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Wohlgemuth: Drown red tape in order to confront state water challenges

BY ARLENE WOHLGEMUTH

In November, Texas voters will be asked to approve Proposition 6, a constitutional amendment that would take \$2 billion from the state's Economic Stabilization Fund, its savings account, to make loans for water development projects.

If the issue sounds vaguely familiar, it should. Just two years ago voters were asked to approve Proposition 2, a constitutional amendment authorizing the state to borrow up to \$6 billion to make loans for water development projects. The lending authority contained in Prop 2 was "evergreen," meaning that the state could relend up to the limit as prior loans were repaid.

Prop 2 passed. Yet so far very little of the money authorized by Prop 2 has been lent out. So why are Texans being asked to take money from the rainy day fund for a purpose never intended when existing revenue sources haven't been used?

Texas does face some significant water challenges. According to one common estimate, Texas will need an additional 8.3 million acre-feet of water by 2060 to meet the demands of a growing population and economy. Current drought conditions have only heightened awareness of the importance of this issue.

But while Texas' water challenges are real, they cannot be solved simply by spending more money. If Texas wants to see why water projects aren't going forward, it needs to look not only at funding but also at regulatory impediments.

Regulation of water in Texas is a Byzantine mix of Spanish, English and statutory law. Groundwater is recognized both constitutionally and by state statute as being a vested property right of the landowner. Surface water, by contrast, is officially owned by the state. Yet individuals and public entities hold surface water rights for specific beneficial uses (the right to divert a particular volume of water from a water course), which are themselves a form of vested property right, and may be bought and sold. In cases where there is insufficient water to meet all existing water rights, rights are given priority based on the date they were issued, with older (or more "senior") rights given priority.

The process of selling a water right, however, can involve a lot of bureaucratic red tape. Texas contains 23 major river basins, with eastern Texas having comparatively more water and West Texas having less. Interbasin transfers have traditionally been a means of dealing with droughts or other water shortages by moving water from areas where it is plentiful to places where it is scarce. In 1997, however, a “junior rights” provision was added to the Texas Water Code requiring that any portion of a water right involved in an interbasin transfer would lose its seniority. This has proven to be a major disincentive for new transfers.

In addition, the Legislature has, perhaps inadvertently, passed legislation which complicates — rather than facilitates — new water supply projects. Senate Bill 2 in 2001 and House Bill 1763 in 2005 enlarged the authority of groundwater conservation districts to limit private development of groundwater. In 2007, SB 3 established a multi-layered process leading to the Texas Commission of Environmental Quality’s adoption of environmental flow standards. Water supply projects based on development of groundwater and new surface water right permits are delayed by these new groundwater and environmental flow statutes.

Other regulatory issues complicate completion of water supply projects. Suppose, for example, that the owner of a water right wants to change the use to which his water is put from an agricultural to a municipal use. Even though nothing else may change, this “amendment” to the water right may require a contested case hearing — a long administrative process which can discourage such changes from taking place.

Regardless of whether Prop 6 passes in November, Texas must deal with these regulatory issues if it wants to ensure adequate water for the state’s future.

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