Presented:
The University of Texas School of Law’s 2007 Texas Water Law Institute

December 2007
Austin, Texas

UNIQUE WATER RIGHTS PERMITTING ISSUES

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UNIQUE WATER RIGHTS PERMITTING ISSUES
By Leonard H. Dougal and Cassandra Quinn

I. INTRODUCTION

Several unique water rights permitting issues have arisen recently as groups throughout the state search for ways to ensure the availability of water for a growing population while still providing protection for the state’s natural resources. The strategy of some water suppliers to meet increased demands has included seeking large appropriations of water; other suppliers have sought to reuse water they have already appropriated. Several environmental groups have sought to ensure that enough water is left in the state’s rivers to adequately support aquatic life by seeking permits for “environmental flows”, water that would remain in the river to provide instream flows and inflows for bays and estuaries. Developers of power plant cooling reservoirs are faced with choices between on-channel and off-channel reservoirs, while developers of resorts and residential subdivisions are also impacted as they seek water to provide for “amenity lakes” and address detention of stormwater run-off.

II. MULTI-RESERVOIR SYSTEM OPERATION PERMITS

A number of river authorities have applied to TCEQ and received approval to operate multiple reservoirs in a coordinated manner, so as to maximize the availability and reliability of water supply from the reservoirs. A recent example of an application for such a “system operating permit” is the June 2004 application to TCEQ filed by the Brazos River Authority (“BRA”), which owns and operates four reservoirs and has water rights in eight federal reservoirs on the Brazos River and its tributaries. The application seeks water rights for an additional 421,449 acre-feet of firm yield water per year, which BRA contends is made available by managing its reservoirs as a coordinated system. Although a previous “system operation order” permits BRA to operate its reservoirs as a system, the order does not appropriate to BRA the additional yield of the system.

BRA has emphasized that, through operational flexibility and use of return flows, more water is available for beneficial use without the infrastructure, impact, and expense inherent in other options, such as building new reservoirs or developing groundwater sources. System operation yields additional water by allowing BRA to satisfy downstream senior water rights from the most efficient source available, rather than by requiring the pass-through of water from one of BRA’s reservoirs. Specifically, BRA’s permit application requests operational flexibility to “(i) use any source of water available to the Authority 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 Authority’s reservoirs on a priority basis, and (ii) release, pump and transport water from any of the Authority’s reservoirs for subsequent storage, diversion and use throughout the Authority’s service area.”

1 The views and opinions stated in this paper are solely those of the authors and do not necessarily represent the views or opinions of Jackson Walker LLP or any of its clients.
2 See Application of Brazos River Authority for Water Rights Permit No. 5851.
In addition to operational flexibility, BRA’s application seeks water rights to current and future return flows (i.e. treated sewage effluent and brine bypass/return) to the extent that such return flows continue to be discharged and returned to the Brazos River, its tributaries, and BRA’s reservoirs.

Similarly, the Lower Colorado River Authority (“LCRA”) has a Water Management Plan for the Lower Colorado River Basin, which was approved by the predecessor to the TCEQ in March 1999.3 LCRA operates the Highland Lakes system of reservoirs, comprised of two water storage reservoirs, Lakes Buchanan and Travis, and three intermediate pass-through reservoirs, Lakes Inks, LBJ, and Marble Falls. Lake Austin, the last of the lakes in the chain, is owned by the City of Austin but operated by LCRA.4 Although LCRA has rights to consumptively use more than 1,500,000 acre feet per year of water from the Highland Lakes system, other entities control more than 600,000 acre feet of such rights in the Lower Colorado River basin. Hence, in its Water Management Plan, LCRA has to coordinate its operations and management to take into consideration the rights of significant other users of water.

