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Texas Water Law Case Update

Trey Nesloney

Author Contact Information:
Trey Nesloney
Booth, Ahrens & Werkenthin, PC
Austin, TX

tnesloney@baw.com
512.472.3263

Texas Water Law Case Update

GROUNDWATER CASES

***Bragg v. Edwards Aquifer Auth.*, No. 06-11-18170-CV (38th Dist. Ct., Medina County, Feb. 22, 2016) ("*Bragg Remand*")**

This case is a continuation of the lengthy dispute between the Edwards Aquifer Authority ("EAA") and the Braggs that stems from the EAA's denial of groundwater production permits sought by the Braggs to supply water to their pecan orchards. The Braggs own two pecan orchards in Medina County, Texas, that are located over the Edwards Aquifer. *See Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 124 (Tex. App.—San Antonio 2013, pet. denied). In 1993, the Texas Legislature enacted the EAA Act to manage the Edwards Aquifer and to "sustain the diverse economic and social interests dependent on the aquifer." *Id*. The EAA Act established a new comprehensive regulatory scheme to control use of groundwater from the aquifer and created the EAA to implement this scheme. *Id*. at 124-25. The Texas Legislature also directed the EAA to manage groundwater withdrawals from the Edwards Aquifer through a permit system that gives preference to existing users that could demonstrate historic use (withdrawals from the aquifer) between June 1, 1972 and May 31, 1993. *Id*. at 125. The Braggs applied for two groundwater permits for their two orchards, but the EAA denied one application and only partially granted the other due the Braggs failure to state groundwater use during the historical period. *Id*. at 126.

In response to these denials, the Braggs first sued the EAA for failing to prepare and conduct Takings Impact Assessments under the Texas Private Real Property Rights Preservation Act, but lost at the Texas Supreme Court. *See Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729 (Tex. 2002). Then the Braggs sued the EAA alleging a takings claim and federal civil rights violations, but the federal claims were eventually denied in federal court; however, the takings claim was remanded to state court. *See Bragg v. Edwards Aquifer Auth.*, 2007 WL 2491834 (W.D. Tex. Aug. 31, 2007), *aff'd*, 342 Fed. Appx. 43 (5th Cir. 2009).

On remand, the trial court granted the Braggs' motion for partial summary judgment, concluding that the EAA's actions resulted in a regulatory taking. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 126 (Tex. App.—San Antonio 2013, pet. denied). A bench trial was held to determine compensation, which focused on the amount of water the Braggs were entitled to and the value of that water. *Id*. The trial court ruled that the Braggs were entitled to $732,493.40 ($134,918.40+$597,575.00) in compensation from the EAA for being granted an amount less than what was requested in their applications. *Id*.

On appeal, the Fourth Courts of Appeals analyzed the case using the *Penn Central* factors and held "the record supports the conclusion that the permitting system imposed under the [EAA] Act resulted in a regulatory taking of both" of the Braggs' orchards. *Id*. at 146. However, the court of appeals disagreed with the trial court as to the proper method by which compensation should be calculated, stating that "just compensation should be determined by reference to the highest and best use of the properties, which here are the pecan orchards." *Id*. at 151. "[W]e conclude the 'property' actually taken is

the unlimited use of water to irrigate a commercial-grade pecan orchard, and that 'property' should be valued with reference to the value of the commercial-grade pecan orchards immediately before and immediately after the provisions of the [EAA] Act were implemented or applied" to the orchards. *Id*. at 152. Concluding that the trial court erred in calculating the Braggs' compensation, the Court of Appeals remanded the case to allow the trial court to calculate the compensation owed on the orchards as the difference between the value of the land as commercial-grade orchards with unlimited access to Edwards Aquifer water immediately before implementation of the EAA Act compared to the value immediately after the EAA Act's implementation. *Id*. at 152-53.

Based on that directive, a jury awarded the Braggs $2,551,049.60 in compensation as a result of the regulatory taking on February 22, 2016. *See generally Bragg Remand*. When factoring in pre-judgment interest, the Braggs' recovery is estimated to be over $4 million.

***Coyote Lake Ranch, LLC v. City of Lubbock*, 14-0572, 2016 WL 3176683 (Tex. May 27, 2016) ("*Coyote Ranch*")**

In a landmark decision for Texas water law, the Texas Supreme Court extended the "accommodation doctrine" (a doctrine developed and historically applied in Texas oil and gas cases) to use of and access to groundwater rights, and also explicitly recognized the existence of a groundwater estate that is severable from and dominant over the surface estate. The accommodation doctrine, sometimes also referred to as the "alternative means" doctrine, was first stated in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), as a way of balancing the rights of the servient surface estate with the dominant mineral estate, as follows:

> [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.
> *Id.* at 622.

In *Coyote Ranch*, the City of Lubbock bought Coyote Lake Ranch, LLC's (the "Ranch") groundwater during a drought in 1953. *Coyote Ranch* at *1. As part of the deed granting the groundwater to the City of Lubbock, the Ranch reserved the right to access the groundwater associated with the land for domestic use, ranching operations, oil and gas production, and agricultural irrigation. *Id*. The deed also contained lengthy and detailed provisions controlling the City of Lubbock's right to use property in order to access, test, drill wells for, and produce the groundwater. *Id*. at *1-2. Specifically, the deed conveyed to the City of Lubbock "all of the percolating and underground water in, under, and that may be produced" from the ranch, "together with the full and exclusive rights of ingress and egress in, over, and on said lands, so that the Grantee of said water rights may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring producing, and getting access to percolating and underground water." *Id*. at *2, fn. 6. The deed also gave the City of Lubbock the right to use the part of the land "necessary or incidental" to the taking, production, treating,

transmission, and delivery of water, and may construct certain facilities on the lands "necessary or incidental to any of said operations." *Id*.

