

**CURRENT ISSUES IN  
TEXAS WATER LAW - INTERBASIN TRANSFERS**

**CLE International  
Texas Water Law  
Houston, Texas  
May 4 and 5, 2000**

**BRUCE WASINGER  
Bickerstaff, Heath, Smiley, Pollan, Keever  
& McDaniel, L.L.P.  
1700 Frost Bank Plaza  
816 Congress Avenue  
Austin, Texas 78701  
(512) 472-8021  
(512) 320-5638 (Facsimile)  
<bwasinger@bickerstaff.com>**

**INTERBASIN TRANSFERS OF SURFACE WATER  
IN TEXAS  
AFTER SENATE BILL 1**

INTRODUCTION

On September 1, 1997, the so-called law of interbasin transfers of surface water in Texas substantively changed and one's ability to successfully obtain the necessary regulatory approval was substantively reduced. That portion of Senate Bill 1 relating to interbasin transfers is found in Acts 1997, 75th Leg., ch. 1010, § 2.08.

Prior to the passage of Senate Bill 1, interbasin transfers of surface water in Texas was not an uncommon event. In fact, interbasin transfers of surface water had been occurring for approximately eighty (80) years. The Texas Water Development Board reports that there are approximately eighty (80) interbasin transfers of surface water occurring every day in Texas. Such transfers have been and are a part of Texas life.

THE LAW AFTER SENATE BILL 1

That portion of Senate Bill 1 addressing the interbasin transfer of surface water is now codified in § 11.085, Texas Water Code. The Texas Natural Resource Conservation Commission's (TNRCC) administrative rules to implement § 11.085 are found at 30 TAC 297.18. These rules were adopted by TNRCC on January 20, 1999 and became effective on February 24, 1999. Set forth below are the requirements of § 11.085 followed by the corresponding TNRCC administrative rule.

§ 11.085. InterbasinTransfers

(a) No person may take or divert any state water from a river basin in this state and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a permit, certified filing, or certificate of adjudication from the commission authorizing the transfer.

**30 TAC 297.18**

**(a) No person may take or divert any state water from a river basin and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a water right authorizing the transfer. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code, § 16.051.**

(b) The application must include:

- (1) the contract price of the water to be transferred;
- (2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category;
- (3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users; and
- (4) the projected effect on user rates and fees for each class of ratepayers.

(c) The applicant shall provide the information described by Subsection (b) of this section to any

person on request and without cost.

(d) Prior to taking action on an application for an interbasin transfer, the commission shall conduct at least one public meeting to receive comments in both the basin of origin of the water proposed for transfer and the basin receiving water from the proposed transfer. Notice shall be provided pursuant to Subsection (g) of this section. Any person may present relevant information and data at the meeting on the criteria which the commission is to consider related to the interbasin transfer.

(e) In addition to the public meetings required by Subsection (d) of this section, if the application is contested in a manner requiring an evidentiary hearing under the rules of the commission, the commission shall give notice and hold an evidentiary hearing, in accordance with commission rules and applicable state law.

(f) Notice of an application for an interbasin transfer shall be mailed to the following:

- (1) all holders of permits, certified filings, or certificates of adjudication located in whole or in part in the basin of origin;
- (2) each county judge of a county located in whole or in part in the basin of origin;
- (3) each mayor of a city with a population of 1,000 or more located in whole or in part in the basin of origin; and
- (4) all groundwater conservation districts located in whole or in part in the basin of origin; and
- (5) each state legislator in both basins.

(g) The applicant shall cause the notice of application for an interbasin transfer to be published once a week for two consecutive weeks in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin or the receiving basin. The published notice may not be smaller than 96.8 square centimeters or 15 square inches the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices.

(h) The notice of application must state how a person may obtain the information described by Subsection (b) of this section.

(i) The applicant shall pay the cost of notice required to be provided under this section. The commission by rule may establish procedures for payment of those costs.

(j) In addition to other requirements of this code relating to the review of and action on an application for a new water right or amended permit, certified filing, or certificate of adjudication, the commission shall:

- (1) request review and comment on an application for an interbasin transfer from each county judge of a county located in whole or in part in the basin of origin. A county judge should make comment only after seeking advice from the county commissioners court; and
- (2) give consideration to the comments of each county judge of a county located

in whole or in part in the basin of origin prior to taking action on an application for an interbasin transfer.

(k) In addition to other requirements of this code relating to the review of and action on an application for a new water right or amended permit, certified filing, or certificate of adjudication, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed 50 years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries that must be assessed Sections 11.147, 11.150, and 11.152 of this code in each basin. If the water sought to be transferred is currently authorized to be used under an existing permit, certified filing, or certificate of adjudication, such impacts shall only be considered in relation to that portion of the permit, certified filing, or certificate of adjudication proposed for transfer and shall be based on historical uses of the permit, certified filing, or certificate of adjudication for which amendment is sought;

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing permit, certified filing, or certificate of adjudication, if an amendment to an existing water right is sought; and

(5) the information required to be submitted by the applicant.