III. LCRA’S REQUEST FOR ALL UNAPPROPRIATED WATERS AND TO CONSTRUCT OFF-CHANNEL RESERVOIRS

In 1999, the Lower Colorado River Authority (“LCRA”) filed an application to divert, store, and use excess flood waters and unappropriated flows of the Colorado River basin downstream of O.H. Ivie Reservoir and Lake Brownwood in an amount not to exceed 853,514 acre-feet of water per year.5 The application also requested authorization to construct one or more off-channel reservoirs with a maximum combined storage capacity of 500,000 acre-feet of water. LCRA estimates that the reservoirs would contain a maximum surface area of 25,408 acres, and be located somewhere in Colorado, Wharton or Matagorda Counties. LCRA’s preferred site is located on the Pierce Ranch in Wharton County and, under a preliminary agreement with the owners, LCRA has the option to purchase approximately 4200 acres of the ranch for a holding basin.6 LCRA proposes to construct any reservoirs entirely off-channel and to redirect any existing watercourses around the perimeter of the reservoirs, in order to maintain local drainage, runoff, and natural streamflow in the immediate area of the proposed reservoir sites. LCRA requests to use the appropriated water for municipal, industrial, and agricultural purposes anywhere within LCRA’s authorized water service area.

The application poses complex hydrological and environmental issues. LCRA proposes to take large amounts of water on an infrequent basis, a different diversion scheme than in other water right permits. On September 19, 2007, the TCEQ considered the draft permit and hearing requests and responses related to the application, and referred the application to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing based upon hearing requests filed by numerous water right holders. The Commission also ordered SOAH to consider whether

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3 An amendment to the Water Management Plan was filed in May 2003, and remains pending at TCEQ.
4 See, the LCRA Water Management Plan for the Lower Colorado River Basin at 1-2 (May 2003).
5 See Application of Lower Colorado River Authority for Water Rights Permit No. 5731.
the permit should be modified to require notice and an opportunity to be heard prior to approval or construction of any off-channel reservoirs.

The application is an important step in LCRA’s water sharing proposal with the San Antonio Water System (“SAWS”), which is designed to develop alternative supplies to meet long-term needs in the lower Colorado River basin and the San Antonio area. One aspect of the project involves capturing and storing unused and excess river flows in holding basins, or off-channel storage facilities.

IV. ENVIRONMENTAL FLOWS LITIGATION

With some river basins already fully appropriated, and others becoming increasingly so, concerns have grown over whether sufficient instream flows and freshwater flows to bays and estuaries will remain to adequately protect aquatic life. To address these concerns, several groups sought appropriations of water that would be left in the rivers and allowed to flow downstream. This is unique because the TCEQ traditionally has only issued water rights for impoundments and diversions—not for “environmental flows”.

In 2000, the San Marcos River Foundation (SMRF) filed an application to appropriate approximately 1.3 million acre-feet per year of water in the Guadalupe and San Marcos Rivers to provide for environmental flows. Similar applications followed from the Galveston Bay Conservation & Preservation Association, Galveston Bay Foundation, Matagorda Bay Foundation, Caddo Lake Institute, Inc. and the Lower Colorado River Authority. However, in 2003, the TCEQ concluded that it lacked the statutory authority to issue permits to appropriate water for environmental flows. Several of the applicants filed appeals with the district court, which concluded that the TCEQ did have jurisdiction. Appeals of that decision have been filed and are pending in the Corpus Christi court of appeals.

Environmental flows were addressed in both House Bill 3 and Senate Bill 3 during the 80th Legislative Session. The two bills expressly prohibit the issuance of a new water rights permit for environmental flows, but do allow the TCEQ to approve an application to amend an existing permit or certificate of adjudication to change the use to or add a use for such flows. The legislation applies prospectively and, thus, does not affect the pending litigation. To address environmental flows, H.B. 3 and S.B. 3 create a basis-by-basin process for developing recommendations to meet instream needs and freshwater inflows to bays and estuaries. To oversee the process, the Legislature created a statewide Environmental Flows Advisory Group consisting of agency and legislative officials, supported by a science advisory committee and committees of stakeholders in each basin and bay area.

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7 More information on the project is available at http://www.lcra.org/lswp/index.html.
8 For a detailed discussion of environmental flows, see Colette Barron Bradsby, Texas Environmental Flows Update, 8th Annual Changing Face of Water Rights in Texas (June 28-29, 2007).
V. WATER REUSE PROJECTS

Water that has been appropriated may be beneficially used and reused. If the water never reaches a state watercourse, such as when a municipality’s treated effluent is directly used for landscape irrigation or industrial purposes, the reuse is described as “direct reuse” (sometimes known as flange-to-flange). Direct reuse does not require a water rights permit separate from the permit for the initial appropriation, so long as the reuse is undertaken within the scope of the initial appropriation (e.g. which typically would include a review of the purpose and place of use). The situation is more complicated, however, with “indirect reuse”, which occurs when appropriated water is used, returned to a state watercourse, and then diverted by the appropriator at a point downstream for reuse. With “indirect reuse”, the question arises whether the “reuse” is actually a new use requiring a new appropriation.

