

Brazos River Basin Water

Water Availability & Senior Rights Impairment

Remand Deadline

Plan Aspects

CONSTRUING SPECULATIVE USE

TCEQ REMANDS MILLION ACRE-FOOT WATER APPLICATION FOR BRAZOS RIVER BASIN

by David Moon, Editor

Introduction

APPLICATION RAISES “SPECULATION” ISSUES

The Texas Commission of Environmental Quality (TCEQ) at its January 25, 2012 meeting rejected a water use permit application (Application) by the Brazos River Authority (BRA) to appropriate over one million acre-feet of water from the Brazos River. The Application essentially requested all water remaining in the Brazos River Basin (Basin) — including existing and future return flows. Granting the Application would put the BRA in the position of controlling all new uses of water in the Basin.

Administrative Law Judges (ALJs) Newchurch and Burkhalter concluded that the Application cannot be approved and should either be denied or remanded to the State Office of Administrative Hearings (SOAH) for further hearing on the Water Management Plan. The ALJs determined that they “cannot find that BRA has shown that water is available for appropriation at the points where BRA would eventually divert water or that senior water rights would not be impaired by proposed diversions. That is mostly due to BRA’s proposed two-step process, which the ALJs also believe might result in a non-final order.” Proposal for Decision (Proposal), October 17, 2011, page 193. The ALJs also provided TCEQ with an alternative recommendation to grant the Application in part by only authorizing diversions at four locations for specific quantities identified in the Application.

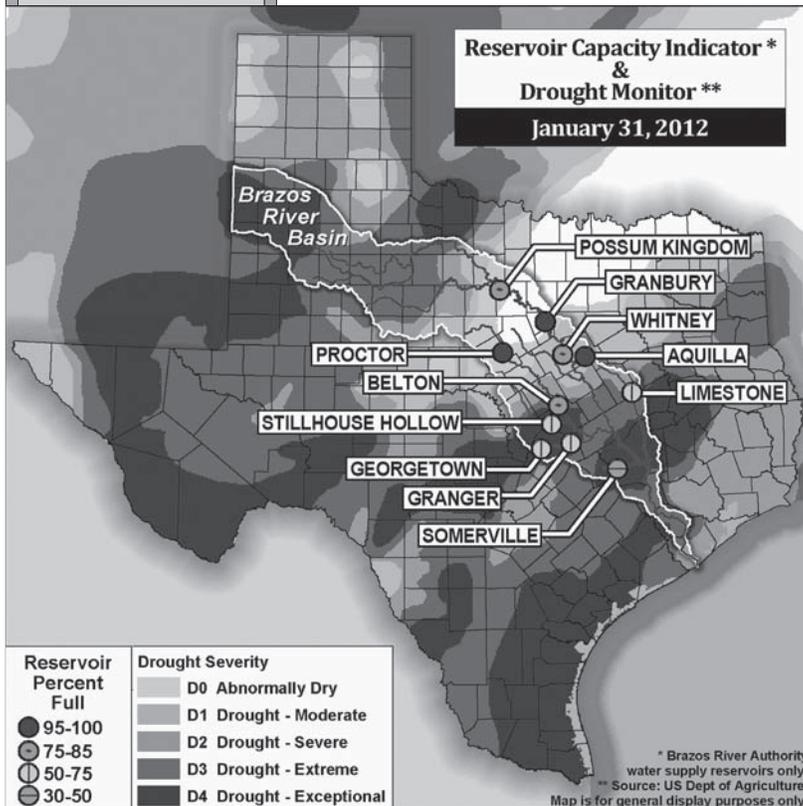
TCEQ’s Interim Order (January 30, 2012) remanded Permit #5851 back to SOAH with instructions to “abate the hearing to allow the Applicant to submit additional information related to the application in the form of a Water Management Plan.” A timeline was set out in the Interim Order (Order) for submittal of the detailed Plan within ten months. Meanwhile, TCEQ also directed the ALJs overseeing the case to “draft a proposed order denying BRA’s permit application if BRA fails to meet that deadline.” Order at 1.

