

### **San Marcos River Foundation Water Rights Dispute Concludes**

On May 1, 2009, without comment, the Texas Supreme Court denied the petition for review in *San Marcos River Foundation v. Texas Commission on Environmental Quality, Guadalupe-Blanco River Authority, San Antonio River Authority and San Antonio Water System*, 267 S.W.3d 356 (Tex. App.—Corpus Christi Jul. 31, 2008), Cause No. 13-06-00326-CV. This decision concludes almost nine years of dispute over whether the San Marcos River Foundation (“SMRF”) could legally appropriate approximately 1.3 million acre-feet of water for instream flows through application to the Texas Commission on Environmental Quality (the “Commission”). The matter appears to now be finally concluded.

In 2000, SMRF filed its application with the Commission. Opponents of the application contended that the Legislature had not authorized the Commission to appropriate water for instream use purposes, that a taking, storage or diversion of state water is required pursuant to Texas Water Code Section 11.121 in order for an appropriation to be authorized, and that the SMRF application should be denied for failure to meet those elements. Moreover, to the extent that such water may be needed for instream flows, opponents to the SMRF application contended that the Commission should reserve water from appropriation rather than granting such rights to a non-profit organization.

In 2003, the Commission dismissed the SMRF application along with several other pending instream flow applications, based on the conclusion that it did not have the authority to issue this type of permit. SMRF immediately filed an appeal in Travis County District Court, and in 2006, the District Court held that the application should be returned to the Commission for processing through an administrative hearing. Opponents of the application appealed this decision, and in October 2007, the Third Court of Appeals heard oral arguments on the legal issues at play.

In August 2008, the Thirteenth Court of Appeals overruled the District Court’s decision and ruled that the Commission had no jurisdiction to consider SMRF’s application on the basis of Texas Water Code Section 11.0237, which had been passed as part of Senate Bill 3 during the 80<sup>th</sup> Legislative Session. This provision of the Water Code essentially codified that the Legislature has not authorized the issuance of surface water rights for instream flows, which was the very essence of what SMRF had sought to do with its application in 2000. This decision was subsequently appealed by SMRF to the Texas Supreme Court, which declined to grant the petition for review on May 1, 2009.

The issue of instream uses and environmental flows is an ongoing debate as Texas seeks to balance its need for fresh water supplies with environmental interests. Pursuant to the comprehensive environmental flows process adopted by the Legislature in SB 3, bay and basin stakeholders groups in several river basins across the state are in the process of developing recommendations for bay and basin flow demands. Lloyd Gosselink attorneys are working closely with stakeholders involved in this process. Should you have any questions regarding the SMRF case or the ongoing environmental flow studies process, please feel free to call either Martin Rochelle or Brad Castleberry at (512) 322-5800.