Permit applications by the City of Austin have raised this issue. In two separate permit applications, the City sought the right to use the bed and banks of the Colorado River to transport all of the current and future return flows from its wastewater treatment facilities for reuse downstream. The LCRA challenged both applications, contending that, once discharged into the river, the water became state water subject to appropriation. LCRA’s stated position was that the City had no right to a “bed and banks” permit for the discharged water, and that if any permit application was allowed, the City was only entitled to apply for a new appropriation of water (which would make the water the most junior in the basin). However, the dispute between LCRA and the City appears to have been resolved recently through the execution of a June 18, 2007 settlement agreement. As part of the settlement agreement, the parties plan to seek regulatory certainty on the use of return flows and are negotiating a Supplemental Water Supply Agreement which is a key component of implementation of the settlement.

The City of Austin’s applications involved return flows originating from an appropriation of surface water. A different situation is presented when the underlying water supply is not from surface water, but from groundwater. This case arose with permit applications filed by the Cities of Bryan and College Station. The Cities’ applications sought authorization to convey groundwater based return flows down the bed and banks of various watercourses throughout the Brazos River Basin and subsequently divert such flows from the Brazos River for municipal, industrial, and agricultural purposes. After considering the applications under Section 11.134 of the Water Code, the Executive Director denied the applications, and the Cities filed a motion to overturn. Because the water to be reused would be groundwater, the TCEQ Commissioners concluded (in a 2-1 decision, with Commissioner Soward dissenting) that, as a matter of law, the applications did not involve “state water” based on Section 11.042(b) of the Water Code, which provides the criteria for the owner of privately owned groundwater to retain ownership of groundwater after discharge into a state watercourse. Accordingly, the Commission directed the Executive Director to process the Cities’ applications solely under Section 11.042(b) and the

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12 See Applications of City of Austin for Water Rights Permit Nos. 5779 and 5915.
13 Application of City of Bryan for Water Rights Permit No. 5912; Application of City of College Station for Water Rights Permit No. 5913.
Commission’s bed and banks authorization rules and not under statutes and rules applicable to an appropriation of state water.

A review of water rights applications pending at the TCEQ on November 21, 2007 indicates fourteen applications which have some component of reuse as part of the application.

According to its website, the North Texas Municipal Water District currently has one of the largest wastewater reuse program in the state. NTMWD’s Wilson Creek Regional Wastewater Treatment Plant discharges treated effluent into Wilson Creek upstream from Lake Lavon. NTMWD has water rights allowing reuse of up to 35,941 acre-feet per year of this treated wastewater for municipal purposes, providing about 13 percent of NTMWD’s total water supply. NTMWD is currently seeking a permit amendment that would double its permitted reuse and is considering future reuse projects to increase this supply further.15

VI. POWER PLANT COOLING RESERVOIRS

A review of cooling reservoirs permitted for water supply to electric power generation plants in Texas shows different methods have been chosen for the construction and permitting of such reservoirs. Some plants, such as the Handley Generating Plant, a steam electric plant located on Lake Arlington, and the Comanche Peak Nuclear Power Plant, located at the convergence of Panther Creek and Squaw Creek in the Brazos Basin,16 have elected to utilize “on-channel” reservoirs for water supply and cooling purposes. Other plants, such as the South Texas Nuclear Plant, now operated by STP Nuclear Operating Company, divert water into an entirely off-channel 202,600 acre-foot reservoir for cooling and water supply.17