Although the Order is clearly not a final order denying the Application outright, TCEQ left little doubt about its current view of the Application. TCEQ required the ALJs to prepare the proposed “denial order” so that it is “consistent with the ALJs’ analysis and conclusion that BRA’s original application did not meet the requirements for permit issuance and should be focused on the issues that led to their recommended denial.” *Id.* However, BRA comes away from this decision with the opportunity to obtain the additional water requested provided it can provide sufficient detail to the ALJs and TCEQ to convince them of the

Application’s merit and overcome some fundamental issues of water law. The remand gives BRA another shot at providing needed specificity to their plans for use of the water, even though the permit was filed over seven years ago and the parties have already participated in an eleven day hearing.

Following submittal of the Water Management Plan, TCEQ provided for seven months for review and compliance with public participation requirements. If supplemental information is necessary, BRA was ordered to “promptly respond to any requests for additional information... within 20 days... ” *Id.* at 2. After that the record was to be reopened and a hearing held on the new information, including the proposed permit application as modified by the Water Management Plan. TCEQ also placed a strict deadline on the end of the process, by directing the ALJs to issue a revised proposal for decision and proposed order within 24 months from January 30, 2012, after which the parties would have an opportunity to file exceptions and replies. *Id.*

The original application was filed with TCEQ on June 25, 2004. The ALJs conducted the hearing regarding the permit over 11 days in May and June of 2011. Apparently, TCEQ’s Order is designed to keep the process on a strict timeline as BRA continues to pursue the massive appropriation by preparing a Water Management Plan.



Brazos River Basin Water

Brazos River Authority

DOW Downstream

System Operations Permit (Proposed)

Return Flows

Flexibility

Diversions

An unusual coalition of critics oppose the application as Protestants, including: landowners; farmers; environmentalists; and the Dow Chemical Company (which runs a complex near the mouth of the Brazos).

Background

BRA SYSTEM AND “SYSTEMS OPERATION PERMIT” APPLICATION

BRA was created by the Texas Legislature in 1929 and was the first State agency in the United States created specifically for the purpose of developing and managing the water resources of an entire river basin. BRA’s staff of 250 develop and distribute water supplies, provide water and wastewater treatment, monitor water quality, and pursue water conservation through public education programs.

BRA owns several major dams on the Brazos River and its tributaries; the Application encompasses twelve reservoirs — one of which is not yet constructed — in Texas’ largest river basin. BRA has existing water rights to 705,000 AF of water, but 99% of that supply is already under contract to various cities and industry. See Proposal at 5 for details. An “acre-foot” (AF) is equal to about 326,000 gallons; as a volume figure in water parlance, when one refers to an acre-foot that implicitly means an acre-foot for every year.

The Dow Chemical Company (DOW) owns 235 AF of relatively senior water rights in the Basin, most of which are senior to BRA’s existing rights; those rights, however, are the most downstream water rights on the Brazos River due to the location of DOW’s diversion points. DOW was particularly concerned that there is no watermaster for the Brazos River and that there is no simple priority call system in place. As noted in the Proposal for Decision, BRA did not oppose the appointment of a watermaster. Proposal at 182.

BRA applied for a “systems operation permit” in June 2004. In its Post-Hearing Written Argument (BRA Argument) at page 2, BRA refers to the Application as “truly unique, in terms of its complexity, its scope, and its benefits.”

The Application was filed pursuant to rules of the TCEQ & TWC Ch. 11 to:

- Authorize a new appropriation of state water in the amount of 421,449 acre-feet (AF) per year for multiple uses, including domestic, municipal, agricultural, industrial, mining and other beneficial uses on a “firm” basis in the Basin. The new appropriation amount includes the current and future return flows requested in the application. BRA indicated that the entire amount of 421,449 AF is available only if all of it is diverted at the mouth of the Brazos River, and can only be made available by the Applicant through the system operation of its water rights [reservoir system].
- Use of up to 90,000 AF of its firm supply (part of the 421,449 AF of firm water requested above) to produce — along with other unappropriated flows — an “interruptible” water supply of 670,000 AF and the appropriation of that interruptible water supply. [“Firm” water means water from a water right that will be available during the drought of record. “Interruptible” water (“non-firm” water) will not be available at all times, not during the drought of record and not even during many other times, and thus may be interrupted to provide for more senior users. BRA will sell interruptible water on a yearly basis, when it predicts it will have sufficient water.]
- Create an exempt interbasin transfer authorization to transfer and use, on a firm and interruptible basis, such water in the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin, and to transfer such water to any county or municipality or the municipality’s retail service area that is partially within the BRB for use (on a firm and interruptible basis) in that part of the county or municipality and the municipality’s retail service area not within the BRB.
- Appropriate current and future return flows to the extent that such return flows continue to be discharged or returned into the bed and banks of the Brazos River, its tributaries, and Applicant’s reservoirs.
- Allow operational flexibility to: (1) use any source of water available to the Applicant to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Applicant’s reservoirs on a priority basis; and (2) release, pump and transport water from any of Applicant’s reservoirs for subsequent storage, diversion and use throughout the Applicant’s service area.
- Divert water from existing and other diversion points, some of which are not yet identified
- Allow use of the bed and banks of the Brazos River, its tributaries, and BRA’s reservoirs for the conveyance, storage, and subsequent water diversion
- Recognize that the SysOp Permit will prevail over inconsistent provisions in BRA’s existing water rights regarding system operation

BRA “seeks authority to take advantage of water savings achieved through coordinated operation of its various existing water rights, as well as the right to make additional appropriations.” *Id.* at 6.

Brazos River Basin Water

Protestants' Position

Speculation

Beneficial Use

Permit Process

Water Availability & Impacts

Two-Step Rejected

Unknowns

Diversion Points

Positions of the Contending Parties

The Protestants “complain that BRA has not properly proposed points and rates of diversion as required, making it impossible to determine whether unappropriated water is available at the point where BRA would eventually divert water and whether senior water rights would be impaired.” They also argue that the permit would be detrimental to the public welfare and raised claims that “BRA was required, but failed, to adequately consider the protection of instream uses, recreation, tourism, water quality, fish and wildlife habitat, the availability of water for family farmers, and water salinity levels.” Proposal at 2.

BRA claimed that its proposal will protect the environment, fish and wildlife habitat, and instream uses. It proposed “complex interim restrictions on instream flows that it contends would accomplish those purposes. It also agrees that those interim restrictions are subject to adjustment to comply with the environmental flow standards that the Commission eventually will adopt in the future.” *Id.* at 3.

The Executive Director (ED) of TCEQ recommended that BRA’s Application be approved in part. He “agrees with BRA on every significant point but one.” The ED’s position differs only as to the handling of return flows, maintaining that BRA may use return flows only to the extent of current discharges (not future return flows) and “BRA may only use return flows that originate from BRA or from treatment facilities owned or operated by BRA.” *Id.*

The critical issue of speculation was highlighted in the Friends of Brazos River (FBR) Post Hearing Argument at page 1: “At the heart of BRA’s approach is an attempt to circumvent requirements of existing laws and permit, including one of the most fundamental provisions of Texas surface water law: demonstration of actual beneficial uses for the specific amounts of water to be appropriated.” FBR also asserted that “BRA’s approach also seeks to circumvent the requirements related to protection of instream flows that are found in both existing law and prior permit issued to BRA.” *Id.*

The “Texas Two-Step” Process

FUTURE UNKNOWNNS AND THE PERMITTING PROCESS

BRA pushed for a two-step process, where TCEQ would grant the water rights to BRA first and later address specific requests for a diversion and use of water when BRA filed a water management plan as an amendment to the permit. BRA maintained that it could not develop a water management plan until it knows how much water it can divert. Proposal at 2 and 160.

