decision in case of the BRA SysOps Application, the law governing return flows is beginning to take shape. When examining these decisions, it is paramount to first recognize that neither have been completely finalized at this time. A petition has been filed by Janes to review and overturn the *Janes v. TCEQ* decision at the Supreme Court; also, the BRA SysOps case is still in Travis County District Court. All of the decisions regarding return flows, including the interpretations of Sections 11.042 and 11.046 of the Texas Water Code, made by the Court of Appeals and TCEQ could be overturned on appeal. With that being said, the following is summary of how different types of return flows are likely to be treated, assuming that these decisions are upheld in their entirety:

Transporting Groundwater Based Return Flows Controlled by the Applicant

According to both *Janes v. TCEQ* and BRA SysOps, one can obtain an authorization under Section 11.042(b) of the Texas Water Code to discharge and subsequently divert groundwater based return flows "controlled" by the applicant. Types of control would include situations where the applicant owns the groundwater from which the effluent is derived, the wastewater treatment plants owned or operated by the applicant are discharging the groundwater-based effluent, or the applicant has a contractual relationship giving it control over the groundwater-based effluent.

This Section 11.042(b) bed and banks authorization would not have a priority date. This is evidenced by Lubbock's Permit No. 3985A involved in *Janes v. TCEQ*, which in Paragraph 4 states, "[t]he groundwater based return flows authorized to be conveyed via the bed and banks of a state watercourse in this permit do not have a priority date and are not subject to priority calls from senior water rights." BRA's SysOps Permit has a priority date, and some of its own return flows are groundwater based, but BRA voluntarily subjected all of its return flows to third party demands before diverting these return flows in its modeling. This was based on BRA's theory of return flows at the time, which was that all water that reenters the watercourse is subject to appropriation.

Also, this type of 11.042(b) authorization would not be subject to priority calls from other existing water rights or special conditions protecting existing water rights unless an existing water right was specifically "granted based on the use or availability of these return flows." Tex. Water Code § 11.042(b). Even after these recent decisions, it is unclear exactly how a protestant could argue that its water right was granted based on the use or availability of another's groundwater-based return flows. In theory, a protestant would need to show that its water right was granted at a time when these groundwater-based return flows were being historically discharged. This was a major problem for Janes in the *Janes v. TCEQ* case, because Lubbock was not discharging effluent at the time Janes obtained its water right in 1968. It is more likely that a protestant would have to provide specific evidence associated with its existing water right indicating that its appropriation was based on the availability of these flows. This could, in theory, include modeling that shows that these groundwater-based return flows were included in the water availability analysis associated with and supporting this existing water right.

If one has a TPDES permit associated with the discharge of groundwater-based return flows, according to BRA SysOps the applicant should attempt to obtain a bed and banks permit to transport the maximum discharge amount stated in that TPDES permit. The applicant is not limited to only the current or highest historically-discharged amount. The TCEQ, however, will not allow bed and banks authorizations for future projections of groundwater based return flows higher than the current maximum TPDES discharge amount.

Transporting Surface Water Based Return Flows Controlled by the Applicant

According to both *Janes v. TCEQ* and BRA SysOps, one can obtain an authorization under Section 11.042(c) of the Texas Water Code to discharge and subsequently divert surface water-based return flows "controlled" by the applicant. Types of control would include situations where the surface water-based return flows are derived from water supplied by the applicant, derived from wastewater treatment plants owned or operated by the applicant, or obtained through a contractual relationship with the discharger or underlying water right holder.

The questions of whether this 11.042(c) authorization would have a priority date and/or would be subject to priority calls post-*Janes v. TCEQ* and BRA SysOps are a much harder to answer. A Section 11.042(c) authorization to transport imported surface water may not have a priority date that is enforceable by existing water rights located in the receiving basin, because the underlying water right is only subject to

senior rights in the basin of origin. In *Janes v. TCEQ*, the Fourteenth Court of Appeals (applying Third Court of Appeals precedent) accepted Lubbock's and the TCEQ's argument that Janes (as a Brazos River Basin water right) could not call on Lubbock to continue discharging water derived from imported surface water (from the Canadian River Basin).

For surface water return flows native to the receiving basin, the situation is even muddier. In *Janes v. TCEQ*, the Court of Appeals stated, "the Commission was not required to evaluate whether senior rights holders, including Janes, would be able to satisfy their permitted amounts from the discharged effluent if there were insufficient water in the North Fork to otherwise satisfy their permits." *Janes v. TCEQ*, 522 S.W.3d at 517. One could argue this should allow an 11.042(c) applicant to be able to obtain a bed and banks authorization for his or her own surface water-based return flows, whether or not these are being relied on by other existing senior water rights.