Numerous environmental permitting issues arise with power plant cooling reservoirs. First, a reservoir which is located “on channel” in a classified segment of state water will be required to comply with the segment’s surface water quality standards. Those standards are based upon the designated uses of a stream segment and vary depending upon location of the segment within a river basin.18 Typical issues relevant to power plants will be the thermal loading and temperature limits of a reservoir or stream segment, which will necessarily be more restrictive for an “on channel” reservoir. TCEQ rules set the maximum temperature criteria, expressed as a rise over the ambient temperature, in freshwater streams and in bay and gulf waters.19

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16 Certificate of Adjudication No. 12-4097.
17 Certificate of Adjudication No. 14-5437.
19 The rule provides, in part, “the following temperature criteria, expressed as a maximum temperature differential (rise over ambient) are established: freshwater streams—5 degrees Fahrenheit; freshwater lakes and impoundments—3 degrees Fahrenheit; tidal river reaches, bay and gulf waters—4 degrees Fahrenheit in fall, winter, and spring, and 1.5 degrees Fahrenheit in summer (June, July, and August). Additional temperature criteria (expressed as maximum temperatures) for classified segments are specified in Appendix A of §307.10 of this title.” 30 Tex. Admin. Code § 307.4(f).
Industrial cooling impoundments, defined by rule as “an impoundment which is owned or operated by, or in conjunction with, the water rights permittee, and which is designed and constructed for the primary purpose of reducing the temperature and removing heat from an industrial effluent”\(^{20}\) are subject to less stringent water quality standards. The relevant rule governing temperature, provides in part:\(^{21}\)

> Consistent with §307.1 of this title (relating to General Policy Statement) and in accordance with state water rights permits, temperature in industrial cooling lake impoundments and all other surface water in the state shall be maintained so as to not interfere with the reasonable use of such waters. Numerical temperature criteria have not been specifically established for industrial cooling lake impoundments, which in most areas of the state contribute to water conservation and water quality objectives.

Separately from water rights permitting considerations, permitting use of a reservoir for cooling should consider the requirements to comply with Clean Water Act Section 316 (governing cooling water intakes and entrainment and impingement issues) and Clean Water Act Section 404 (pertaining to dredge and fill permits).

**VII. AMENITY LAKES**

As property that is rural in character has been transformed by developers into subdivisions of homes, issues have arisen when a pre-existing impoundment of water traditionally used for domestic and livestock uses is located on the property. Section 11.142 of the Texas Water Code provides an exemption to permitting for the construction of dams and reservoirs which impound up to 200 acre-feet of state water for domestic and livestock purposes.\(^{22}\) This exemption was extended by the legislature, in 2001, to apply to reservoirs constructed for fish and wildlife purposes, if constructed on tax qualified open-space land (Section 23.51, Tax Code, defines “qualified open-space” as real property currently devoted principally to agricultural use and has been for five out of the last seven years). Notably, both the domestic and livestock exemption and the fish and wildlife exemption were deemed by the legislature as not applicable to “a commercial operation.”\(^{23}\) Often, developers will want to utilize such impoundments as “amenity lakes” to enhance the character of a residential subdivision. The question then arises whether the mere subdivision of land around a pre-existing exempt reservoir presents a change in use requiring the developer (or the homeowner’s association) to seek a water rights permit from the TCEQ.

So long as the exempt reservoir’s size and character is not changed, a developer may argue that the mere subdivision of ownership around the reservoir does not destroy the pre-

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\(^{23}\) Two versions of the wildlife exemption passed the legislature in 2001. One of the versions does not expressly exclude a commercial operation, but does note that it only applies to an “unincorporated area”. See, Acts 2001, 77th Leg., R.S. ch. 1427.
existing domestic and livestock (or fish and wildlife) use of reservoir. Indeed, the TCEQ
definition of “domestic use” clearly encompasses some measure of recreational use; it is defined
as “[u]se of water by an individual or a household to support domestic activity. Such use may
include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family
garden and/or orchard; for watering of domestic animals; and for water recreation including
aquatic and wildlife enjoyment.” Additionally, the mere subdivision of ownership in land
adjacent to an exempt reservoir would not in itself actually reduce the amount of state water
otherwise available to downstream users of water. A developer may argue that the act of
permitting such an exempt reservoir provides the opportunity for downstream water right holders
to seek a better position, as those holders could then make a “call” on the reservoir water, or seek
to require the developer to pass all state water through the impoundment, by keeping the
reservoir filled with groundwater or purchased water.

