

10-24, Local: Court rules Marshall must hold hearing on plan to sell water

By GLENN EVANS

AUSTIN " The city of Marshall will have to defend its application to sell water from Caddo Lake to customers outside the retail service area that hugs its city limits, an appeals court has decided. The ruling issued last week by the Third Court of Appeals in Austin overturns a June 2002 decision by the Texas Commission on Environmental Quality. The Oct. 16 decision upholds a lower court ruling against the city.

Marshall city commissioners were scheduled to discuss whether to appeal the ruling to the Texas Supreme Court in closed session Thursday night, but were not expected to take up the question until after press time. "So far, Marshall's approach has cost its taxpayers and ratepayers, and past and former employees, about \$360,000," Caddo Lake Institute Director Dwight Shellman said. "Marshall has nothing more than it started with when it rejected our settlement (offer) in 2000."

The Caddo Lake Institute initially opposed Marshall's application to sell >untreated water from the unused portion of its 5.2 billion gallons of annual water rights. The city uses about 1.9 billion gallons annually and is projected to use 2.6 billion by 2050. The process began with Marshall's plan to sell untreated water to Entergy Power Partners, which later contracted to buy its water from Longview. It lived on because the question remained unanswered whether the water rights permit amendment required a contested case hearing for the public and affected landowners to give input. The Texas Commission on Environmental Quality's initial ruling agreed with >Marshall that the amendment was too routine to require a contested case hearing.

The 53rd District Court disagreed with TCEQ, and on Oct. 16, the Third Court of Appeals upheld that court's ruling. TCEQ declined to comment Thursday on the latest ruling other than to say it is reviewing it and will consider options that could include its own appeal to the Texas Supreme Court. Caddo Lake Institute attorney Richard Lowerre said his client argued the potential downstream impact on water quantity and quality merited a hearing at which affected parties can voice concerns. "We're convinced we'll be able to prove there will be dramatic effects to Caddo Lake if the amendment is authorized," Lowerre said. He added the institute was most concerned with allowing the city to pump at will during droughts.

"There may be times of the year when they can get all they want," he said. "During drought periods, that has been a problem." Marshall, which straddles the Sabine River and Cypress Creek basins, >questioned whether any water sale is considered an interbasin transfer under a 1997 state water law. It argued that sales within the retail service area did not require a contested case hearing like most interbasin transfers.

"That's what we said in the first place," Caddo Lake Institute Director Dwight Shellman said. "That's never what this was about. We always admitted that. The court of appeals said they are entitled to automatically export (water) >within their RSA." Marshall City Attorney Todd Fitts disagreed. "From our point of view, yes, getting the interbasin transfer question >cleared up is important," he said. "And they are now saying they didn't contest that and didn't have a problem with it."

They didn't, Shellman and Lowerre said, as long as the interbasin transfer is within the retail service area. The Entergy plant Marshall hoped to make its water customer is about eight miles south of the city's retail service area.

The Caddo Lake Institute said Marshall wanted much more, as evidenced by other cities, water and river authorities that filed friends-of-the-court briefs supporting Marshall's request. When the three-member Texas Commission on Environmental Quality sided with Marshall in 2002, it opened the door for Marshall and other entities to sell water like a commodity, Lowerre said. "The agency " the Texas Commission on Environmental Quality " has recently been trying to stop public hearings in every area " pollution, water rights," Lowerre said. "The people in this agency tend to think, 'We're the experts. Just leave it to us. We'll take care of you.' They have pretty much said to the people of Texas, 'We're going to open up marketing. We're going to let you go out and sell it to the highest bidder.' And the law says, no, these are public waters and these are public decisions." No date has been set for a contested case hearing.