Protestants, on the other hand, asserted that such a two-step process is “unprecedented” and “doesn’t fit within the structure of Texas water rights permitting.” Relying on BRA to address the “details and necessary protections for how that permit can be effectively managed to protect existing water rights and the environment” should not be allowed, especially since there is no “statutory structure, or at least rules, governing operations under such a water management plan scenario” — “Once BRA has its perpetual water right, the risk is squarely placed on existing water rights and the environment.” National Wildlife Federation (NWF) Post-Hearing Argument at 1. In addition, the objectors maintain that it is impossible to gauge the availability of water or the potential impacts on water rights holders, water quality, fish, and wildlife habitat without knowing the location of diversion points or the flow rates to be diverted. They further maintain that granting the permit without such details is clearly premature and speculative.

The ALJs agreed that the two-step process was “unprecedented” — rejecting BRA assertions that various other permits cited by BRA were pertinent prior examples. Proposal at 165. “Most notably, none of the precedents cited by BRA and the ED [Executive Director, TCEQ] involved the TCEQ issuing a water right without requiring the applicant to prove all the elements required by Water Code § 11.134 at the time of permit issuance. Thus, the ALJs conclude that there is no precedent in water rights permitting in Texas which supports the use of the two-step process envisioned by BRA and the ED.” *Id.*

The two-step process has additional problems, according to the ALJs’ Proposal, including: theoretical diversion points; the failure to specify diversion rates; and the fact that the actual amounts of water that will be appropriated by BRA would remain unknown until completion of the water management plan process. *Id.* at 165-172. “The most prominent aspects of the SysOp Permit, however, are far from definitive.” *Id.* at 170. The Permit “as it is currently proposed, would likely not be considered to be a final and appealable order.” *Id.* at 173.

The failure to identify the actual diversion points that would be utilized by the permit — i.e. the “Imaginary Diversion Points” alluded to in FBR’s Post-Hearing Argument — is a key factual omission. “The specific locations of diversion points for new appropriations throughout the basin are required to be identified in the permit application and permit. § 11.125(b)(2), Tex. Water Code and 30 TAC §295.7. Both Texas law and TCEQ rules require BRA’s application identify the location of point(s) of diversion and show the locations on a map in the application.” FBR Argument at 14. FBR went on to argue that “Only when the diversion points are proposed, can the specific impacts on the stream and instream uses at and

Brazos River Basin Water
Water Management Plan
Diversion Rates
Adverse Affect
Diversion Points (Infinite)
Impacts on Senior Rights
Unappropriated Water
Sources

just downstream of the diversion points be identified and assessed. That type of analysis is, however, required *before* a new appropriation is approved under § 11.134, Tex. Water Code.” *Id.* at 15 (emphasis added). Under BRA’s proposed two-step process, however, the diversion points for the permit were not all identified, since the proposal was to have the later Water Management Plan specify diversion points, rates of diversion, etc.

Remand to SOAH and the ALJs

Once BRA submits its Water Management Plan to the ALJs, many of the factual questions and related water law issues will need to be addressed by the ALJs. Although the Application was not granted and BRA clearly has much to do to prepare an adequate Water Management Plan to secure a permit, it should also be noted that the ALJs rejected eighteen proposed permit conditions as part of their Proposal for Decision (see pages 185-189). In addition, the ALJs Proposal for Decision also made findings on some of the myriad of issues involved, such that one could expect they will be reluctant to change their rulings upon remand. At this point, it is unclear if the TCEQ will later uphold the ALJs holdings or rule otherwise.

While the “Texas Two-Step” may be dead, the ALJs concluded that BRA has already shown that “granting its System Operation Permit would be in the public interest and not detrimental to the public welfare, the environment, instream water uses, or CCG’s [Comanche County Growers] or Mr. Ware’s [both are Protestants to the Application] water rights.” *Id.* at 4. Other important rulings in the ALJs Proposal for Decision are discussed below.

Diversion Rates and Adverse Affects on Existing Rights

The ALJs decided that the Application does not adequately identify a maximum rate of diversion, as required by a TCEQ rule governing permitting (30 TAC § 295.6). Due to its decision to request the two-step process, BRA’s Application is “silent as to rates of diversion” and BRA conceded that “it is seeking a permit that would not specify any maximum diversion rate.” BRA asserted that “the diversion rates will be subsequently identified in the process of developing the WMP [Water Management Plan].” Proposal at 19.