Despite these arguments, the TCEQ has taken the position that, once converted to an
amenity lake for a residential subdivision, a formerly exempt impoundment is then required to be
permitted, typically for recreational use. In its rules governing the wildlife management
exemption, the TCEQ precludes the use of the exemption for a “commercial operation” which is
defined to include “housing developments.” Further, Section 11.143 of the Water Code
requires exempt reservoirs to be permitted if the owner desires to use the water for a non-exempt
purpose.

The difficulty with such permitting, and the policy issues on both sides of the subject
were highlighted in a recent case involving a subdivision in Collin County developed by
Westerra Stonebridge L.P. (“Westerra”), wherein Westerra sought to permit three small formerly
exempt reservoirs, with a total surface area of 12 acres to impound 78 acre-feet of water. The
draft permit required each of the three reservoirs to be maintained full at all times, by utilizing an
alternative supply of municipal water, and thereby allow the free passage of State water. The
permit application was nevertheless protested by North Texas Municipal Water District
(“NTMWD”), a downstream holder of water rights, and the case was referred to hearing by the
Commissioners. At the time of this writing, the permit application was still pending at the
TCEQ.

Westerra also filed a Petition for Rulemaking at TCEQ seeking the adoption of a rule that
would amend 30 TAC § 297.21(e) to exclude from water right permitting a previously exempt
reservoir which pre-dated the subdivision and which reservoir has been subjected to permitting
under Clean Water Act Section 404. Specifically, the Petition sought to narrow the definition of

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25 The definition of “recreational use” includes use of water for “aesthetic land enhancement of a subdivision.” 30
27 Section 11.143 (Use Of Water From Exempt Dam Or Reservoir For Nonexempt Purposes) provides, in part: “(a)
   The owner of a dam or reservoir exempted under Section 11.142(a) or (b) who desires to use water from the dam or
   reservoir for a purpose not described by that subsection shall obtain a permit to do so. The owner may obtain a
   regular permit, a seasonal permit, or a permit for a term of years. The owner may elect to obtain the permit by
   proceeding under this section or under the other provisions of this chapter governing issuance of permits.”
“commercial operation” to exclude a dam or reservoir that pre-existed the housing development and which reservoir is governed by a Clean Water Act Section 404 permit. TCEQ staff and NTMWD opposed the Petition. Both argued, among other things, that the legislature intended to include “housing developments” within the term “commercial operations” which are precluded from use of the reservoir exemption. By order dated February 13, 2007, the Commissioners denied the Petition for Rulemaking.

The Westerra case is a clear example of the difficulty which can be encountered by a developer seeking to permit an amenity lake, and the increasing hostility of various water suppliers and groundwater districts to the use of water to fill such lakes. Sometimes called “vanity lakes” many water suppliers and groundwater districts see them as a waste of a valuable resource.

VIII. SUBDIVISION DETENTION PONDS

Water rights issues could also arise when a subdivision developer constructs a stormwater detention pond designed to mitigate downstream flooding. The key water rights question is whether the water captured in stormwater detention ponds is privately owned water or whether it is state water requiring a water rights permit. Texas law categorizes surface water into two general types: diffuse surface water and water in a watercourse.\(^{29}\) Diffuse surface water belongs to the owner of the land on which it gathers, so long as it remains on that land before passing into a natural watercourse.\(^{30}\) Once water reaches a watercourse, it becomes property of the state, held in trust for the public.\(^{31}\)

From a water rights standpoint, a properly designed stormwater detention pond would typically be constructed so that it acts as a surge basin to slow down the flow of stormwater runoff, rather than to permanently impound and retain water. Detention ponds are typically sized based upon a design storm event to temporarily retain stormwater so that the new rooftops and impervious cover in a subdivision do not create greater run-off impacts to downstream properties than would have occurred prior to construction of the subdivision. Alternatively, a detention pond could be designed as a permitted impoundment, using the permitting process similar to that recommended by TCEQ for amenity lakes. If a detention pond is located “on-channel” (e.g. constructed on a stream or other channel) such that it impounds state water, the impoundment would need to go through the water rights permitting process.