In 2012, the City of Lubbock announced plans to increase groundwater production by drilling as many as 20 test wells and 60 additional production wells on the property. *Id*. at *3. The City of Lubbock began mowing extensive paths through the grass to the prospective well drilling sites. *Id*. The Ranch filed suit to enjoin the City of Lubbock's operations. Id. The Ranch claimed that the City of Lubbock had a contractual and common law duty to use only the amount of surface that is reasonably necessary to its operations, that the mowing or removing of vegetation from the surface by the city causes destructive wind erosion hindering the existing surface use, and presented an alternative plan for different well sites and fewer roads. *Id*. The Ranch also presented evidence that the City of Lubbock's operations could hurt threatened species on the property. *Id*.

The trial court granted the Ranch's temporary injunction, and the City of Lubbock appealed, arguing that its deed expressly gives it the right to conduct the operations associated with its new groundwater wells, and that the accommodation doctrine applies to mineral estate owners and not to groundwater owners. *Id*. The Court of Appeals determined that the deed provisions were broad enough to authorize the City of Lubbock's operations, and dissolved the temporary injunction. The Court of Appeals rejected the Ranch's argument that the accommodation doctrine should apply to groundwater interests. *Id*.

The case was appealed to the Texas Supreme Court, which determined that "[t]he deed gives the City the right to drill wells 'at any time and location' but only 'for the purpose of' conducting operations to access the groundwater." *Id*. at *4. "The deed then limits the City's use of the Ranch to what is 'necessary or incidental' to those operations." *Id*. "But the deed leaves unclear whether the City can do everything necessary or incidental to drilling anywhere, as it claims, or only what is necessary or incidental to fully access the groundwater, as the Ranch argues." *Id*. "The deed does not resolve this dispute." *Id*. Accordingly, the court determined that the deed provisions alone could not resolve the dispute, and examined whether the accommodation doctrine should apply.

The Texas Supreme Court held that "similarities between mineral and groundwater estates, as well as in their conflicts with surface estates, persuade us to extend the accommodation doctrine to groundwater interests." *Id*. at *8. The court noted the similarities between groundwater and minerals, including how both have same right to use the surface, are subject to the rule of capture, and are protected from waste. The court also drew from its recent ruling in *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012), where the court held that groundwater, like oil and gas, is owned by the landowner in place below the surface. The court stated that, "[a]nalogizing groundwater to minerals in determining the applicability of the accommodation doctrine is no less valid than it is in determining ownership." *Coyote Ranch* at *9.

Similar to prior oil and gas cases, the court stated the accommodation doctrine as it applies between a severed groundwater estate and surface estate, as follows:

> [T]he surface owner must prove that (1) the groundwater owner's use of the surface completely precludes or substantially impairs the existing use, (2) the surface owner has no available, reasonable alternative to continue

> the existing use, and (3) given the particular circumstances, the groundwater owner has available reasonable, customary, and industry-accepted methods to access and produce the water and allow continuation of the surface owner's existing use.
> *Id*.

While the Texas Supreme Court held that the accommodation doctrine should apply in this case, it ultimately determined that the Court of Appeals was correct in reversing the trial court's injunction, finding that the limitations imposed by the temporary injunction were too broad. *Id*. The court remanded the case for further proceedings consistent with its interpretation of the terms of the deed and its application of the accommodation doctrine. *Id*. at *10.

Chief Justice Hecht delivered the opinion of the court, but there was also a strong concurrence from Justice Boyd. Justice Boyd agreed with the court's overall holding that the accommodation doctrine also applied to groundwater interests, but disagreed that the language of the deed was silent or did not resolve the dispute. In his opinion, joined by Justices Willett and Lehrmann, the deed made it clear that the City of Lubbock had the right to drill water wells "at any time and location" to access the groundwater. *Id*. at *11. However, the accommodation doctrine should be applied if it is determined that the City of Lubbock's selected paths, roads, and power lines are not "necessary or incidental" to taking of water from the well sites. *Id*. at *12.

On September 23, 2016, the Texas Supreme Court denied the City of Lubbock's Motion for Rehearing. However, the court did issue a new revised opinion addressing some of the points made the City of Lubbock's motion. The original opinion used a "necessary and incidental" standard in the analysis, but the language of the deed stated a "necessary or incidental" standard. The court's revised opinion changed that wording to be consistent to the deed language.

***Texas Comm'n on Envtl. Quality and Post Oak Clean Green, Inc. v. Guadalupe County Groundwater Conservation Dist.*, 04-15-00433-CV, 2006 WL 1371775 (Tex. App.—San Antonio Apr. 6, 2016, no pet.) ("*TCEQ v. Guadalupe GCD*")**

The Guadalupe County Groundwater Conservation District ("Guadalupe GCD") had adopted Rule 8.1, titled "Solid, Hazardous or Radioactive Waste," which provided, in part, that "[i]n no event may waste or sludge be permitted to be applied in any manner in any outcrop area of any aquifer within the Guadalupe County Groundwater Conservation District." *TCEQ v. Guadalupe GCD*, at *1. The rule also required any person seeking an application to generate, transport, apply, dispose or otherwise manage a waste or sludge within the boundaries of the Guadalupe GCD to provide notice of that application to the Guadalupe GCD. *Id*.

