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**What Now? Indirect Reuse After the TCEQ Decision  
in the Brazos River Authority System Operation  
Permit Contested Case**

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## I. INDIRECT REUSE: INTRODUCTION AND BACKGROUND

Indirect reuse, the use of water after it has been discharged into a state watercourse, has been the subject of regulatory confusion for many years. The mix of statutes, case law, regulations, and Texas Commission on Environmental Quality (Commission or TCEQ) practices didn't present the bright lines necessary for the TCEQ Executive Director to easily and consistently authorize indirect reuse permits. A 2012 law review article identified unresolved Texas indirect reuse issues as:

(1) whether the reuse of return flows, after discharge to a stream, is a use of state water subject to the laws of prior appropriation or subject to a different regulatory scheme; (2) whether return flows derived from different sources of water should be treated differently for purposes of evaluating a request to reuse the return flows; (3) who can obtain indirect reuse rights; (4) whether Section 11.042 is inconsistent with Section 11.046 of the Texas Water Code (unused water is returned to the stream and is subject to appropriation by others); and, (5) what type of analysis must be done to determine the impact on other water right holders and the environment?<sup>1</sup>

A white paper by the Reuse Committee of the Texas Water Conservation Association that was appended to the 2007 State Water Plan framed the issues in largely the same way but also included:

Is effluent derived from "future" return flows treated differently than effluent derived from "existing" return flows?<sup>2</sup>

A contested complex water right application by the Brazos River Authority (BRA) for Water Use Permit No. 5851 (permit application) seemed poised to force the hand of the Commission to resolve most if not all of these long lurking indirect reuse questions and uncertainties. This article will explore the answers and remaining questions regarding indirect reuse found in the TCEQ order approving the BRA application and the resulting draft permit. CITE to pending rehearing, etc.

In 2004, BRA sought a new System Operation water right permit (SysOp Permit) from the TCEQ.<sup>3</sup> Through its unique ability to operate twelve reservoirs as a system (system operation), BRA asserted that it could divert and use unappropriated water that would not be made available to anyone else seeking a new appropriation in the Brazos basin downstream of Possum Kingdom Reservoir. No new reservoir construction was necessary given BRA's existing storage rights throughout the basin but additional diversion authority was sought to expand BRA's options for diverting water directly from the mainstem of the Brazos River and tributaries. BRA also sought appropriation of existing and future return flows in the Brazos River basin, noting that such an appropriation may delay or reduce the need for BRA to construct its permitted Allens' Creek

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<sup>1</sup> Nathan S. Bracken, *Water Reuse in the West: State Programs and Institutional Issues. A Report Complied by the Western States Water Council*, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 451 (2012).

<sup>2</sup> Tex. Water Dev. Bd., *Water for Texas 5* (2007), <https://www.twdb.texas.gov/waterplanning/swp/2007/>.

<sup>3</sup> Application of the Brazos River Authority for Water Use Permit No. 5851, on file with the TCEQ.

Reservoir.<sup>4</sup> The SysOp Permit would be operated at a priority junior to BRA's numerous existing water rights. From 2011 to 2016, the Application was subject to three separate contested case hearings at SOAH, with about twenty parties participating in different stages of the proceedings.<sup>5</sup>

The TCEQ Commissioners described BRA's Application for the SysOp Permit as the most complex water right application ever filed in Texas.<sup>6</sup> For water lawyers, the Application contained a plethora of juicy issues covering vagaries and disagreements on such topics as diversion authority, reservoir sedimentation, environmental flow protection, beneficial use, public welfare, water conservation, operational flexibility, historical and current water availability modeling, Commission practice and policies, indirect reuse, bed and banks authorizations, the legal characterization of water, ownership of groundwater based and surface water based effluent, the rights of term permit holders, water quality protection for senior water right diversions, consistency with regional and state water plans, the need for a watermaster, and the procedural and substantive development of and Commission oversight of water management plans.

## II. THE INDIRECT REUSE QUESTIONS IN THE BRA CONTESTED CASE

While the three Proposals for Decision in the BRA case are all fascinating reads that provide a window into the details of the various positions taken by the parties regarding indirect reuse, this article will concentrate on the Commission order issued on September 16, 2016 after consideration of the third SOAH PFD.<sup>7</sup> Indirect reuse questions were front and center in all three SOAH proceedings. The Commission made certain findings and remanded certain issues to SOAH with 2012 Interim Order after the first PFD and with a 2016 Interim Order after the second PFD, the Proposal for Decision on Remand.<sup>8</sup> Limited specific questions and Commission guidance related to return flows in the 2016 Interim Order directed the confines of the third SOAH hearing that produced the June 3, 2016 Supplement to the Proposal for Decision on Remand.

As this author noted in 2011 closing arguments, with no offense intended to BRA or to law school professors, the BRA application read like a final exam fact situation dreamed up by a devious law school professor. Any one of the disputed issues was worth a three hour final exam, and many parties took the bite on multiple issues. Within this complicated water rights application, the Commission described the return flows issues as the most complex. CITE The four sources of

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<sup>4</sup> The request for future return flows was dropped in a later amendment to the BRA application. *See* TCEQ Commission Agenda Webcast for January 25, 2012 for Commissioners' discussion disfavoring the permitting of future return flows; available at <http://www.texasadmin.com/tx/tceq>.

<sup>5</sup> SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR. SOAH Proposals for Decision: October 17, 2011; July 17, 2015 and June 3, 2016. Available for download from the TCEQ E-Filing System at <http://www14.tceq.texas.gov/epic/eFiling/index.cfm?fuseaction=search.searchByDocket&requesttimeout=180>. See also Concerning the Application by the Brazos River Authority for Water Use Permit No. 5851 and Related Filings, 2011 WL 5115204, 2016 WL 3213328, SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR. Note: the author represented Texas Parks and Wildlife Department, a party to the contested case.

<sup>6</sup> *See* TCEQ Commission Agenda Webcasts for January 25, 2012 and January 20, 2016 for Commissioners' discussion; available at <http://www.texasadmin.com/tx/tceq>.

<sup>7</sup> On October 11, 2016 Motions for Rehearing were filed by the Lake Granbury Coalition, the Friends of the Brazos, and the Brazos Family Farmers and Ranchers. Available for download from the TCEQ E-Filing System at <http://www14.tceq.texas.gov/epic/eFiling/index.cfm?fuseaction=search.searchByDocket&requesttimeout=180>.

<sup>8</sup> *See also* 2012 WL 441519, 2016 WL 619066 (Tex. Com. Env. Qual.).

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