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SUPREME COURT OF TEXAS
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No. 17-0348

IN THE SUPREME COURT OF TEXAS

R.E. JANES GRAVEL COMPANY,

Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; ITS EXECUTIVE DIRECTOR RICHARD A. HYDE; ITS COMMISSIONERS BRYAN SHAW, TOBY BAKER, AND JON NIERMANN; AND THE CITY OF LUBBOCK,

Respondents.

On Petition for Review from the Fourteenth Court of Appeals
No. 14-15-0031-CV, Houston, Texas

AMICUS CURIAE BRIEF OF THE LOWER BRAZOS RIVER COALITION ON PETITION FOR REVIEW

Molly Cagle
State Bar No. 03591800
molly.cagle@bakerbotts.com
Samia R. Broadaway
State Bar No. 24088322
samia.broadaway@bakerbotts.com
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2500
(512) 322-2501 (Facsimile)

September 11, 2017

Counsel for Amicus Curiae
Lower Brazos River Coalition

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INTEREST OF *AMICUS CURIAE*

The Lower Brazos River Coalition ("the Coalition") is a grassroots partnership of concerned individuals, organizations, municipalities, ranchers and farmers, environmentalists and conservationists, businesses and industries that seeks fair and effective Brazos River water supply management.[1] The Coalition seeks to ensure that the Brazos River's limited resources are developed and managed for the benefit of all, including local communities, industries, agricultural needs, energy concerns, sportsmen, wildlife habitat and critical environmental flows.[2] The Coalition is the sole source of any fee paid for preparing this amicus brief. *See* Tex. R. App. P. 11(c).

The Coalition provides a collective voice for downstream interests as competition for water increases.[3] The reuse of water in the upper portions the Brazos River is of vital interest to the Coalition because it affects both the reliability of downstream surface water rights and the availability of water for recreational, wildlife, and other environmental needs.

The Lower Brazos River Coalition takes no position on the Janes Gravel Company's overall arguments, the City of Lubbock's application at the Texas Commission on Environmental Quality ("TCEQ"), or even whether the City

[1] Lower Brazos River Coalition, "Who We Are," http://www.keepbrazosflowing.org/who-we-are/ (last visited Jul. 7, 2017).
[2] *Id.*
[3] *Id.*

should receive a bed-and-banks authorization for the particular return flows at issue in this case. The Coalition is, however, concerned about one unnecessary statement in the appellate court's decision that glosses over a critically important aspect of Texas water law and, if left unaddressed, could be misused to the detriment of Coalition members.

SUMMARY OF ARGUMENT

Because of a rogue a statement by the Court of Appeals (which appears to grant upstream water users the unqualified right to discharge and reuse discharged surface water effluent in all circumstances), this case has the potential to impact downstream water users statewide, not just in the Brazos River basin. In rendering its decision, the Court of Appeals appears to ignore the express provision of Texas water law that surface water effluent discharged to a watercourse generally becomes "surplus water" available for downstream water users. Tex. Water Code § 11.046(c).[4] After explicitly stating that it did not need to resolve this issue in order to dispose of the case, the Court of Appeals nevertheless implied that discharged effluent can *never* become surplus water and thus is *never* available for downstream appropriation.

[4] The *amicus curiae* brief filed by the Brazos River Authority on June 12, 2017 explains relevant background principles of Texas water law. To avoid duplication, these general principles are not repeated here.

For the reasons presented below, the Lower Brazos River Coalition respectfully asks, if this Court denies the petition for review, that it do so with a per curiam that specifically disavows any suggestion that this particular statement correctly articulates the law. If the Court grants the petition for review, the Coalition respectfully asks that the Court explicitly clarify that the Court of Appeals' statement regarding the interplay between Texas Water Code Sections 11.042 and 11.046 applies only to the facts of this case.