In 2011, Post Oak Clean Green, Inc. ("Post Oak") submitted an application to the Texas Commission on Environmental Quality ("TCEQ") seeking a determination of land use compatibility for its future solid waste landfill, which was proposed to be located within the Guadalupe GCD. *Id*. In 2013, Post Oak submitted an application for a municipal solid waste landfill permit, seeking to construct and operate a solid waste landfill in the same location as in its application for a determination of land use

compatibility, which was within the outcrop area of the Carrizo-Wilcox recharge zone located within the Guadalupe GCD. *Id*.

In April 2014, Guadalupe GCD filed a lawsuit against Post Oak in the 25th Judicial District Court in Guadalupe County, seeking a declaration under the Uniform Declaratory Judgments Act ("UDJA") that disposal of solid waste at the site by Post Oak violates the Guadalupe GCD's Rule 8.1. *Id*. at *1-2. On September 3, 2014, the Guadalupe GCD filed a motion for partial summary judgment. *Id*. at *2. TCEQ intervened, contending that the relief requested by the Guadalupe GCD is preempted by the Solid Waste Disposal Act, and filed a plea to the jurisdiction and cross-motion for partial summary judgment, arguing that the Guadalupe GCD's declaratory judgment action was not proper because the UDJA does not allow for claims that challenge the construction of an agency rule, and that, pursuant to Section 361.011(b) of the Texas Health and Safety Code, the TCEQ has exclusive or primary jurisdiction over agency permitting of municipal solid waste landfills. *Id*. at *2. The TCEQ also claimed the Guadalupe GCD's lawsuit was not ripe. *Id*.

On January 16, 2015, the trial court granted the Guadalupe GCD's motion for partial summary judgment ruling, in part, that the Guadalupe GCD's Rule 8.1 was not preempted by the Solid Waste Disposal Act. *Id*. The trial court also signed an order on June 23, 2015, denying TCEQ's plea to the jurisdiction, prompting both the TCEQ and Post Oak to appeal. The TCEQ and Post Oak alleged that Guadalupe GCD's declaratory judgment claim was not ripe, that the Guadalupe GCD failed to establish standing, and that the Guadalupe GCD's substantive claim was barred because it falls within the TCEQ's (exclusive or primary) jurisdiction. *Id*. at *3.

The San Antonio Court of Appeals concluded "that any controversy between the District and TCEQ at this time has not matured to a ripe controversy sufficient to confer jurisdiction on the trial court," so the Court of Appeals reversed the trial court's judgment denying TCEQ's plea to the jurisdiction. *Id*. at *4. The Court of Appeals reasoned that "[t]he pleadings and evidence further indicate that TCEQ has not yet granted Post Oak's application to build the landfill at issue." *Id*. "[B]ecause the landfill permit is still pending with TCEQ, we cannot agree that the District has suffered a concrete injury or will be imminently harmed." *Id*. Finding for the TCEQ on the dispositive ripeness issue, the Court of Appeals did not address the other challenges.

SURFACE WATER CASES

***Texas Comm'n on Envtl. Quality v. Texas Farm Bureau*, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied) ("*Farm Bureau*")**

In 2011, the Texas Legislature passed House Bill 2694 that added certain provisions related to the statutory authority of the Texas Commission on Environmental Quality ("TCEQ"), including the addition of Section 11.053 to the Texas Water Code. *See* Act of May 28, 2011, 82nd Leg., R.S., ch. 1021, § 5.03, sec. 11.053, 2011 Tex. Gen. Laws 2579, 2593. Section 11.053, titled "Emergency Order Concerning Water Rights," granted the Executive Director of the TCEQ the power, "[d]uring period of drought or other emergency shortage of water," to issue an order to "temporarily suspend the right of any person who holds a water right to the water," and "temporarily adjust the diversions

of water by water rights holders." Tex. Water Code § 11.053(a). Notably, the statute requires that the order must be "in accordance with the priority of water rights established by Section 11.027" of the Texas Water Code. Section 11.027 is the prior appropriation statute, as it mandates that "[a]s between appropriators, the first in time is the first in right." Tex. Water Code § 11.027.

Section 11.053(c) also required the TCEQ to "adopt rules to implement this section." Tex. Water Code § 11.053(c). Attempting to comply with the legislature's directive, the TCEQ in 2012 adopted its Chapter 36 rules, titled "Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage." Chapter 36 included rules defining a drought or emergency shortage of water, specifying the conditions under which the Executive Director could issue an order pursuant to Section 11.053, and setting procedures for notice and hearing on appeals of an order issued by the Executive Director. Specifically, 30 Tex. Admin. Code § 36.5(c) stated that, "[t]he executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns," allowing the executive director to ignore priority rights when a senior call is made during a drought or emergency shortage of water.

Plaintiffs (including the Texas Farm Bureau) sued, challenging the legality of the TCEQ's drought rules. The district court declared the drought rules invalid because they exceed the TCEQ statutory authority by allowing the TCEQ to exempt preferred uses from curtailment or suspension even if it is not in accordance with priority. *See Farm Bureau* at 267. The trial court determined that Section 11.053 of the Texas Water Code did not grant the TCEQ this authority, and it also was not authorized by the TCEQ's police power or any general authority to protect the public health, safety, or welfare. *Id*. at 267-68.

The TCEQ appealed to the Thirteenth Court of Appeals, which affirmed the decision of the district court (the appeal was transferred from the Third Court of Appeals pursuant to a docket-equalization order). The Thirteenth Court of Appeals dismissed the TCEQ's claim that Section 11.053 of the Texas Water Code is ambiguous. *Id*. at 270. The court stated, "[t]he entire section of 11.053 must be accomplished in accordance with the priority of water rights established by section 11.027." *Id*. "The agency's interpretation would allow senior water rights holders to be suspended before their junior counterparts, which is inconsistent with the plain meaning of the statute." *Id*. "We conclude the district court correctly found that section 11.053(a) requires the TCEQ to apply the section 11.053(b) factors within the framework of 'first in time, first in right.'" *Id*. at 272.

