

Water issues volatile

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One of the most volatile and controversial issues facing lawmakers considering overhauling state water law is the question of interbasin transfers, or the moving of water from rivers and lakes in one part of the state to thirsty cities in another.

Another is water marketing, the emerging enterprise in which entrepreneurs buy or lease rights to underground water, or otherwise partner with water-rights holders, and then sell the harvested water to cities or other buyers.

The state's Senate Select Committee on Water Policy has spent much of the last year studying the questions of interbasin transfers and water marketing, as well as other pressing water policy questions, as part of an effort to refine the state's body of water law.

Last Tuesday, on the opening day of the Texas Legislature's new session, the committee released its much-anticipated report and recommendations to state lawmakers.

Among the recommendations are that the Legislature reevaluate the tough interbasin transfer laws found in 1997's Senate Bill 1 water legislation, which have nearly ended interbasin transfers, in order to ensure that water supply projects critical to Texas can be built.

The committee is also recommending that lawmakers consider affirming state support of water marketing efforts - as long as marketers' water deals contain provisions to protect the environment and economies of areas from which water is mined for sale.

Interbasin transfers

Texas' interbasin transfer law is designed to regulate exports of surface water - water in lakes or rivers - from one river basin to another in order to ensure that the water needs of the contributing area, typically a rural one, aren't disregarded in favor of the needs of the receiving area, typically a metropolitan one.

That noble proposition, however, conflicts with the need to move water from those areas deemed to have excess water to those high-population areas where water shortages are at hand or expected. As the select committee puts it: "The sources of water in Texas do not always align with its population."

But water-project developers are discouraged from moving surface water from one basin to another by the "junior water rights provision" of the interbasin transfer law. That provision requires the state to reclassify as "junior" any permitted water rights involving water to be transferred from one basin to another.

In simple terms, that means the water-rights holder must move to the end of the line - behind those with more senior, or higher priority, rights - to claim available river water. In a drought, when the river flow is low, there may be no water left for that junior-water-rights holder to capture.

One example of a water project that could be impacted by the statute is the Lower Guadalupe Water Supply Project, which would provide river water from the Victoria area, in the Guadalupe River Basin, to Bexar County, in the San Antonio River Basin.

Developers of the Lower Guadalupe Water Supply Project, who are hoping to convince the state to reclassify the two basins as one in order to avoid the problems with the interbasin transfer law, say the statute as now written makes their project less attractive.

That's because, with the availability of water during droughts being in question, the water supply the project would provide becomes less reliable.

The select committee reports that the interbasin transfer laws may prompt state water planners - who are charged with cataloguing water projects and strategies to ensure Texas' water future - to give less consideration to otherwise viable projects that involve interbasin transfers.

The committee and others agree that the strict interbasin transfer laws may also contribute to water planners' over-reliance on groundwater resources (which are not regulated by interbasin transfer laws, which apply to surface water in rivers and lakes) and on the building of new surface reservoirs - neither of which are popular water supply options.

So the senators, in their report, are recommending that the Legislature "evaluate the appropriateness of the junior water rights provision and other interbasin transfer permit requirements."

The senators suggest two "alternative legislative options" on the interbasin transfer question.

The first option is keeping the junior water rights provision, but with modifications as needed to move forward with critical water supply projects while assuring an adequate future supply of the water resource for the region of origin and for the environment.

The second also suggests retaining the junior water rights provision but repealing some of the law's other "protection of basin of origin" requirements: such things as considering whether transfers will harm the basin of origin's economy or environment; whether compensation for harm done should be paid to the basin of origin; and whether the receiving area, in order to demonstrate that it will not be using the new water foolishly, has water conservation and drought contingency plans in place.

In the Victoria area, observers seem to favor of keeping the existing interbasin transfer laws intact.

Jerry James, director of environmental services for the city of Victoria, said the current provision is beneficial to a city like Victoria, which has one of the more recent, or junior, water rights on the Guadalupe River. The city's water right is used to draw Victoria's main water supply.

During droughts, when river flow is low, the city, with its junior right, may not be able to take water from the river and would have to rely on backup supplies.

James said keeping the interbasin transfer law intact "is good for Victoria because it protects our junior water right, especially during drought periods. With the current provision in place, it ensures that Victoria will be able to draw its water before that water would be allowed to be taken to satisfy an out-of-basin need."

In Refugio County, Garrett Engelking, manager of the Refugio Groundwater Conservation District, said he, too, leans toward retaining the current interbasin transfer law because changes could reduce the amount of environmental flows, which are river flows crucial to the health of wildlife and the environment.

"The idea of protecting the basin of origin is extremely critical for the habitat of bays and estuaries. Before any action is taken to reduce the requirements for interbasin transfers, environmental flows must be addressed for each basin, no matter what pressure it places upon municipalities to find or locate new sources of water," Engelking said.