The Protestants, however, maintained that the lack of information was critical because “the impacts of the proposed permit cannot be adequately determined now without knowing diversion rates.” The ALJs agreed with this assertion. The ALJs also stated that “by leaving diversion rates unspecified, it is impossible, at this stage, to determine whether the SysOp Permit will adversely affect senior water rights.” The ALJs concluded that “the Application cannot be granted without knowing the maximum rates of diversion.” Proposal at 19-20.

The Application’s failure to identify the actual diversion points for the proposed water rights and reliance on the two-step process resulted in further problems noted by the ALJs. They finally concluded that “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. Ironically, the Application either: (1) identifies *no* diversion points, or (2) identifies *infinite* diversion points.” Proposal at 28 (emphasis in original).

Besides failing to comply with the rule regarding diversion points, the ALJs explain the importance of such information to a permitting decision: “Moreover, without knowing the actual diversion points, the impacts the SysOp Permit may have on senior water rights cannot be known. When conducting a water availability analysis during consideration of a water-right application, it is critically necessary to know the location diversion point in order to assess the impact that a proposed permit may have on senior water rights and instream uses. BRA concedes this point: ‘the amount of water made available by system operation depends significantly upon the location in the basin at which the water is diverted.’” *Id.* at 28-29.

Water Availability and Impairment of Existing Rights

Like all the western states, Texas law requires that a water right cannot be granted unless “unappropriated water is available in the source of supply” for the proposed right. Water Code § 11.314(b)(2). In addition, an application for a water right cannot be granted unless the TCEQ decides that the new appropriation will “not impair existing water rights or vested riparian rights.” Water Code § 11.314(b)(3)(B).

The SysOp Permit includes three sources of unappropriated water: 1) unappropriated river flows; 2) return flows of treated wastewater; and 3) water available for appropriation from BRA’s existing reservoirs. The underlying reason for BRA’s application is that BRA “has a great deal of storage throughout the basin” and “can convert this unappropriated water into a reliable supply by using stream flows not being used by senior water rights when that water is available, and providing water from storage when there are little or no stream flows available for use.” Proposal at 43.

Brazos River Basin Water

Theoretical Information

Impacts Unknown

DOW Condition

BRA Needs Forecast

Beneficial Use

Speculation Alleged

The issue of water availability and potential impairment of existing water rights led the ALJs to find that BRA had failed to prove “that the full amount of water sought to be diverted under the SysOp Permit is available and that the diversion will not impair existing water-right holders.” The failure was primarily “due to BRA’s requested Two-Step Process, under which BRA did not propose and offer evidence concerning specific points and rates of diversion but deferred those decisions until it files a WMP.” Proposal at 41. Joe Trungale, a civil engineer who specializes in water resource planning and environmental flows studies, testified on behalf of FBR. The ALJs Proposal summarized his opinion succinctly: “...because the Application does not identify actual, as opposed to only theoretical, information on issues such as diversion points, amounts of water to be diverted, places of use, and so on, the amount of unappropriated water available for the SysOp Permit cannot be accurately determined.” *Id.* at 46.

“The inescapable fact is that, assuming BRA’s application was granted in this matter, it would be impossible to know whether senior water rights would be impacted by the permit until the WMP is approved. In essence, BRA and the ED argue that the exercise of the SysOp Permit will not negatively impact senior water rights because the WMP will ensure that such negative impacts do not occur. In the absence of the WMP, BRA and the ED would simply have the Commission take them at their word.” *Id.* at 48.

DOW Condition - Downstream User

DOW proposed a condition regarding flow protections for its downstream rights. BRA and the ED proposed a specific condition for the permit that the ALJs recommended be incorporated into any future permit. No diversion or impoundment is to be allowed by BRA unless the flow of the river at USGS Gauge 081166550 (near Rosharon) is 630 cubic feet per second or more, or if the flow is below DOW’s projected daily pumping rate (which DOW must provide to BRA or the appointed watermaster). Proposal at 185.