The Thirteenth Court of Appeals also dismissed the TCEQ's argument that it has the authority to exempt certain junior rights from a priority call and curtailment or suspension order according to the TCEQ's police power or its general authority to protect the public, health, safety, or welfare. "None of the statutes or the constitutional provision cited by TCEQ give the agency the general authority to suspend water rights after they have been issued." *Id*.

On February 16, 2016, TCEQ's petition for review was denied by the Texas Supreme Court.

***R.E. Janes Gravel Co. v. Covar et al.*, No. 14-15-00031-CV (Tex. App.—Houston [14th Dist.], filed Jan. 8, 2015).**

This case involves the appeal of a permit amendment filed by the City of Lubbock ("Lubbock") to obtain authorization use the bed and banks of the North Fork Double Mountain Fork of the Brazos River to convey up to 32,991 acre-feet per year of groundwater-based and imported surface water-based return flows and subsequently divert these return flows at diversion point approximately 2.7 miles downstream. *See* Proposal for Decision, Concerning the Application by the City of Lubbock for Amendment to Water Use Permit No. 3985, SOAH Docket No. 582-11-3522, at 1, *available at* http://www.soah.texas.gov/pfdsearch/pfds/582/11/582-11-3522-pfd1.pdf ("PFD"). R.E. Janes Gravel Company ("Janes") protested Lubbock's application for amendment. Janes has a senior water right downstream of Lubbock's proposed discharge point authorizing it to divert and impound state water. *Id*. During the State Office of Administrative Hearings ("SOAH") proceedings regarding Lubbock's application, Janes argued that Lubbock should be required to pass a portion of the discharged return flows sufficient to protect its senior water right and to maintain instream uses. *Id*.

The main dispute centered on which statutory provision governed Lubbock's ability to discharge and subsequently divert its groundwater-based and imported surface water-based return flows. Lubbock argued that the bed and banks statute, Section 11.042 of the Texas Water Code, applied to its application; Janes argued that the statute governing return of "surplus water," Section 11.046 of the Texas Water Code, applied to Lubbock's application. *Id*. at 8. Section 11.046 states 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). The Administrative Law Judge ("ALJ") determined that Section 11.046 of the Texas Water Code did not apply, because none of the water in Lubbock's amendment was originally taken from the Brazos River (it was groundwater and imported water), and thus was not being returned "back to the watercourse or stream from which it was taken." PFD at 8. Additionally, the ALJ found that the water associated with Lubbock's amendment was not "surplus water," because that term is defined as "water in excess of the initial or continued beneficial use of the *appropriator*." Tex. Water Code § 11.002(10) (emphasis added). The use of the term appropriator inferred that the water at issue was originally appropriated (derived from state surface water). PFD at 8.

Janes also disputed Lubbock's carriage loss calculations, and Lubbock's contention that the return flows were only groundwater and imported water, claiming that water native to the Brazos River entered Lubbock's sewer system through inflow and infiltration. *Id*. at 13-14, 18-19. Janes provided testimony that for many years Lubbock's effluent had provided a significant portion of the base flow of the North Fork Double Mountain Fork of the Brazos River, and that Janes' water right was issued, in part, on the historic flow of these discharges. *Id*. at 14. Janes thus argued that Lubbock's application would allow these flows to be taken away (diverted by Lubbock) without including any special conditions in the permit to protect senior water rights like Janes that had come to rely on this water. *Id*. The Executive Director responded that prior to obtaining its TPDES permit in 2003, Lubbock had not discharged any treated effluent directly though

a discrete conveyance since the 1930s; therefore, Janes water right could not have historically relied on these discharges. *Id*. at 16.

The ALJ determined that the water that had entered Lubbock's system was not state water, as it has yet to enter a watercourse before being captured by Lubbock. *Id*. at 16. The ALJ also agreed with the ED and Lubbock that Lubbock had no legal obligation to maintain any flows in the North Fork Double Mountain Fork of the Brazos River based on its past practices. *Id*. at 17. Additionally, the ALJ concluded that Lubbock's carriage loss estimates were derived using industry-standard methodology. *Id*. at 19. Based on these findings, the ALJ concluded that Lubbock's application satisfied all applicable statutory and regulatory requirements, and recommended approving the application. *Id*. at 23.

The TCEQ signed the order to issue Lubbock's permit amendment as the ALJ recommended. Janes appealed to the Travis County District Court, which 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 Gravel appealed the district court decision and the appeal was transferred to the Fourteenth Court of Appeals. Oral argument occurred on November 17, 2015.

***Bradley B. Ware v. Texas Comm'n on Envtl. Quality*, No. 03-14-00416-CV, (Tex. App.—Austin, filed July 7, 2014).**

Bradley B. Ware applied for a water right from the Texas Commission on Environmental Quality ("TCEQ") and was issued a ten-year term permit (Water Use Permit No. 5594) on November 7, 1997, which allowed him to annually withdraw 130 acre-feet of water from the Lampasas River. *See* Proposal for Decision, Application of Bradley B. Ware to Amend Water Use Permit No. 5594, SOAH Docket No. 582-08-1698, at 1, *available at* http://www.soah.texas.gov/pfdsearch/pfds/582/08/582-08-1698-pfd1.pdf ("Ware PFD"). The permit was set to expire on November 7, 2007, unless Mr. Ware received the TCEQ approval to extend the term or to convert the permit to a perpetual right. *Id*. at 2. Mr. Ware timely filed an application to amend Permit No. 5594 on November 15, 2005, requesting to extend his permit term for another ten-year period or convert his permit to a perpetual right, and seeking to withdraw an additional 20 acre-feet of water annually to irrigate his farm. *Id*. at 1-2.