To avoid the necessity of a water rights permit for a subdivision detention pond, the pond should be constructed only to capture diffuse surface waters before they reach a watercourse. This can be a complex, fact specific undertaking, considering that the design of such ponds often take advantage of natural drainage. Finally, subdivision detention ponds, whether or not subject

\(^{29}\) Domel v. City of Georgetown, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied).

\(^{30}\) Id.

to water rights permitting, may also require a water quality permit pursuant to Chapter 26, Water Code\textsuperscript{32} or may be so permitted pursuant to a municipality’s water quality ordinances.

**IX. SUBORDINATION AGREEMENTS**

Whether the holder of a water right is entitled to impound or divert water at any given time depends on the priority date of the water right in comparison with the priority dates of other water rights in the basin. Typically, first in time is first in right. Accordingly, when a senior water right is not being fulfilled, the holder of that senior right may make a “call” on the river, requiring that use by enough junior water rights be curtailed to ensure the decreed amount of water is available for the senior right.

But, by using a “subordination agreement”, the holder of a senior water right may agree to allow all or some of its water right to take second position behind another party’s water right. Subordination agreements are often used when a new reservoir is to be constructed, for example to firm up the water supply for the reservoir, and are also commonly used in the Guadalupe River Basin. In some cases, the terms of a subordination agreement may be incorporated into a water rights permit, but such incorporation is not required for the holder of the senior water right.\textsuperscript{33}

A typical example of a subordination agreement is the agreement whereby the BRA agreed to subordinate a portion of its existing water right in Lake Whitney to make 3000 acre-feet per year of water available to the Somervell County Water District for a proposed new off-channel reservoir.\textsuperscript{34} That subordination agreement allowed the permitting and construction of the new Wheeler Branch water supply reservoir using water diverted from the Paluxy River. Reportedly, BRA has also agreed to subordinate certain rights in Possum Kingdom to allow the permitting of the proposed Cedar Ridge reservoir by the City of Abilene.

Subordination has also been used as a strategy to maximize the yield of reservoirs. In 1996, the Guadalupe-Blanco River Authority (GBRA) subordinated a water right it held for hydroelectric use to GBRA’s more-junior, upstream right to store water in and divert and use water from Canyon Reservoir.\textsuperscript{35} As a result, water that would have been passed through the reservoir solely for the generation of hydropower could instead be stored, resulting in an increase of the firm yield of Canyon Reservoir by approximately 40,000 acre-feet of water per year.

A more common example of a subordination agreement, albeit not by that name, is an upstream contract for water supply. In a typical upstream contract, the owner of a senior water right in a downstream reservoir contracts to allow an upstream junior user to divert water from the watercourse using the senior right holder’s priority date and authority. The senior water right holder then reduces the amount of available water from the reservoir to account for the upstream

\textsuperscript{32} An example would be regulated small municipal separate storm sewer systems (MS4) under Stormwater General Permit TXR040000.


\textsuperscript{34} Subordination Agreement of October 16, 2000 between BRA and Somervell County Water District.

\textsuperscript{35} See Certificate of Adjudication No. 18-2074E.
Absent the contract, there may be no unappropriated water available for the junior user to divert, or the available water would be so junior in time as to be unreliable. In exchange for the contract, the senior water right holder typically will charge its standard system rate for the water supplied, just as if the water was diverted and used directly from the reservoir.

X. WATER RIGHTS APPLICATION NOTICE

In *City of Marshall v. City of Uncertain*, the Texas Supreme Court struck down an amendment to a water right filed pursuant to Texas Water Code § 11.122(b) that the TCEQ granted without notice or an opportunity to be heard. The court’s decision will have significant impact on the circumstances when water right amendments now require notice and opportunity for hearing. In response, the TCEQ has created an advisory group of stakeholders recommended by the Executive Director to discuss what notice would be appropriate for an application to amend a water right under Section 11.122(b). At the date of this writing the advisory group and TCEQ staff are still working through the notice requirements for water rights amendments.

XI. CONCLUSION

Competing demands for water and strategies for addressing the state’s growing population have given rise to a variety of unique water rights permitting issues. The resolution of these issues will greatly impact how water is supplied and used throughout the state.

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