Beneficial Use vs. Speculation

BRA addressed the issue of “beneficial use” in its Post-Hearing Argument by noting that “Even though BRA has contracted nearly all of its reliable water supply, a demand for additional water supplies currently exists...BRA also has pending requests for water from approximately twenty different entities that would contract, collectively, for over 150,000 af/yr of water.” BRA also cited to the 2011 Regional Water Plans for Regions G and H in regard to forecasts of substantial additional water supply needs. BRA Argument at 5-6. “The evidence shows there is an immediate need for additional water supplies in a large portion of the Brazos River Basin and BRA intends to beneficially use the newly appropriated water by contracting with its existing and future customers who have a need for these additional supplies. *Id.* at 6-7.

The ALJs ruled on the “Beneficial Use” issue and set forth its views on that term of art (Proposal at 63): “BRA met its burden to prove that the SysOp Permit appropriations are intended for beneficial use. Pursuant to Water Code § 11.134(b)(3)(A), an application for a water right cannot be granted unless the TCEQ first finds that the appropriation contemplated in the application ‘is intended for a beneficial use.’ The requirement for showing beneficial use follows from the concept that the state holds the water of the state in trust for the benefit of the people of the state. It is in the state’s interest, therefore, to make sure that a person seeking an appropriation of water will beneficially use it, because appropriating water to an applicant reduces the amount of water the state will have to appropriate to others.” Water Code § 11.134, the statute addressing action on water rights applications is cited in full in the Proposal at 16-17.

The ALJs ruling was based on the “substantial amount of evidence to prove that water appropriated under the SysOp Permit would be put to beneficial use” that BRA presented regarding general water needs in the Basin. *Id.* at 63.

In the Proposal, the ALJs concisely set out the Protestants’ position regarding speculative use of water. “The Protestants’ second argument is essentially that BRA cannot obtain the SysOp Permit based upon ‘speculation’ that it will be able to sell its water rights to others. The Water Code defines ‘beneficial use’ as ‘use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.’ In reliance upon that definition, NWF [National Wildlife Federation] asserts that BRA must identify specific unmet demands that will be met by the SysOp Permit. NWF asserts that BRA has failed to do so because, for example, the amount of total demands for SysOp Permit water projected in the approved plans for Regions G and H is only about 112,000 acre-feet, whereas BRA is requesting much more than that. Similarly, NWF notes that, while roughly 700,000 of BRA’s existing water rights are already committed to be used by BRA customers, the highest ever annual use under those contracts was only 303,301 acre-feet.” Proposal at 65-66.

“Similarly, FBR contends that BRA bears the burden to prove that the requested amount of water is necessary and reasonable for the authorized purposes, but it concedes there is not much Texas case law

Brazos River Basin Water

Monopoly

Water Amount Necessary

Speculation Prohibition

Colorado on Speculation

“Low Threshold” Standard

Low Threshold v. Permit Requirements

on beneficial use to support this contention. Instead, FBR relies upon a substantial body of case law from western states to contend that water rights in Texas should not be issued ‘based upon the speculative sale or transfer of ... appropriative rights.’ That is, FBR contends that, in order to show beneficial use, BRA must prove an actual, current need for the water, such as by showing that it currently has in hand executed contracts to sell all the water to be appropriated under the SysOp Permit. In reliance upon out-of-state case law, Dow argues that BRA is attempting to achieve a monopoly in the Brazos River Basin, and that this, somehow, runs contrary to BRA’s obligation to prove its intention to beneficially use the SysOp Permit water.” Proposal at 66 (citations omitted).