The TCEQ Executive Director recommended denial of Mr. Ware's application, based in part on the TCEQ staff's analysis of Mr. Ware application with respect to the TCEQ's Water Availability Model for the Brazos River Basin ("Brazos WAM"). *Id*. at 4. Based on the Brazos WAM, the TCEQ staff determined there was "little to no water" available at Mr. Ware's diversion point. *Id*. Mr. Ware's application was referred to the State Office of Administrative Hearings ("SOAH") for a contested case hearing before an Administrative Law Judge ("ALJ").

During the SOAH hearing, Mr. Ware argued against the Executive Director's recommended denial because the Executive Director improperly relied solely on the Brazos WAM, that the Brazos WAM disregarded the prior appropriation doctrine and relied on data that was non-current and inaccurate, and the Executive Director impermissibly relied on the wrong priority date with respect to his application. *Id*. at 5. Based on the evidence and arguments, the ALJ determined that while Texas law does not

require the use of the Brazos WAM, it did produce accurate results of projected availability with respect to Mr. Ware's application. *Id*. at 15-23. The ALJ determined that the Executive Director relied on the correct priority date by using the date Mr. Ware's application was declared administratively complete on January 5, 2006, instead of the priority date of his original term permit (July 1, 1997). *Id*. at 27. Therefore, the ALJ recommended that Mr. Ware's application should be denied. *Id*. at 28.

The TCEQ adopted the ALJ's PFD and issued an order denying the application. Mr. Ware filed suit in Travis County District Court requesting that the court reverse the TCEQ's order or remand the case back to the TCEQ, but the district court affirmed the TCEQ's order in 2014. *See Bradley B. Ware v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-10-002342 (53rd Dist. Ct., Travis Cnty., June 11, 2014). Mr. Ware appealed to the Third Court of Appeals, and oral arguments were heard on November 18, 2015.

***In re: Application by the Brazos River Authority for Water Use Permit No. 5851*; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184.**

On June 25, 2004, the Brazos River Authority ("BRA") filed an application seeking issuance of a System Operation water use permit ("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. Through the SysOps Permit Application, BRA sought the operational flexibility to use any source of water available to it in order to satisfy the diversion requirements of senior water rights to the same extent those rights could have satisfied by passing inflows, and to be able to release, pump, and transport water from any of BRA's reservoirs for subsequent storage, diversion, and use throughout BRA's service area. BRA contended that the application produces a significant additional supply by substituting available downstream run-of-river water for releases from storage under BRA's existing rights, and supplying water from storage when certain reservoirs are relatively full while conserving other supplies. Pairing available run-of-river flows in the Brazos River Basin with BRA reservoir releases, and the operation flexibility to make those releases from different reservoirs, creates a reliable supply of water for BRA's customers in the basin. The BRA SysOps Application also 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").

The BRA SysOps Application was declared administratively complete by the Texas Commission on Environmental Quality ("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) was held from May 9th to June 2, 2011. Many of the protestants arguments focused on BRA's proposed two-step process for the application, whereby BRA would obtain the permit now and later (in a second step) develop a Water Management Plan ("WMP") that would provide more

detail on the actual operations associated with permit, including the locations of diversions and specific amounts of water that would be diverted and used at those locations. On October 17, 2011, the two Administrative Law Judges ("ALJs") that presided over the hearing issued a Proposal for Decision, recommending denial of BRA's SysOps Application, in part because they determined that the two-step process violated Texas law. *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 "PFD"). On January 25, 2012, the TCEQ Commissioners considered the 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 WMP associated with the application.

On November 28, 2012, BRA filed its WMP as an amendment to the application. June 28, 2013, the amended application and WMP were declared administratively complete by the TCEQ ED. Again several parties protested the application. On August 26, 2013, a preliminary hearing was held on the amended application. The ALJs issued a revised schedule and the evidentiary hearing was abated due to the development of new environmental flow rules that affected 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 "PFDR"). On January 20, 2016, the TCEQ Commissioners considered the PFDR at their agenda hearing. The Commissioners agreed with findings and conclusions in the 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 (Proposed Stipulations, Initial Briefs, and Reply 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 "Supplement").

At the August 24, 2016 TCEQ agenda hearing, the 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. The Commission issued an order granting the BRA SysOps Application including those changes on September 16, 2016. Motions for Rehearing were to filed on October 11, 2016, by the Brazos Family Farmers and Ranchers, the Lake Granbury Coalition, Friends of the Brazos River, Lawrence D. Wilson, Jane Vaughn, Brazos River Alliance and Ken C. Hackett.

The BRA SysOps Application is very complex, and involved numerous issues associated with water rights and water quality. Summaries of a few of the most contentious issues during the two hearings on the merits and limited remand are provided below:

Return Flows

The utilization of return flows as part of the BRA SysOps Application was a major issue in the case. 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. Generally, the 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). Section 11.042(b) and (c) of the Tex. Water Code state the following:

> Sec. 11.042. DELIVERING WATER DOWN BANKS AND BEDS.
> (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.
>
> (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.
>
> Tex. Water Code § 11.042.

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 its 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. Tex. Water Code § 11.046 states the following:

> 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.
> Tex. Water Code § 11.046.

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* 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. *See* PFD 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 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* 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 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).

During the second hearing on the merits, 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* 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, 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 under 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 Commission hearing on January 29, 2016, the TCEQ Commissioners agreed with the ALJs' interpretations of these provisions. Additionally, the interim order that was released after that hearing, which called for a limited remand on sedimentation and return flows issues, 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. 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 a Section 11.042 authorization).