ARGUMENT

1. The Target Language

The Court of Appeals noted that it "need not decide whether the discharged effluent [from the City of Lubbock] would ever become surplus water." *R.E. Janes Gravel v. TCEQ et al.*, 2016 WL 7323307, *8 (Tex. App.—Houston [14th Dist.], Dec. 15, 2016, pet. filed). This was entirely correct. The Court of Appeals had no need to decide the generic surplus water issue in order to resolve the case before it. Yet, the court went on to decide this admittedly superfluous issue, stating in the next paragraph:

> As we construe section 11.042(c), the Commission's authority to grant a party the right to use a stream to convey surface water from a discharge point to a point downstream, where it will be diverted for reuse, would be meaningless if, under section 11.046(c), the water

became surplus water available for appropriation by senior rights holder[s] upon being discharged into the stream.

R.E. Janes Gravel, at *9.

This statement could readily be construed to completely undermine the theory of "surplus water" in Texas water law. If this Court denies the petition for review but clarifies that it does not approve or disapprove[5] this statement, the Court can preserve the status quo in Texas surface water law, recognizing that issues at the intersection of indirect surface water reuse (*i.e.*, reuse of wastewater effluent following discharge to a watercourse) and "surplus water" are likely to appear before Texas courts in future, more factually apposite, cases.

2. Explanation of Legal Principles

As the Court of Appeals correctly recognized, Texas Water Code Section 11.046(c) "generally describes situations under which surface water returned to a waterway becomes surplus water subject to appropriation by others." *R.E. Janes Gravel*, at *9. Although water rights permit holders may, in general, directly reuse withdrawn surface water before discharging it, "[o]nce water has been [legally] diverted…and then returned to a watercourse or stream…it is considered surplus water and therefore subject to reservation for instream uses or

[5] Similarly, the Court can preserve the current balance in Texas water law by granting the petition for review but explicitly clarifying that the Court of Appeals' statement on the interaction between Texas Water Code Sections 11.042 and 11.046 applies only to this case's particular facts.

beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication." Tex. Water Code § 11.046(c).

Water Code Section 11.046(c) must be read in harmony with Water Code Section 11.042. Section 11.042 is an authorization by the State to use the bed-and-banks of a watercourse to transport and subsequently store, remove, use, and/or reuse water *after* it is released to the watercourse. All surface water is not eligible for an unfettered bed-and-banks authorization under Section 11.042(c). Some surface water is diverted under permits that preclude indirect reuse. Some surface water may only be eligible for a bed-and-banks permit with special conditions that protect other downstream legal interests whose rights were granted based on that discharged effluent. Section 11.042(c) specifically contemplates that bed-and-banks permits may be issued "*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.*" Tex. Water Code § 11.042(c) (emphasis added).

The Court of Appeals' sweeping statement glosses over these technical, but vitally important, intricacies of Texas water law. As a consequence, entities seeking a bed-and-banks authorization under Section 11.042(c) in the

future will almost certainly argue, citing the Court of Appeals in *Janes Gravel*, that bed-and-banks authorizations are always available for surface water, under all circumstances, and that no special conditions can be imposed because of "surplus water" considerations under Section 11.046(c).

Harmonization of Water Code Sections 11.046(c) and 11.042(c) always presents a challenge. The court below initially recognized that resolving the interrelation between these provisions was unnecessary to resolving this case. Here, two unusual facts distinguished the City's 11.042(c) application to TCEQ for permission to use the bed-and-banks of a stream to transport discharged effluent downstream for reuse. First, the surface water at issue was out-of-basin, and out-of-basin surface water follows different rules than in-basin surface water. *See, e.g.*, Tex. Water Code § 11.085. Second, the City already had a reuse authorization from TCEQ when it requested a bed-and-banks permit; it needed only the transport mechanism under Section 11.042(c) in order to get its effluent from the place of discharge to the point of diversion and reuse. There would have been no issue had the court tailored its statement to the facts presented, for instance, by stating:

> As we construe section 11.042(c), the Commission's authority to grant a party the right to use a stream to convey **[<u>out-of-basin</u>]** surface water **[<u>under a preexisting reuse authorization</u>]** from a discharge point to a point downstream, where it will be diverted for reuse, would

be meaningless if, under section 11.046(c), the water became surplus water available for appropriation by senior rights holder[s] upon being discharged into the stream.

