

**Water Supply Planning Opportunities: Exempt Interbasin Transfers**\*

*By Martin C. Rochelle and Nathan E. Vassar*

The end (mostly) of the most recent drought in Texas presents opportunities for water utilities to take stock of their current supplies and their ability to lawfully and most efficiently use those supplies within their current and future service areas, all in light of their existing and projected water supply needs. Our recent drought is an important reminder that there remain many water supply challenges across our state that simply cannot be solved by a rainy season or a wet year.

In evaluating a utility's lawful rights to use water, one issue that is often the subject of confusion is the geographic service area limit that may be imposed in either a state-issued surface water right or a groundwater conservation district's production permit. While "place of use" limitations are not always included in water rights authorizations, when they are applicable it is important for utilities to understand such limitations and comply with them. One significant constraint that has been the subject of significant conflict over the last hundred years involves the use of surface water supplies within the geographic limits of the basin in which the supplies are located—within the "basin of origin." Without explicit authorization from the state, no surface water right holder may divert such supplies outside of the basin of origin. Such authorizations, referred to as "interbasin transfer" rights, have been the subject of much debate at the Texas Capitol and the source of significant litigation in the courts. Indeed, the interbasin transfer statute, Water Code Section 11.085, was substantively amended in 1997, via the Legislature's

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\* This article is included in a series of water supply planning and implementation articles that address simple, smart ideas for consideration and use by water suppliers in their comprehensive water supply planning efforts.

enactment of Senate Bill 1, to significantly increase the burden on applicants seeking interbasin transfer permits.

While securing a post-Senate Bill 1 interbasin transfer (“IBT”) authorization comes with a host of significant legal and technical challenges, the Legislature has thankfully afforded a few useful exceptions to the Water Code’s IBT permitting requirements. These exceptions can be employed by utilities to provide surface water supplies to areas that may be located outside of the surface water right’s basin of origin. Specifically, an exempt interbasin transfer (“exempt IBT”) provides a relatively quick and cost-efficient option to allow a utility to plan now in order to serve future demands in projected growth areas that may be geographically located across a river basin boundary.

Exempt IBTs are specifically authorized under Section 11.085(v) of the Texas Water Code. Section 11.085(v) includes a menu of options that, if applicable and utilized, can avoid the burdensome requirements for extensive application details, broad and expensive notice, public meetings, evidentiary hearings, and evidence of heightened water conservation implementation, among other requirements that apply to non-exempt IBTs. Significantly, exempt IBTs also escape the application of the “junior rights” provision of Section 11.085, such that an existing water right proposed to be transferred outside the basin of origin pursuant to an exempt IBT retains its original priority date.

Several exempt IBT categories are available under the statute. Section 11.085(v)(1) allows the transfer of not more than 3,000 acre-feet of water per year, in combination with other transfers authorized under the same water right. In addition, applicants may use Section 11.085(v)(3) to transfer water from the water right’s basin of origin into that basin’s adjacent coastal basin. For regional water suppliers whose existing and future service areas may straddle

river basin boundaries, Section 11.085(v)(4) allows transfers within the entire retail service area of that utility, as well as to the geographic areas of a county or municipality that fall outside of the basin of origin. Emergency transfers and transfers of water imported to the state are also permitted as exempt IBTs under Sections 11.085(v)(2), and 11.085(v)(5), respectively.

One or more of these options may prove helpful to meet growing water supply needs in the coming years, particularly for potential customers with relatively modest annual demands (less than 3,000 acre-feet per year), utilities located near river basin boundaries (either in retail service area or by county/municipal geographical limits), or those that may wish to meet demands in one of Texas' eight coastal basins. Further, an applicant may seek an exempt IBT on the basis of several of these options in the same application, as may be applicable to an applicant's particular circumstances.

The value of exempt IBTs extends to both time investment and risk of protest, and the expense and delays that accompany same. Exempt IBT applications may be prepared and processed within a short period, making them attractive, "low-hanging fruit" planning tools. In addition to being exempt from the significant substantive IBT requirements of Section 11.085(b)-(u), the courts have ruled that applications for exempt IBTs do not require notice or the opportunity for a contested case hearing. *City of Marshall v. City of Uncertain*, 124 S.W.3d 690 (Tex. App.—Austin 2003; aff'd in part on other grounds, 206 S.W.3d 97 (Tex. 2006)).

The next several years will undoubtedly present time-intensive water supply challenges, lengthy permitting processes, and unique legal hurdles for many water utilities across the state. Contrasted against these realities, an exempt IBT may provide an efficient, low-risk solution to supply water – or to position a utility to supply water – to meet demands that may fall outside of the utility's authorized service area. Water suppliers may wish to take advantage of one or more



of these available vehicles, as the use of such a proactive effort now may avoid the need for more reactive approaches down the road.

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