Water Availability Issues

Tex. Water Code § 11.134 states the TCEQ shall grant an application only if "unappropriated water is available in the source of supply." Tex. Water Code § 11.134(b)(2). Several of the protestants argued that modeling decisions made by BRA overstated the water available for appropriation for BRA's application. These modeling decisions included: (1) using permitted capacity of its reservoirs, which fails to take into account sedimentation, (2) not factoring in the effects of the recent drought; and (3) locating demands at the mouth of the river or at a downstream point in the basin, instead of simulating these demands at there anticipated locations.

With respect to the sedimentation issue, one of the protestants (The Dow Chemical Company) introduced evidence showing that some of the original storage capacity of BRA's reservoirs had been lost due to sedimentation, and that this loss of storage capacity greatly reduces the yield of these reservoirs (and thus the water available for appropriation for the SysOps Permit). The ALJs concluded "that the Commission should grant the Application in amended form, with the reductions in the appropriation amounts as indicated by the revised modeling utilized by Dow." *See* PFDR at 65. The Commission partly agreed with the ALJs' recommendation. The Commission "determined to implement the [sedimentation] reduction via appropriate special condition limitations instead of lowering the Use Appropriation amounts in the four Demand Level scenarios." Essentially, the Commission ruled to base BRA's appropriation amount on permitted storage capacity, but limit the amount BRA can actually divert and use based on the sedimentation reductions adopted by the ALJs.

Similar to the sedimentation issue, the protestants argued that the recent drought may have reduced the water available for appropriation for BRA SysOps Application, but BRA failed to take that into account. BRA acknowledged that (at the time of the second hearing on the merits) Possum Kingdom Reservoir was in a new drought of record. However, BRA argued that the drought was not over (Possum Kingdom had not refilled at the time), so the effects of the drought could not yet be evaluated. Additionally, BRA argued that a reduction in yield for Possum Kingdom Reservoir would not necessarily mean an reduction in water availability for the SysOps Permit; one would have to conduct a study to reevaluate and recalculate the naturalized flows for the basin to actually determine this answer. The ALJs determined that the SysOps matter could not be put on indefinite hold until the drought ended, and that special condition be added to the permit "whereby BRA is to study the effects of the new drought within nine months

of issuance of the permit." *See* PFDR at 75. "[I]f the results of the BRA study indicate that a new drought of record has decreased the amount of water available for the SysOp Permit, then the appropriation amount specified in…the Permit shall be correspondingly decreased." *Id*.

Several protestants also criticized BRA's modeling in the first hearing on the merits, because BRA located many of its demands near the mouth of Brazos River, at the bottom of the basin. BRA argued that it would not know where the demands were until after the permit was issued and downstream customers were identified. Even for its anticipated demands identified in the state and regional water plans, BRA would not know the actually diversion points under after the permit was issued, the WMP was developed, and the diversion locations were identified. As stated above, the Commission remanded the case for a second hearing so that BRA could develop its WMP, addressing these concerns. In the WMP, BRA's appropriation modeling runs simulated the permit with current BRA contractual commitments at their actual locations, additional demands shown in the regional water plans at their anticipated locations, and additional demands in the Richmond Gage to Gulf of Mexico reach of the basin.

Environmental Concerns

Several protestants raised certain environmental concerns with the SysOps Application. The ALJs rejected an argument that the legacy environmental flow requirements should be applied to the permit as well as the newly adopted Senate Bill 3 standards. Another argument was that BRA should be required to meet the environmental flow conditions at measurement points that are both upstream and downstream of BRA's diversion locations. The ALJs concluded that "BRA's obligation to forego a particular diversion and pass environmental flows under the SB3 rules should only apply at the measurement point nearest the particular diversion." *See* PFDR at 146. The ALJs also concluded that "requiring BRA to daily determine the diversion rates under senior water right and add those to the applicable environmental flow condition, is not practical," as was suggested by the National Wildlife Federation. Protestant Friends of the Brazos River argued against the procedure in BRA's WMP for identifying and passing pulse flows. BRA's procedure allowed them to temporarily store pulse flows. It was argued that this temporary delay was not justified under the TCEQ rules, that capturing a pulse could undermine its ecological benefits, and that BRA provided no time limit in the WMP for how long a possible qualifying pulse would be stored. The ALJs concluded that BRA's "treatment of high flow pulse flows conforms to the requirements of the Texas Water Code and the SB 3 rules and should be approved." *Id*. at 167.

Diversion Points

As stated above in the discussion on water availability, BRA did not (and in its view could not) identify specific diversion points for its demands associated with the SysOps Permit. After the first hearing on the merits, "[t]he ALJs conclude[d] that, as currently formatted, the BRA Application fails to comply with the requirement in Section 295.7 to identify the specific locations where water will be diverted pursuant to the SysOp Permit." PFD at 28. The ALJs reasoned that, "[b]y failing to identify real, specific diversion points in the application, BRA has failed to comply with the clear requirement of 30 TAC § 295.7" *Id*. at 29. To satisfy the concerns of the ALJs, in the WMP BRA

modeled: (1) existing diversions at the diversions authorized by BRA's existing water rights, including current contractually authorized diversion points on stream channels downstream from BRA reservoirs; (2) regional plan diversions in the reach that BRA expects them to occur; and (3) additional supply diversions that are beyond current contracts and regional plan demands in the reach from the Richmond Gage to the Gulf of Mexico. To simulate the regional plan and additional supply demands, BRA divided up the basin into 40 diversion "reaches." The protestants contended, during the second hearing on the merits, that this reach concept still does not comply with the TCEQ rules, which call for an application to "state the location of point(s) of diversion." 30 Tex. Admin. Code § 295.7. The ALJs concluded that the TCEQ rule requiring a specific diversion point to be identified in the application was directory and not mandatory. *See* PFDR at 28. In a follow up letter to the Commission responding the parties exceptions, the ALJs stated that "even if the Commission concludes the rules are mandatory, we believe there is sufficient evidence in the record to support a finding that BRA met the rules' requirements." *See* ALJ's Response to Exceptions, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184 (Sept. 23, 2015) *available at* http://www.soah.texas.gov/pfdsearch/pfds/582/10/582-10-4184-exc2.pdf.

