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White: Federal law endangers Texas water supply

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There is nothing like persistent drought to remind our lawmakers that Texas is significantly behind schedule on completion of needed projects to increase the Texas water supply. Most of the major planks of Texas water law were enacted in the throes, or on the heels, of serious drought. Indeed the landmark legislation known as SB 1 that now guides water supply development on the regional and local levels was passed in 1997 after an extended drought across the state.

The current focus on water is somewhat different than previous drought-inspired water law. The intensive drought during three of the past four years is not only a glaring reminder that Texas needs to accelerate water developments to meet increased demands projected far in the future, when the population has doubled; it also shows that Texas needs to expand supply to meet current demand.

The current 2012 State Water Plan calculates that Texas will need an additional 8.4 million acre-feet of water in 2060. Certain areas of the state, however, already experience water scarcity — understood as water demands that exceed the available supply. In 2012 and likely in 2013, farmers in the lower Colorado River basin will not have water for the first time in 75 years. Some major cities want to accelerate projects needed to access water owned but not planned for current use until 20 to 30 years in the future.

If the drought persists, increasing areas of the state will experience real water scarcity.

The current Legislature is wisely focused on one of the two main impediments to timely and cost-efficient construction of the water supply projects known as strategies in the State Water Plan: funding. Although some large cities and river authorities have access to adequate capital to finance needed water projects, many local entities and smaller cities lack access to the amount of capital needed.

Financing, however, is not the only barrier to increasing the water supply. Perhaps equally important are regulatory impediments flowing from state and federal authorities. On the state side, issues surrounding inter-basin transfers, re-use, environmental flows, water right amendments and new groundwater law on “managed available groundwater” can slow, halt or confound issuance of the permits without which many water projects cannot proceed. Thankfully, these are issues that the state can solve, in principle without federal interference. Federal laws have long recognized “the authority of each state to allocate quantities of water within its jurisdiction.” Yet there is a rub that makes federal regulation a far greater obstacle to water projects than state regulation.

Federal environmental laws like the Endangered Species Act, the Clean Water Act and the National Environmental Policy Act confer broad, intrusive authority over the water and land of Texas. According to the Corps of Engineers and EPA, Texas has 7.6 million acres of wetlands under federal regulatory control. Wetland areas are typically implicated in water supply projects. These two agencies’ new “Guidance Regarding the Identification of Waters Protected by the Clean Water Act” is so broad that it does not exclude even artificial ponds and swimming pools from the federal ambit.

The Endangered Species Act, alone, can impose cast iron shackles on water use and water development. As the U.S. Supreme Court has concluded, the language in the law allows no balance between the alleged needs of the species and human beings. Consider a few timely examples in Texas:

Litigation about the whooping cranes along the Gulf Coast may federalize allocation of the water in the Guadalupe and San Antonio rivers. And then there is the discovery of a single endangered spider, called the Braken Bat Cave Meshweaver, that immediately halted construction of the last 1,500 feet of a 6-mile, \$11 million pipeline to convey water to the west side of San Antonio. Completion of the last leg remains in limbo. This Meshweaver is one of 90 endangered or threatened species in Texas. Another 100 species are in the queue for listing.

Texas can and must solve all these problems. A growing bipartisan group of the U.S. Congress agrees that these federal environmental laws enacted over 40 years ago, now imposing such a burden on water resources managed by states, are obsolete and need reform. And with sufficient will and fiscal prudence, our Legislature can resolve the funding and regulatory impediments. Texas has phenomenal water resources. And now is the time to harness them for our growing population and economy.

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