

TEXAS HOUSE OF REPRESENTATIVES



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OPINION COMMITTEE

J.D. Sheffield
District 59

FILE # ML-48066-16
I.D. # 48066

RQ-0124-KP

The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

Re: The doctrine of unconstitutionality
of delegation of Legislative
authority to private parties

Dear Attorney General Paxton and Opinion Committee:

I respectfully request your opinion on a matter that has been brought to my attention by McCulloch County, Texas ranchers and landowners who are classified as Domestic & Livestock ("D&L") users of the flows in the San Saba River ("D&L Interests") relating to the "Upper San Saba River Management Plan" ("the Plan"), a copy of which is attached.

The Question:

Will the adoption of the Plan, and legislative action to incorporate the same by statute, constitute an unconstitutional delegation of legislative and executive authority infringing on the separation of powers, as well as effect a taking of constitutionally and statutorily protected rights of riparian landowners along the Upper San Saba River segment to the flows in the river.

The Background:

The Plan has been circulated by Menard County Judge Richard Cordes on behalf of the Menard Irrigation Company and standalone Menard County Irrigators (the "Menard Irrigation Interests"). The Plan has been presented at Public Meetings convened in the four counties (McCulloch, Mason, Menard and Schleicher) that compose the land area for that segment of the waterway identified as the Upper San Saba River. The D&L interests have attended several of these Public Meetings and have expressed their united opposition to the Plan.



The Legislature has (i) designated the TCEQ as the state agency with “primacy” on matters related to appropriation and regulation of state owned waters (including “underflow”) flowing in Texas water courses, including the San Saba River, and (ii) created a program to provide “local control” within one or more designated river basins to address issues specific to a particular water course or segment thereof, i.e. the Watermaster Program.

The Legislature’s delegation of authority to the TCEQ is unequivocally clear in Sections 5.012-5.013 of the Texas Water Code:

Sec. 5.012. DECLARATION OF POLICY. The commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.

Sec. 5.013. GENERAL JURISDICTION OF COMMISSION.

(a) The commission has general jurisdiction over:

(1) water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights;

* * *

(b) The rights, powers, duties, and functions delegated to the Texas Department of Water Resources by this code or by any other law of this state that are not expressly assigned to the board are vested in the commission.

(c) This section allocates among various state agencies statutory authority delegated by other laws. *This section does not delegate legislative authority.*

Texas Water Code §§ 5.012-5.013 (emphasis added)

The Legislature also has created the State Watermaster Program under the TCEQ's jurisdiction to facilitate more hands-on regulation of day-to-day beneficial use and avoidance of illegal diversions and use of state water in and from water courses like the Upper San Saba River. The Watermaster Program is particularly useful in times of low flows and/or prolonged drought conditions. Subchapter G of Chapter 11 of the Texas Water Code, specifically Section 11.325 *et seq.*, prescribe the process for creating a local Watermaster Program. The TCEQ has promulgated rules applicable to the operation of its Watermaster Programs in 30 TAC Chapters 303-304, including assignment of a Watermaster to a segment of a stream.

The Plan devised by Menard's Irrigation Interests contemplates the Legislature empowering a "private board" to regulate all diversions from the Upper San Saba River. The San Saba River and all of the water in it and its underlying underflow alluvium belongs, however, to the State of Texas. That water is owned by the State and held in trust for all of Texas' citizens. See Act of June 20, 2003, 78th Leg., R.S., ch. 1242, § 2 (amending the Texas Water Code to add Section 11.0235); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 101 (Tex. 2006). The TCEQ has been delegated jurisdiction over the management of surface water by the Legislature. Texas Water Code §§ 5.012-5.013; see generally *id.* §§ 11.001-11.561. Surface water, i.e., "the water under ordinary flow, underflow, and... in a watercourse, is defined by Section 11.021 to be "state water". *Id.* at 101 n.6; see *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264, 272 (Tex. App.—Austin 2004, pet. denied).

The San Saba River and its flows are "surface water" owned by the State. It is a major tributary of the Colorado River system in the Upper part of the Colorado Basin, and it feeds the downstream Highland Lakes. Thus, the answer to the question presented is of significant importance to a large segment of the Texas populace.

Constitutional Issues and Illegal Elements Presented by the Plan

I refer you to the Texas Supreme Court's decisions in *FM Properties Operating Company v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) and *Texas Boll Weevil Eradication Foundation, Inc v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). Both decisions stand for a basic proposition:

"the Texas Constitution prohibits the Texas Legislature from delegating legislative power to a private entity with a pecuniary interest potentially contrary to the public welfare."