WHOLESALE RATE CASE

***Petition by the City of Dallas for Review of a Decision by the Sabine River Authority*, PUC Docket No. 43674, SOAH Docket No. 473-15-1149 ("*SRA/Dallas PUC Appeal*")**

***City of Dallas v. Sabine River Auth.*, No. 03-15-00371-CV (Tex. App.—Austin, filed June 16, 2016) ("*SRA/Dallas Contract Appeal*")**

***City of Dallas v. Cary "Mac" Abney et al.*, No. D150045C (260th Dist. Ct., Orange County, filed Feb. 13, 2015) ("*SRA/Dallas Board Suit*")**

***City of Dallas v. Cary "Mac" Abney et al.*, No. 09-16-00038-CV, 2016 WL 3197591 (Tex. App.—Beaumont June 9, 2016, no. pet.) (mem. op.) ("*SRA/Dallas Venue Appeal*")**

***City of Dallas v. Sabine River Auth.*, No. 09-16-00246-CV (Tex. App.—Beaumont, filed July 7, 2016) ("*SRA/Dallas Plea Appeal*")**

In the early 1970's, based on interest from local utilities, Sabine River Authority ("SRA") decided to construct a dam and reservoir on Lake Fork Creek in Wood, Rains, and Hopkins Counties, Texas. In 1974, SRA entered into a Water Supply Facilities Agreement (the "1974 Agreement") with Dallas Power & Light Company, Texas Electric Service Company, and Texas Power & Light Company (together the "Corporations"). The 1974 Agreement provided for the construction of the reservoir known as Lake Fork Reservoir and the adjoining water supply facilities, and entitled the Corporations to draw water from the reservoir during its forty (40) year term.

In 1981, SRA entered into a Water Purchase Agreement with the Corporations (the "1981 Agreement") by which SRA agreed to reduce the commitment to the

Corporations to 20,000 acre-feet of water per year for generating power. On the same day that SRA and the Corporations entered into the 1981 Agreement, SRA, the City of Dallas ("Dallas"), and the Corporations entered into the *Water Supply Contract and Conveyance* (hereafter the "Contract"), which essentially transferred most the Corporations' rights (except for the 20,000 acre-feet per year reserved in the 1981 Agreement) under the 1974 Agreement to Dallas. The term of the Contract was to renew for another 40-year term on November 2, 2014, unless Dallas gave written notice to SRA by November 1, 2013 of its intent to not renew. Neither SRA nor Dallas gave a notice terminating the Contract. With only one exception, the terms and conditions of the Contract were to continue for any renewal term. If renewed, the compensation to be paid was to be determined by mutual agreement between SRA and Dallas, taking into account "such price as is prevailing in the general area at the time for like contract sales of water of similar quality, quantity and contract period." *See* Contract § 6.02. The Contract also provided that "[i]n the event that the City and the Authority are unable to agree upon the amount of such compensation prior to the expiration of each such term, the Texas Water Commission may establish interim compensation to be paid by the City to the Authority."

As the end of the Contract approached, Dallas and SRA had negotiations regarding the rate; however, after years of discussion, the contract term ended with SRA and Dallas unable to reach an agreement. On October 9, 2014, SRA's Board of Directors unanimously approved a motion to set the amount of compensation for the next renewal term of the Contract effective November 2, 2014. SRA charged Dallas a rate of $0.5613 per thousand gallons, or $182 per acre-foot. SRA classified this as an "interim" rate until the two can agree to a prevailing rate. To date, SRA and Dallas have not been able to agree on the rate.

On October 30, 2014, Dallas filed a petition with the Public Utility Commission of Texas ("PUC") to review the interim water rate set by the SRA Board of Directors on October 9th, as well as to determine the prevailing water rate. *See SRA/Dallas PUC Appeal*. Dallas asserted that the PUC had jurisdiction over this matter under Tex. Water Code § 12.013, and contended that the rate set by SRA "does not constitute 'a rate set pursuant to a contract' within the meaning of [16 Tex. Admin. Code] § 24.31(c)." Dallas also argued that if SRA disagrees that the rate is not set pursuant to contract, that the Administrative Law Judge ("ALJ"), "after interim rates are set, should abate the case" until the contract issues are resolved.

The PUC subsequently referred the case to the State Office of Administrative Hearings ("SOAH") on November 10th, requesting the assignment of an ALJ to conduct a hearing. The ALJ held a prehearing conference on January 6, 2015 that was recessed until January 22nd, and issued SOAH Order No. 4 to memorialize that prehearing conference. In SOAH Order No. 4, the ALJ made several findings. First, the ALJ found that the PUC had jurisdiction over the matter under Section 12.013 of the Texas Water Code. Second, the ALJ determined that the PUC has authority to set an interim rate. Third, the ALJ ruled that the PUC had delegated authority to him to set interim rates by referring the matter to SOAH. Fourth, the ALJ stated that he "may and will set an interim rate using the process set out in [Commission rules]," and that he could set an interim rate because "there is currently no contractual rate" and, therefore, there is "no need" to determine whether the public interest is adversely affected. And, finally, the

ALJ stated that he "will abate the case if [SRA] or Dallas files a motion to abate in accordance with 16 Tex. Admin. Code § 24.131(d)."

