

Agenda Item 7.6(b)....9/15/04

Recommendation of Brazos G Water Policy Workgroup on 5/18/04

TOPIC:

SURFACE WATER – INTERBASIN TRANSFERS (IBT) OF SURFACE WATER

BRAZOS G RWPG POLICY RECOMMENDATION:

“Interbasin transfers have been a critical component of water management in Region G, as there are currently over 80 permitted IBTs statewide. The TWDB projects that the State’s population will double in the next 50 years. It is intuitive that IBTs will be a necessary component of the water management strategies. The real issue is how to accomplish future IBTs in fairness.”



TWDB FACT SHEET FROM WEB SITE

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Version: 6 11/4/03

Policy Topic: Surface Water—Interbasin transfers (IBT) of surface water.

Brief Description of Issue:

Senate Bill 1 (SB 1), the omnibus water legislation passed in 1997, statutorily mandated that the priority date for new interbasin transfers of surface water be “junior” (later in time) to all rights granted before the time the IBT application was filed. SB 1 also imposed significant procedural and evidentiary requirements on the granting of IBT authorizations.

Possible Solutions, Impacts, Considerations:

- Prior to the passage of SB 1, the Texas Commission on Environmental Quality (TCEQ) could grant an IBT for water in excess of the amount required to protect existing rights if the benefits of the transfer outweighed detriments to the basin of origin. There were no specific requirements about the priority dates of IBT authorizations. Prior to SB 1, TCEQ issued IBT amendments both with the priority date of the original water right, and also with junior priority dates.

- Nearly 80 interbasin transfers of surface water that were authorized prior to 1997 currently serve metropolitan areas in Texas with 20- 25 percent of the state's currently available surface water supply (1).
- Since the passage of SB 1, only one new IBT permit has been issued, and some suggest that the emphasis has shifted to transfer of groundwater that is governed in Texas by the "rule of capture", which can be regulated by groundwater conservation districts.

Background:

The Texas water rights permitting system for surface water adheres to the prior appropriation doctrine, or "first in time is first in right." Older or "senior" water rights have priority to their allotments of water before newer "junior" right holders can access theirs. In times of drought when water supplies are limited, this becomes increasingly important, because in certain basins there may not enough available water to meet all permitted rights. Changes to the Texas Water Code resulting from the passage of SB 1 made new IBT permits "junior" to all other rights in the basin that were granted before the IBT application was filed. This may make IBT amendments to existing water rights less reliable during times of drought than if they were granted with a priority date of the original water right. This change will not impact IBT requests for new water rights, since the priority date for these IBTs will be the same under rules in place before SB 1 and after. Since municipal water supplies must be highly reliable in order to justify the required investment for infrastructure and to ensure an adequate supply of drinking water at all times, the SB 1 provisions on priority dates may be causing some suppliers to look for sources other than amendments to existing water rights. Additionally, SB 1 significantly increased the procedural and evidentiary requirements that may further discourage the use of IBTs.

Prior to the passage of SB 1, Texas Water Code Section 11.085 as interpreted by Texas courts provided that TCEQ could grant an IBT permit for water in excess of the amount required to protect existing rights if the benefits of the transfer outweighed detriments to the basin of origin. There were no specific requirements about the priority dates of IBT authorizations.

SB 1 significantly amended Texas Water Code Section 11.085 by adding administrative requirements beyond the balancing test and by the "junior right" provision for transfers of water greater than 3,000 acre-feet per year. Section 791.026 of the Government Code, specifically relating to contracts for water and wastewater treatment facilities, allows a water supply contract to include a requirement that the purchaser must develop alternative or replacement water supplies prior to the expiration of the contract and may provide for enforcement through a court order. This type of provision could be utilized between two political subdivisions to recover any water involved with an interbasin transfer as well as intrabasin transfers.

Most of the requirements of the revised Water Code Section 11.085 are not applicable to

transfers of 3,000 acre-feet per year or less; for emergency transfers; for transfers to adjoining coastal basins; and for transfers from a basin to a county, city, or the city's retail service area that is partially within the basin for use in that part of the county, city, or retail service area not within the basin. On a volume basis, surface water is recommended in the 2002 State Water Plan to meet 66 percent of the needs for additional water during the next fifty years (2). Because of the currently perceived greater difficulty in obtaining permits for interbasin transfers, the new basin of origin protections created by SB 1 may affect the implementation of many water management strategies that rely on surface water supplies.

Sources:

- (1) Wasinger, B. and Mason, T.; *Interbasin Transfers-A Problem Resolved? Basin of Origin Protection*, October 1997.
- (2) Texas Water Development Board, *Water for Texas 2002*, January 2002