One drawback, he said, is that retaining the current law would place a greater burden on rural counties to supply groundwater to replace surface water that isn't permitted to be moved.

"Until the environmental flows issue is resolved, I favor the first option, but not completely," Engelking said. "I prefer the do-nothing-until approach."

Art Dohmann, president of the Goliad County Groundwater Conservation District, said he's not in favor of changing the interbasin transfer laws.

"I support the current law regulating interbasin transfer of surface water as being equitable and ethical," said Dohmann. "The current law allows for interbasin transfer of excess surface water while protecting the basin of origin from detrimental economic impact."

Water marketing

The terms *water marketing* and *water ranching* are generally used to describe the practice of landowners leasing - to cities or to water marketing enterprises like T. Boone Pickens' Mesa Water Inc. - the right to pump the groundwater that lies beneath their land.

In some instances, the land is sold. In others, the landowners form a contractual partnership with a water marketing firm in which they retain their water rights but agree to export their water and share the profits with the firm, which provides legal, engineering, hydrologic and other services.

Water ranching began to occur in Texas after the interbasin transfer rules established in 1997 began to prohibit the free movement of surface water, one high-level observer said.

Water marketing efforts are currently being explored in Victoria, Goliad, Refugio and Bee counties, and elsewhere.

The select committee, in its report to the Legislature, writes about the need to "advance water marketing" as a way to help the state ensure that the growing water needs of all regions are met.

However, the senators acknowledge that there are "legal, regulatory and attitudinal" barriers facing water marketing.

TexasWaterMatters.org, a Web site operated by a coalition of Texas environmental groups, expounds on some of those barriers.

The environmentalists say that water ranching usually occurs in rural areas where groundwater supplies are still relatively untapped. What makes water ranching different from more traditional uses of groundwater is that the volumes of water being withdrawn are much greater than the historical landowner would have ever used to irrigate crops or to support livestock or family.

For this reason, issues like aquifer sustainability, fairness and equity in withdrawals and legal rights to capture water, are coming into question, the environmentalists say.

Some feel that just the idea of someone selling off such a vital natural resource as Mother Nature's groundwater is odious.

Among the alternative legislative options suggested by the senators is adopting initiatives that would advance water marketing while providing restraints to ensure an adequate supply of the water resource for the region of origin and the environment.

"A key component necessary for proposed water marketing projects must involve mechanisms to benefit the exporting communities," the senators write.

Lynn Sherman, president of WaterTexas of Austin, one of the state's leading water marketing enterprises, said he's encouraged by the senators' suggestion to advance water marketing.

"I think it's critical that private water development be encouraged. The reason is that the days of government-funded projects are waning."

Sherman explained that Texas hasn't completed a large-scale water development project since the dam-building era ended in the mid-1980s.

That's because federal funding for the development of water supply projects has dropped 70 percent nationwide in the last 20 years, Sherman said.

With the lack of water development by the government, he said, something must be done to meet the water needs that keep the state afloat economically.

"I don't see the government dollars there to do it, so private enterprise has to be involved," Sherman said.

He also addressed fears that groundwater developers are going to dry up groundwater supplies and are not interested in the sustainability of aquifers.

"The fact is that a groundwater project cannot be sold without there being a predictable supply throughout the term of the contract, which is generally 30 to 100 years with renewals. That, by definition, is sustainability."

He said there are exceptions. In those arid regions of the state which have little choice but to use groundwater supplies, sustainability isn't always possible. But even those places, he said, use the "50/50 rule," under which 50 percent of the now-available resource is left after 50 years.

As far as the recommendation that water marketing projects must involve mechanisms to benefit the exporting communities, Sherman said he agreed.

"The one thing that has been missing from water policy in the state of Texas is a mechanism whereby value for an exported water supply is invested in communities in the area of origin."

He said one way to do that is to redirect water export fees collected from water marketers by groundwater districts. Those fees now go to the groundwater districts, but could be redirected instead to schools or community economic development efforts, he said.

Another way to ensure that water-exporting communities benefit from water sales is to establish a fee or tax on surface water sales, so that a portion of revenues earned by agencies that sell surface water is dedicated to schools or communities.

"I'm very supportive of that and have been," Sherman said.

As far as the question of water marketing itself being an odious practice, Sherman said water marketing is just another way of supplying water.

"It's just people coming together to put supplies together and trying to make them available," Sherman said. "A landowner owns that groundwater under his or her property - and they have a right to sell it."

He said the same type of commercial marketing happens with other crucial commodities.

"It happens with oil and gas, with electricity. For heaven's sake, it happens with food. You have private enterprise involved in all those endeavors," Sherman said.

In Goliad, groundwater district President Art Dohmann said this: "I support that initiatives to advance water marketing that relate to the movement of water must be implemented with essential restraints to protect the region of origin and for the environment. Restraints should include the ability to revoke permits, after a reasonable period of time."

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