In the *Texas Boll Weevil* case the Texas Supreme Court considered the constitutionality of a Texas statute which authorized a nonprofit organization to designate eradication zones for the control of boll weevils attacking Texas cotton. That statutorily created nonprofit organization then issued assessments to the cotton farmers in its designated zones to cover the cost of its boll weevil eradication management efforts. In *FM Properties* the Texas Supreme Court considered the constitutionality of a statute which allowed a *private* landowner, or group of landowners, to exempt themselves from Austin's municipal water quality standards by designating their property as a "water quality protection zone" and preparing their own substitute water quality plan.

In both cases, the Texas Supreme Court struck down the authorizing statutes as contrary to Article II, Section 1 and Article III, Section 1 of the Texas Constitution. Both authorizing statutes were determined to constitute unconstitutional delegations of legislative authority to private entities.

Other illegal elements contained within the Plan as laid out in the Public Meetings held to date appear to be:

1. The proposed "governing board" will be dominated by the Menard Irrigation Interests.
2. D&L Interests would be required to register with the Board under penalty of confiscation/forfeiture of their protected D&L property rights.
3. The cost of the proposed Plan would be significantly higher than the cost of a statutorily authorized Watermaster Program similar to one being successfully implemented on the Concho River. Notwithstanding (i) their lack of full representation on the Governing Board, (ii) the fact their diversions are too insignificant to impact the flows in the San Saba River, particularly within the problem area in and around Menard, and/or (iii) recognition of their protected D&L Rights, the D&L Interests would be required to contribute to the cost of the Plan. This is clearly a case of both "taxation without representation" and "taxation without benefit to the affected taxpayers" (but a direct benefit in reduced costs to the problem creators – the Menard Irrigation Interests).
4. In addition to the potential loss of their statutorily recognized and protected D&L Rights to the flows within the San Saba River, any McCulloch County D&L Interest that failed to register and pay under the Plan would be precluded under the Plan from seeking any direct recourse from the TCEQ to protect the constitutionally established priority interest of the downstream D&L users in the River's flow, e.g., requesting priority calls or investigation of suspected wrongful/illegal diversions of state water associated with the flows of the San Saba.
5. The Plan's "guidelines" would not require the curtailment of any irrigation diversions unless "*river flow at the gauge in Menard falls below* [a level to be set by the Menard Irrigation Interest Board]" In addition to the patent conflict of interest this structure creates, the "Menard Gauge" is located *above* (i.e. upstream from) the problem. Specifically, the gauged flows can never detect the unregulated over pumping by the Menard Irrigation Interests which are diverting and pumping at a point in the San Saba River *downstream* from the Menard Gauge. In selecting that Menard Gauge as the "trigger" for any potential curtailment, rather than the more logical LCRA Hydromet Gauge No. 1563 located at the Highway 87 crossing of the San Saba River in McCulloch County, *downstream* of the unregulated irrigation diversions of the Menard Irrigation Interests, McCulloch County river flow is not a consideration.

6. The Plan does nothing to address the TCEQ's latest and other studies on production and diversion of the underflows of the San Saba River (State Water) from more than 100 shallow wells near the river's banks completed in the alluvial underflow layers. Those TCEQ and other studies conclude that the production from the wells constitutes the illegal diversion of State Water from the San Saba River in and around Menard. These unauthorized takings of State Water, as documented by the TCEQ and other studies, (i) are all occurring *below* the Menard Gauge and *above* the 10 mile crossing below Menard which has created the current situation, and (ii) cause the San Saba's flow each year during the Menard Irrigation season to disappear entirely as the River's course runs through McCulloch County.
7. The Plan insures the ability of the Menard Irrigation Interests to continue taking as much water as they want from the San Saba River without authorization or penalty, while downstream McCulloch County D&L Interests are required to surrender involuntarily their constitutional priority to the "local control" of the upstream Menard Irrigation Interests without recourse or due compensation.

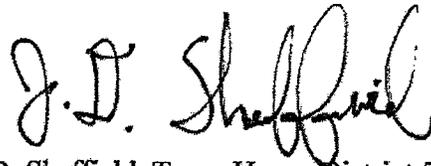
SUMMARY:

Because the Plan (i) relegates the downstream D&L Interests of McCulloch County to the mercy of Menard Irrigation Interests controlling the Board, and (ii) assures the ongoing destruction of the San Saba River's flow across the long run through McCulloch County, it appears to be patently unconstitutional.

The issuance of an Attorney General Opinion would likely avoid a significant waste of effort and resources, and hopefully, facilitate a legally proper, and ultimately simpler and more cost effective, solution to the Upper San Saba River's problems, e.g. the establishment of a State Watermaster for the four county (McCulloch, Mason, Menard and Schleicher) segment of Upper San Saba River under existing law.

Please let me know if you have any questions or need further information related to this request.

Respectfully submitted,

A handwritten signature in black ink that reads "J.D. Sheffield". The signature is written in a cursive, flowing style.

J.D. Sheffield, Texas House District 59