### **30 TAC 297.18**

**(c) In addition to the other requirements of this chapter relating to the review of and action on an application for a new or amended water right, the commission shall weigh the effects of the proposed transfer by considering:**

**(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed fifty years;**

**(2) factors identified in the applicable approved regional water plans which address the following:**

**(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;**

**(B) the amount and purposes of use in the receiving basin for which the water is needed;**

**(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;**

**(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;**

**(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and**

**(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right in the basin of origin, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on the historical uses of the water right for which amendment is sought.**

**(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;**

**(4) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is sought;**

**(5) comments received from county judges required to be provided notice of the application as provided by § 295.17 of this title (relating to Emergency Authorization, Texas Water Code, § 11.139); and**

**(6) information required to be submitted by the applicant.**

**(1) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:**

**(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period; and**

**(2) the applicant for the interbasin transfer has prepared a drought contingency plan and has developed and implemented a water conservation plan that will result in the highest practicable**

levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

**30 TAC 297.18**

**(d) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:**

**(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period as defined by the factors provided in subsection (c) of this section; and**

**(2) the applicant for the interbasin transfer has prepared drought contingency and water conservation plans meeting the requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, and Guidelines and Requirements) and has implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.**

(m) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

**30 TAC 297.18**

**(e) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.**

(n) If the transfer of water is based on a contractual sale of water, the new water right or amended permit, certified filing, or certificate of adjudication authorizing the transfer shall contain a condition for a term or period not greater than the contract term.

**30 TAC 297.18**

**(f) If an interbasin transfer of water is based on a contractual sale of water, the new or amended water right authorizing the transfer shall contain a condition for a term or period not greater than the contract term, including any extension or renewal of the term.**

(o) The parties to a contract for an interbasin transfer may include provisions for compensation and mitigation. If the party from the basin of origin is a government entity, each county judge of a county located in whole or in part in the basin of origin may provide input on the appropriate compensation and mitigation for the interbasin transfer.

**30 TAC 397.18**

**(g) The parties to a contract for an interbasin transfer of water may include provisions for compensation and mitigation. If the party from the basin of origin is a governmental entity, each county judge located in whole or in part in the basin of origin may provide comment on the appropriate compensation and mitigation for the interbasin transfer.**

(p) For the purposes of this section, a basin is designated as provided in accordance with Section 16.051 of this code. A basin may not be redesignated in order to allow a transfer or diversion of water otherwise in violation of this section.

(q) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and

upon conviction is punishable by a fine of not more than \$1,000 or by confinement in the county jail for not more than six months.

(r) A person commits a separate offense each day he continues to take or divert water in violation of this section.

(s) Any proposed transfer of all or a portion of a water right under this section is junior in priority to water rights granted before the time application for transfer is accepted for filing.

### **30 TAC 197.18**

**(h) A new water right or amendment to an existing water right for a proposed interbasin transfer of water is junior in priority to water rights in the basin of origin granted before the time an administratively complete application for the transfer is filed with the chief clerk in accordance with § 281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.**

(t) Any proposed transfer of all or a portion of a water right under this section from a river basin in which two or more river authorities or water districts created under Section 59, Article XVI, Texas Constitution, have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water services areas shall be junior in priority to water rights granted before the time application for transfer is accepted for filing.

### **30 TAC 297.18**

**(i) A new water right or amendment to an existing water right for a transfer of water from a river basin in which two or more river authorities or water districts have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water service areas shall be junior in priority to water rights granted in that basin before the time an administratively complete application for the interbasin transfer is filed with the chief clerk in accordance with § 281.17 of this title. If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.**

(u) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section.

### **30 TAC 297.18**

**(j) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section. Nothing in this provision shall be construed as adversely affecting the ability of any other potentially affected person to obtain party status.**

(v) The provisions of this section, except Subsection (a), do not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same permit, certified filing, or certificate of adjudication;

(2) a request for an emergency transfer of water;

- (3) a proposed transfer from a basin to its adjoining coastal basin; or
- (4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and the municipality's retail service area not within the basin.

### **30 TAC 297.18**

**(k) The provisions that are contained in subsections (b) - (j) of this section that are in addition to those generally required for an application for a new or amended water right do not apply to:**

- (1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;**
- (2) a request for an emergency transfer of water as provided by § 297.17 of this title (relating to Emergency Authorizations; Texas Water Code, § 11.139);**
- (3) a proposed transfer from a basin to its adjoining coastal basin; or**
- (4) a proposed interbasin transfer from the basin of origin to a county or municipality or the municipality's retail service area that is partially within the basin of origin for use in the part of the county or municipality and the municipality's retail service area not within the basin of origin. The further transfer and use of this water outside of such county or municipal retail service area as existing at the time of the transfer or as may exist in the future other than back to the basin of origin shall not be exempt under this paragraph. For purposes of this paragraph, a county, municipality, or municipality's retail service area refers to a geographic area.**

TNRCC's rules include one additional requirement that is not covered in § 11.085. 30 TAC 297.18(b) follows:

### **30 TAC 297.18**

**(b) An increase in the authorized amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin transfer for purposes of this section.**

Since the passage of Senate Bill 1, no party has attempted to secure an interbasin transfer permit from the TNRCC, except under § 11.085(v), which basically is viewed as the exception section. A party needs a permit from TNRCC. The new intensive requirements imposed by Senate Bill 1 are not applicable.

Until portions of § 11.085 of the Texas Water Code are amended, interbasin transfers of surface water in Texas, which have been a part of Texas life, will be a thing of the past.