FBR also cited the definition of “beneficial use” in their Post-Hearing Argument: “Beneficial use is defined as the amount of water that is economically necessary for a purpose authorized by Chapter 11 of the Water Code, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water. Tex. Water Code § 11.002(4). The purpose of the requested water must also be beneficial, as specified in Section 11.023(a) and (b) of the Water Code... Thus, an applicant must demonstrate that the requested *amount* of water is necessary and reasonable for the authorized *purpose(s)*.” FBR Argument at 28-29 (emphasis in original). FBR then went on to make its case regarding speculation:

That the Legislature required a water right applicant to specify its intended beneficial use reveals the Legislature’s intent to prohibit speculative permitting for a scarce, public and valuable resource. This requirement is particularly apt today, with our ongoing drought issues. The standard must be scrupulously and deliberately applied to ensure that this public resource is not indiscriminately appropriated to permittees whose only use for the water is to hoard it in the hope of being able to sell it sometime in the future. Although there is not much Texas case law on beneficial use, other Western states have addressed this requirement and provide useful and relevant insight as to its purpose. FBR Argument at 28-29

FBR tried to convince the ALJs to look to Colorado for guidance regarding the issue of speculation, citing *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794 (Colo. 2011). Colorado’s Supreme Court addressed a similar beneficial use requirement under their laws. “The court there noted that the intent to appropriate water for a beneficial use is an integral part of the applicant’s obligation, and it ‘cannot be based on the speculative sale or transfer of the appropriative rights.’ *Id.* at 798. Mere storage of diverted water is not itself a beneficial use, noted the Court. *Id.* at 799. Moreover, the Court held that the existence of firm contractual commitments are insufficient to satisfy the beneficial use requirement if there is no specific plan and intent for application of the appropriated waters to a beneficial use. *Id.* at 798-99.” FBR Argument at 29. FBR cited a California case (*Central Delta Water Agency v. State Water Res. Control Bd.*, 124 Cal. App.4th 245 (App. Ct. 2004)) and a Washington case (*Dep’t of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998)), among others, to bolster their argument. FBR also pushed the fact that “Hypothetical diversions do not satisfy the beneficial use requirement.” FBR Argument at 30-32. (See Water Briefs, *TWR* #87 and #88 regarding recent Colorado holdings.)

Ultimately, the ALJs found that Texas Water Code § 11.134(b)(3)(a) merely asks whether the appropriation contemplated is *intended* for a beneficial use. “This is a low threshold to overcome... Contrary to Protestants’ suggestions, there are no requirements that BRA must specifically identify each diversion and the amount needed at each diversion to demonstrate the proposed appropriation is intended for beneficial use.” The ALJs pointed out that BRA provided a number of statutory provisions in the Water Code that support a flexible construction of “intended for beneficial use.” The ALJs also noted that BRA identified Texas case law that supports the position that BRA “need not have actual water use contracts in hand in order to prove beneficial use” citing two cases, *Texas River Protection Assoc. v. TNRCC*, 910 S.W.2d 147 (Tex. App. - Austin 1995, writ denied) and *City of San Antonio v. Texas Water Comm’n*, 407 S.W.2d 752 (Tex. 1966). Proposal at 67.

The ALJs were clearly convinced that Texas’ “low threshold” (i.e., that the “appropriation contemplated in the application is ‘intended for a beneficial use’” - Proposal at 63) in combination with BRA’s evidence of future water needs and its intent to supply water for those needs was sufficient to avoid being deemed speculative. This portion of the ALJs Proposal came despite strong findings and rulings earlier in their Proposal regarding the requirements in Texas to specify “maximum diversion rates” and to identify the locations of the actual points of diversions (see discussion above). Indeed, earlier in its Proposal the ALJs noted that Kathy Alexander, the Technical Specialist who served as the ED’s technical lead on the BRA Application, “conceded that she currently has ‘no idea’ how or where BRA will actually use the water authorized by the permit it seeks. She also conceded that BRA would probably not make any diversions from the control points identified in the application.” Proposal at 26-27.

Brazos River Basin Water

Environmental Conditions

Public Interest

Water Supply Needs

Other Issues

Many important issues raised by the parties are beyond the scope of this article, including the impacts on instream flows and water quality. Interested readers should refer to the detailed Proposal, as well as the excellent briefs filed by both the Applicants and Protestants. The Water Report anticipates covering TCEQ's pending decision regarding the Application. What follows are brief descriptions of some of the more salient issues.

