

Marshall can sell Caddo water Opponents to challenge state panel's decision, citing threat to lake

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By LEE HANCOCK / The Dallas Morning News

The Texas Natural Resource Conservation Commission ruled Friday that Marshall can sell Caddo Lake water to industry, agreeing that the agency's director followed state law in granting permits needed for the sale without hearings or environmental review.

The city's lawyer praised the decision, but opponents have vowed to challenge the decision in court. One challenge is pending in Austin state court, and Caddo Lake Institute President Dwight Shellman said his organization and others are considering filing additional state and federal lawsuits.

"We're not giving up," he said.

Friday's decision by the three-member commission caps a yearlong fight between officials in the East Texas city and defenders of the state's only naturally formed lake, where 44 endangered or threatened species live in and around the South's most pristine Bald Cypress swamp.

City officials contended that the changes they were seeking were minor adjustments to existing water rights.

But lake supporters, ranging from area property owners to Texas Parks and Wildlife and the U.S. Fish and Wildlife Service, have warned that Marshall's plan could pose a significant threat to a fragile and already endangered environmental jewel.

Both sides agree that the case poses major implications for planning future water use and conservation in Texas.

"We can't really meet our state's future water needs if every little change has to come before a contested case hearing," said Martin Rochelle, an Austin attorney who represented the city before the commission.

"A case hearing adds time and expense," he said. "It's a full-blown administrative trial with parties and discovery, and evidentiary rules are in play. Rules of civil procedure are in play. Like any litigation, the outcome is sometimes uncertain."

But Mr. Shellman said TNRCC's ruling "amounts to a huge rip-off of the public interest in the water that isn't going to be used."

He said that historically, unused water rights such as Marshall's should be canceled and reallocated under state law, but TNRCC is instead misinterpreting the law to make such rights "marketable and worth millions."

"What we have basically going on is a transfer of the people's water rights to private interests," he said. "The net effect is that the city is being allowed to take water it will never use, and selling it to the highest bidder."

The city has had a permit for more than 40 years that allows it to use Cypress Creek, upstream of Caddo Lake, as its municipal water supply, and has historically used less than half of the 5.2 billion gallons it is currently allowed to draw each year.

Marshall's last attempt to get permission to sell some of that raw water to industry failed in the 1980s, when a state court denied the city's request because it lacked viable industrial customers. City officials again sought permission for industrial water sales from the Caddo watershed last June, after signing a contract with Entergy Corp. to supply 5.5 million gallons of water a day from Cypress Creek to cool a gas-fired power plant being built south of the East Texas city.

In mid-March, TNRCC Director Jeff Saitas granted the changes requested by Marshall to clear the way for the water sales. But public uproar over the potential harm to Caddo Lake prompted the company to announce in May that it would buy water for the plant from neighboring Longview.

Opponents of Marshall's plan appealed Mr. Saitas' decision to the full conservation commission, arguing that he had contradicted earlier agency rulings, violated state law and overstepped his authority. They contended that the agency should have granted requests by hundreds of landowners and other lake advocates for the formal hearing and full environmental review.

Parks and Wildlife lawyers and even TNRCC's own public interest council filed pleadings arguing that Mr. Saitas failed to follow state law in the case.

But Mr. Saitas said state law required his agency to view Marshall's request as if it already were using all of the 5.2 billion gallons of water it is permitted to take yearly from Cypress Creek, just upstream of the lake.

Mr. Saitas also maintained that his agency's rules allowed no new environmental restrictions, even if no environmental assessments were done before the original water rights were granted in the 1950s and new scientific understanding in the five decades since might show that the lake could be damaged.

Representatives for several large water users groups – including the Texas Water Conservation Commission, the Brazos River Authority and the Texas Irrigation Council – filed pleadings arguing that requiring Marshall to submit to a public hearing could have major implications on water use planning.

"This is a fundamental issue for holders of water rights, and the ability to manage water in Texas is at stake," the general manager of the Brazos River Authority stated.

That agency and several statewide water users groups noted that Texas' current water plan projects that existing water rights affecting more than 81 billion gallons of water need "adjustment or modification" similar to that sought by Marshall

Friday's decision ensures a streamlined process of getting that water to cities and industry.

"I think the Legislature intended that there's a whole slew of minor amendments, nonsubstantial amendments that shouldn't have to be subject to the mine field that is sometimes contested case hearings," Mr. Rochelle said.

But Mr. Shellman said the commission has opened the door for "water hustlers," commercial interests eager to exploit the state's water resources without regard to public interest or the environment.

"They're allowing Marshall to double the amount of water it takes out. That's not a little or insubstantial thing," he said. "The number of rules that have been turned on their heads to do it is not insignificant."

E-mail lhancock@dallasnews.com