This is not how the TCEQ staff has evaluated applications for surface water-based return flows in the past. For example, in BRA SysOps, the TCEQ ED took the position that BRA could obtain a bed and banks authorization for its own surface water-based return flows, but this bed and banks authorization would be given the priority date of the application insofar as it applies to historically discharged return flows in order to protect existing rights. Under the ED's interpretation of Section 11.042(c) of the Texas Water Code, historically discharged return flows would be subject to environmental flow and beneficial inflow requirements. However, discharges in excess of historical amounts would not be subject to call by senior rights and would have no environmental flow requirements. The maximum authorization would be limited to the current TPDES permitted discharge amount. Any increase would be limited to the current TPDES permitted discharge would necessitate an amendment of the bed and banks permit to authorize use of the increased volume.

As an example, assume an applicant has a TPDES permit allowing the discharge of a maximum of 100 acre-feet of surface water-based effluent per year. Historically, the applicant has only actually discharged 40 acre-feet per year. The TCEQ staff may support a draft bed and banks permit (a Section 11.042(c) authorization) that allows the applicant to discharge and subsequently divert 40 acre-feet of surface water-based return flows per year, but these diversions would be subject to a priority date, and the staff would likely conduct a water availability analysis to determine if some (or possibly all) of these flows are being relied on by third party senior water rights. If the 40 acre-feet per year of historically discharged flows are being relied on by third party water rights, it is likely that TCEQ staff will not support the bed and banks application, because it may harm existing water rights. However, the applicant may be able to make the argument, consistent with *Janes v. TCEQ*, that "[n]othing in section 11.042(c) preclude[s an applicant] from obtaining a bed-and-banks permit although it already had been discharging the effluent."

The other 60 acre-feet per year that has never been historically discharged may not have a priority date, and may not be subject to a call, if the TCEQ staff follows its initial position in BRA SysOps. The TCEQ staff's position became moot in that case because BRA voluntarily subjected all of its return flows to third party demands before making SysOps diversions in its modeling, to be consistent with BRA's interpretation of return flows law at the time.

Appropriating Others' Return Flows

According to the TCEQ's Final Order in BRA SysOps, a third-party diverter can divert available surface water and/or groundwater-based return flows that are being discharged back into a watercourse (if the discharger or another that controls these flows does not have a bed and banks authorization). BRA was able to appropriate these flows based on their TPDES discharge amounts. Strangely, this allowed BRA to appropriate not only return flows that have been historically discharged, but also future additional return flows as long as they are associated with an existing TPDES permit authorizing these future discharges. An applicant, like BRA in SysOps, will also only be able to appropriate surface water and/or groundwater-based return flows that are being discharged back into a watercourse that are available after taking into account existing third party demands and environmental flow requirements.

The confusion occurs when an applicant attempts to obtain a bed and banks authorization after his or her own return flows have been appropriated or are being relied on by a third party. In the case of BRA SysOps, the TCEQ added a special condition to allow future bed and banks authorizations of both surface water and groundwater based return flows, even after BRA has appropriated these flows as part of SysOps. BRA's SysOps permit, as mandated by the TCEQ's SysOps Interim Order, contains special conditions that interrupt BRA's use of return flows "upon the issuance of a bed and banks authorization pursuant to" Texas Water Code § 11.042 by the TCEQ to the discharging entity (termed the "recapture" provisions by some of the parties in the case). Therefore, even though BRA has explicitly appropriated these third-party return flows as part of the SysOps Permit, the third parties controlling these return flows can come back at any time in the future and obtain a Section 11.042(b) or (c) authorization (to allow bed and banks transport of their surface water or groundwater based return flows) and BRA loses the right to appropriate these return flows, reducing its total appropriation amount. As stated above, the

Commissioners seemed to add these recapture provisions because they were worried about the pervasive nature of BRA's SysOps Application; these recapture provisions did not seem to be based on any specific statutory or other legal argument by the Commission although there is pre-Senate Bill 1 precedent for these conditions. Therefore, one should be aware that some parties interpreting the BRA SysOps case may argue these special "recapture" conditions were specific to BRA SysOps, and should not apply to other appropriations of return flows.

Even though the TCEQ Commissioners did not seem to add the recapture provisions based on a specific statutory or legal analysis, it could be argued that these recapture provisions would be consistent with the legal holding by the Court of Appeals in *Janes v. TCEQ*. The interpretation of the Fourteenth Court of Appeals (applying Third Court of Appeals precedent) in that case was that appropriations under 11.046 do not block an applicant from obtaining an 11.042 authorization. In other words, just because an applicant has been historically discharging return flows, and a third party has been diverting those return flows that have re-entered the watercourse, that does not preclude the bed and banks applicant from obtaining a Section 11.042 authorization to discharge and subsequently divert those return flows because he or she failed to obtain "prior approval" before initially discharging those return flows.