By ignoring the limitations inherent in the facts of this case, the Court of Appeals issued an opinion that could easily be cited to say that, notwithstanding Section 11.046, surface water returned to a stream can *never* become surplus water under 11.046. Under this reading, it would appear that discharged surface water effluent can *always* receive an indirect reuse authorization under Section 11.042(c). Thus, it would follow that Section 11.042(c) permits need not contain special conditions to protect "existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries" that depend upon the availability of "surplus water" because bed-and-banks authorizations are always preferred. Under this reading, surplus water would be a dead letter as to several key portions of Texas water law involving reuse, and the provisions of Section 11.046(c) would be rendered nugatory. This is particularly troubling when the court admittedly claimed it had no need to resolve this issue in the *Janes Gravel* decision.

CONCLUSION AND PRAYER

There is undoubted tension between the indirect reuse of surface water effluent under Water Code Section 11.042(c) and the idea that discharged effluent

becomes surplus water under Section 11.046(c) once it is returned to a watercourse. All Texas water users would benefit from clarity on when and under what circumstances Section 11.042(c) bed-and-banks permits are available for surface water effluent and when the effluent becomes surplus water under Section 11.046. But due to the complexity of these issues, only confusion, not true clarification, can come from offhand observations or loose language. Undoubtedly, future cases will squarely raise this issue, and Texas courts will grapple with these nuanced questions of Texas water law. But *Janes Gravel* does not present the proper legal or factual setting for such a determination. Its attempted resolution should be disavowed by this Court.

For these reasons, the Lower Brazos River Coalition respectfully requests that, if this Court denies the petition for review, it accompany that denial with a per curiam opinion clarifying that this Court neither approves nor disapproves of the Court of Appeals' musings on the interaction between Texas Water Code Sections 11.042(c) and 11.046(c). If this Court grants the petition for review, the Coalition respectfully requests that it explicitly clarify and limit the Court of Appeals' statement to the facts of the present case.

Respectfully submitted,

/s/

Molly Cagle
State Bar No. 03591800
Samia R. Broadaway
State Bar No. 24088322
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2500
(512) 322-2501 (Facsimile)
molly.cagle@bakerbotts.com
samia.broadaway@bakerbotts.com

Attorneys for Amicus Curiae
Lower Brazos River Coalition

CERTIFICATE OF COMPLIANCE

This *amicus curiae* brief complies with the type-volume limitations of Rule 9.4 because it contains 1,720 words, excluding the parts of the brief exempted by Rule 9.4(i)(1), according to the word-processing software used to prepare it.

Dated: September 11, 2017

/s/

Molly Cagle

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2017, I served a true and correct copy of this *amicus curiae* brief on all counsel of record, listed below, by the Court's electronic filing manager.

Paul M. Terrill III
G. Alan Waldrop
Ryan D. V. Greene
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
pterrill@terrillwaldrop.com
rgreene@terrillwaldrop.com
awaldrop@terrillwaldrop.com
Attorneys for Petitioner R.E. Janes Gravel Company

Cynthia Woelk
Tony Grigsby
Assistant Attorney General
Environmental Protection and Admin. Law Division
MC-015, P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2012
(512) 320-0911 (fax)
Cynthia.Woelk@texasattorneygeneral.com
Anthony.Grigsby@texasattorneygeneral.com
Attorneys for Texas Commission on Environmental Quality et al.

Jason Hill
Lloyd, Gosselink, Rochelle, and Townsend
816 Congress Ave, Suite 1900
Austin, TX 78701-2478
(512) 322-5855
(512) 484-6699 (fax)
jhill@lglawfirm.com
Attorney for the City of Lubbock

/s/
Molly Cagle