On January 20, 2015, SRA concurrently filed a motion to abate under 16 Tex. Admin. Code § 24.131(d) and an appeal of Order No. 4. No commissioner voted to hear SRA's appeal of Order No. 4 and that appeal was denied by operation of law. The parties were so notified on January 30th. In its motion to abate, SRA recounted the ALJ's language in Order No. 4 that if the parties disputed whether the rate was set by contract and a motion to abate was filed that the judge would abate the case. SRA reasserted that the subject rate was set pursuant to contract and noted Dallas's argument that the rate was not set pursuant to contract. Thus, SRA argued, the matter must be abated in accordance with 16 Tex. Admin. Code § 24.131(d).

In Order No. 5, the ALJ stated that he had no discretion in the matter and granted SRA's motion to abate. In addition, the ALJ cancelled the prehearing conference that was to have reconvened on January 22nd. On March 26, 2015, the PUC issued an order on appeal of SOAH Order No. 5. The PUC concluded that it and the ALJ, through referral, currently have authority to set interim rates in this case, despite 16 Tex. Admin. Code § 24.131(d). On March 30, 2015, Dallas requested permission to set up a conference bridge for the April 2, 2015 teleconference in the PUC case. The request was granted. Using the process set out in 16 Tex. Admin. Code § 24.29(d) and (e), the ALJ heard oral arguments from the parties on April 2, 2015, regarding whether an interim rate should be established.

Based on the arguments, on April 2, 2015 the ALJ issued SOAH Order No. 8, establishing interim rates. The ALJ determined that he could not reasonably conclude at this preliminary stage "that the rate SRA currently charges Dallas is unjust or unreasonable." "However, the ALJs finds that the current rate could result in Dallas paying an unjust and unreasonable rate because the PUC may ultimately set a lower rate." "Accordingly, the ALJ orders that the rate SRA currently charges Dallas will be the interim rate to be in effect until this case is finally decided, namely $0.5613/1,000 gallons, on a take-or-pay basis." The ALJ also granted Dallas' motion to require SRA to deposit all collections into an escrow account. The interim rate is retroactively effective from November 2, 2014, when the rate SRA is charging took effect. *See* Tex. Water Code § 12.013(e), (f).

As the *SRA/Dallas PUC Appeal* was ongoing, Dallas filed a declaratory judgment action in Travis County District Court on January 30, 2015, seeking a determination that the rate set by SRA was not set pursuant to the Contract. However, the Travis County District Court dismissed the case on May 21, 2015, granting SRA's plea to the jurisdiction, which argued that the doctrine of governmental immunity barred Dallas' suit against SRA. Dallas filed an appeal with the Third Court of Appeals on June 16, 2016. *See SRA/Dallas Contract Appeal*. Oral argument occurred before the court on March 23, 2016.

Concurrently with these other legal proceedings, Dallas filed a February 2015 suit in Orange County, suing SRA's Board of Directors individually. *See SRA/Dallas Board Suit*. Dallas' petition sues the SRA Board of Directors solely in their respective official capacities as members of the SRA board because, as Dallas alleges, they acted *ultra vires* (i.e., beyond their power and authority) when they voted to increase the rate charged to Dallas for water from Lake Fork Reservoir after November 2, 2014. The suit seeks a

declaratory judgment that SRA's board members acted without legal authority and in violation of SRA's enabling legislation. All but one of the SRA board members answered and filed pleas to the jurisdiction in response claiming that they had acted within their official capacity and that governmental immunity barred the suit.

On June 23, 2015, SRA intervened in the *SRA/Dallas Board Suit*, asserting a claim for breach of contract against Dallas for failing to pay the renewal term set by the SRA Board of Directors. On July 17, 2015, Dallas filed a motion to transfer venue of SRA's breach of contract claim contained in its intervention, arguing that venue for SRA's claim was not proper in Orange County, and was instead proper in Travis County or Dallas County (citing sections 15.002, 15.003 and 15.020 of the Texas Civil Practice and Remedies Code). SRA filed a response in which it argued that the provisions cited by Dallas did not apply, because SRA was not a plaintiff in the case, and therefore its counterclaim is proper in Orange County under section 15.062 of the Texas Civil Practice and Remedies Code, or in the alternative under section 15.003. After a non-evidentiary hearing, the trial court denied Dallas' motion to transfer venue, and in response Dallas filed a notice of appeal (an interlocutory appeal) from the trial court's venue order. *See SRA/Dallas Venue Appeal* at *1-4.

The Ninth Court of Appeals determined, based on its analysis of the facts, that SRA should be characterized as a defendant in the case. Since SRA was not a plaintiff, "no applicable statute allows for an interlocutory appeal from the trial court's venue determination in this case." *Id*. at *10. The Ninth Court of Appeals therefore dismissed the appeal for want of jurisdiction. *Id*.

Also in response to SRA's intervention into the *SRA/Dallas Board Suit* that asserted a breach of contract claim against Dallas, Dallas filed a plea to the jurisdiction based on its own governmental immunity, and on the PUC's exclusive jurisdiction to set the rate. The trial court denied Dallas' plea to the jurisdiction, and Dallas appealed to the Ninth Court of Appeals. *See SRA/Dallas Plea Appeal*. Dallas has requested oral argument, but no hearing date has been set. The court of appeals ordered that all further trial court proceedings in the underlying case (*SRA/Dallas Board Suit*) are stayed until its opinion is issued or until further order.