Environmental Flows

BRA proposed interim special conditions to ensure that the exercise of water rights sought would not negatively impact the environment. They contended that their proposed interim flows go well beyond the requirements to protect all of the environmental resources that TCEQ is required to consider as part of the permitting process. The Texas Parks & Wildlife Department (TPWD) agreed with BRA and Cindy Loeffler, Chief of TPWD's Water Resources Branch, testified that the provisions proposed by CRA will be protective of fish, wildlife, and other instream uses.

The ALJs concluded that "BRA's and the ED's environmental flow review was sufficiently complete. They also find that the Proposed Permit contains reasonable conditions necessary to protect existing instream uses, water quality, fish and wildlife habitat, bays, estuaries, groundwater, and groundwater recharge, and to maintain the biological soundness of the state's rivers, lakes, bays, and estuaries." *Id.* at 70.

Public Welfare, Public Interest, and Instream Uses

The Proposal contains an interesting discussion of the scope of the public interest and welfare inquiry in a water rights permitting case, beginning at page 109 of the Proposal, eventually stating what is included and what is not. The decision ultimately focuses on "the need for additional water supplies in the Brazos River Basin. Water retailers and others are looking to BRA to provide wholesale water to them, and the proposed permit would allow BRA to supply that demand at a very low cost. The ALJs find that approval of BRA's application would serve the public interest and support the public welfare by making additional reliable water available to the public and reducing pressure on BRA to increase its rates." *Id.* at 112.

Referring to BRA's provisions for environmental flow, the ALJs "conclude that approval of the proposed permit would be in the public interest because it would avoid the environmental impact of the construction of additional reservoirs to provide the same amount of water, and it would protect environmental flows from future appropriations through the environmental flow restrictions included in the permit and the dedication of additional water to the Texas Water Trust for environmental needs including instream flows." *Id.* at 114.

Conservation and Drought Planning

The section concerning conservation and drought planning provides background on Texas' approach on these matters in water permitting. BRA did agree to the inclusion of language proposed by NWR that requires updated water conservation plans and drought contingency plans every ten years. The ALJs recommended including the condition in any permit TCEQ issues to BRA. Proposal at 136.

Return Flows

As noted by BRA, returns flows are treated wastewater or unused portions of diversions that are discharged into watercourses in the state. The Application raised several complex issues related to return flows, particularly since BRA based part of its request on current and future return flows. The issues become even more complicated because under the wholesale "approach advocated by BRA...the original sources of the return flow would include groundwater, surface water from the Brazos River Basin, and surface water imported from other basins. Proposal at 137.

Conclusion

The rule against speculation in western water law is a fundamental principle that states throughout the West have upheld in one form or another over the years. *The Water Report* has covered this issue several times, including a recent article on a massive application in Oregon for water from the McKenzie River (Moon, *TWR* #94; see also Hobbs, *TWR* #36 regarding Colorado; and Zellmer, *TWR* #50: *Anti-Speculation & Water Law - Ghost-Busting, Trust-Busting, or Ensuring Beneficial Use*).

Texas' water permitting agency, the TCEQ, will soon be squarely faced with how it will address the issue. By not denying the application outright, TCEQ has given BRA an opportunity to provide enough details to allay concerns and gain control over a tremendous supply of water. It remains to be seen what specifics will be supplied on the planned uses and whether or not that will be sufficient to meet the requirements of Texas water law.

In deciding not to deny the permit, TCEQ will eventually have to address difficult water law issues — critical to how Texas will proceed with its water future — when the case arrives back with a new Proposal for Decision.

FOR ADDITIONAL INFORMATION:

Relevant documents available from TCEQ at:

www10.tceq.state.tx.us/epic/efilings/index.cfm?fuseaction=search.home

>>> then Search for TCEQ Docket Number 2005-1490-WR.

See *Service List in the Proposal for Decision* for a comprehensive list of all parties' attorneys.