

Senate Subcommittee on the Lease of State Water Rights



Interim Report to the Senate Select Committee on Water Policy

78th Interim

(Without Appendices)

November 3, 2004



TEXAS SENATE SUBCOMMITTEE ON THE LEASE OF STATE WATER RIGHTS

SENATOR FRANK MADLA
CHAIRMAN

MEMBERS:
SENATOR ROBERT DUNCAN
SENATOR TROY FRASER
SENATOR EDDIE LUCIO, JR.
SENATOR ELIOT SHAPLEIGH

November 3, 2004

The Honorable Ken Armbrister
Chairman
Senate Select Committee on Water Policy
P.O. Box 12068
Austin, Texas 78711

Dear Chairman Armbrister:

The Senate Subcommittee on the Lease of State Water Rights is pleased to submit to you and the members of the Senate Select Committee on Water Policy its interim report.

It is our sincere belief that, if implemented, the recommendations included in this report will provide the framework necessary to ensure that any sale or lease of groundwater rights from Permanent School Fund and Permanent University Fund lands, for the purpose of developing and marketing water, respects the rights of the communities to be impacted and results in an appropriate benefit to the State of Texas.

We look forward to continuing to work with you and the members of the 79th Legislature.

Respectfully submitted,

Handwritten signature of Frank Madla in black ink.

Frank Madla

Handwritten signature of Troy Fraser in black ink.

Troy Fraser

Handwritten signature of Eddie Lucio, Jr. in black ink.

Eddie Lucio, Jr.

Handwritten signature of Eliot Shapleigh in black ink.

Eliot Shapleigh

Handwritten signature of Robert Duncan in black ink.
Robert Duncan

INTERIM CHARGE

The Committee shall:

1. Study proposals to lease Permanent School Fund and Permanent University Fund lands and their water rights for the purposes of developing and marketing water.
 - Analyze the present and future effects of such proposals on local aquifers, historic stream flows, local underground water conservation districts and other public and private water interests.
 - Study the process by which the General Land Office considers proposals to lease state water rights, including methodology for holding open meetings, obtaining public input, meeting competitive bidding requirements and coordination with TCEQ and other governmental units with possible regulatory oversight.
 - Study and evaluate the current and future value of water rights that may be leased to private entities, including the value to state, residential and commercial interests.

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Background

As the population of Texas continues to grow, especially in the urban areas, the demand on our water resources is increasing, without a corresponding increase in our supply of water. While many Texas cities are implementing aggressive water conservation programs and other measures to stretch their water resources, the need continues to outweigh the supply. These factors have caused cities to look outside their normal water supply area to meet future demands.

Increasingly, rural Texas is being targeted as a possible resource for water. While some urban cities are working with rural areas to secure a future water supply and some water marketers are working with cities, local groundwater conservation districts and regional water planning groups to purchase water for transport to other areas, many rural communities are facing the prospect of having large amounts of this most valuable resource withdrawn from their aquifers without adequate regard to their present and future needs.

In June 2002, Rio Nuevo, Ltd. (Rio Nuevo), a private company based out of Midland, Texas, approached the General Land Office (GLO) with a proposal to lease groundwater rights beneath state lands in far West Texas for the purpose of marketing the water. The initial proposal, which was for a lease of groundwater underneath 646,505 acres, was eventually reduced to 355,000 acres of state land in Hudspeth, Jeff Davis, Culberson and Presidio counties (See Appendix A).¹ Rio Nuevo claims, in a press release obtained by the Subcommittee, that it has "designed a plan to put private funds to work developing needed water supplies for municipalities in the far West Texas area." They also stated, "Rio Nuevo's plan is nothing more than a re-deployment of water resources from areas in West Texas where the water is not being utilized to areas where it is desperately needed."²

To date, a potential customer has not been identified. It is suggested the City of El Paso would

¹ Butcher, Sterry. "GLO: Rio Grande Will Not Deliver Mined West Texas Groundwater." *Big Bend Sentinel*. October 16 2003.

² Rio Nuevo Press Release 2004

be a likely customer. However, in response to the proposal, Ed Archuleta, El Paso Water Utilities, stated the proposal "doesn't make any sense - politically, legally or technically."³

Mr. Archuleta was not alone in his critique of Rio Nuevo's proposal. The efforts of Rio Nuevo and the process by which the GLO analyzed their proposal and proceeded with discussions regarding the proposed project caused serious concerns among statewide elected officials, members of the legislature, local elected officials, state agencies, groundwater conservation districts throughout the state, landowners in far West Texas and members of the general public (See Appendix B and C).

On November 10, 2003, in response to the concerns, Lieutenant Governor Dewhurst commissioned the Subcommittee on the Lease of State Water Rights (Subcommittee), as part of the Senate Select Committee on Water Policy, to examine the proposal and the process by which the GLO leases state groundwater rights. While a specific proposal submitted to the GLO was the catalyst for this study, the recommendations of the report will focus on how all proposals to lease groundwater from Permanent School Fund and Permanent University Fund lands should be considered and processed in order to ensure an open process with public input and proper assessment of potential impacts to current and future water supplies.

General Land Office Process of Leasing State Water Rights

The concept of leasing groundwater from state-owned lands is not new. In 1993, the GLO signed a lease with the City of Presidio, under the direction of Land Commissioner Garry Mauro. The contract was between the City of Presidio and the GLO "for the development of a municipal water supply."⁴ Similarly, the University of Texas System has leased land to benefit the Permanent University Fund. These lands have been leased since 1957 and provide water to the cities of Midland, Odessa, Andrews, Crane, Rankin and McCamey. According to Stephen

³ Texas H20, The Official Newsletter of the Texas Section AWWA. *Wild, Wild, West*. November/December 2003.

⁴ Surface Lease No. 920011 - Memorandum of Agreement for Lease of Surface and Water Rights between the Texas General Land Office and the City of Presidio.

Hartmann, Executive Director of University Lands, although exploratory permits on Permanent University Fund lands have been issued to private water marketing entities, they have not been leased to a private company for water production. Rather, the lands are leased directly to municipalities.⁵

The process by which the GLO considered Rio Nuevo's proposal was highly criticized. Prior to the appointment of the Subcommittee, the GLO had not held any open meetings regarding the proposal submitted by Rio Nuevo, nor had the GLO obtained public input. Furthermore, Rio Nuevo made no effort to contact local groundwater conservation districts or the regional water planning group in far West Texas to discuss their proposal. However, because of increased interest in the issue, GLO representatives attended a Far West Texas Regional Water Planning meeting in Van Horn, Texas on November 20, 2003, to answer questions regarding the proposal. In addition, the School Land Board held a hearing in Alpine on December 2, 2003 to discuss the proposal and to release, for comment, a draft of the lease agreement for groundwater development on Permanent School Fund lands (See Appendix D). During each of these public meetings, the input from participants consistently reflected unanswered questions, frustration, confusion and a wariness of future GLO plans regarding Rio Nuevo's proposal.

A key concern expressed by many was the lack of an open bid process. The Land Commissioner responded by stating, "At present, there is only one possible bidder, and in a case like this, the state gets a better deal by direct negotiation."⁶ Also, prior to the appointment of the Subcommittee, the GLO made no apparent effort to discuss possible ramifications of such a proposal with state or local water management entities. Additional comments identified the lack of concern for potential effects of the proposal and the absence of necessary data needed to analyze the proposal.

⁵ Senate Subcommittee on the Leasing of State Water Rights hearing March 11, 2004

⁶ Patterson, Jerry, Texas General Land Commissioner. "Get the Facts Right on West Texas Water Deal" *Austin American Statesman* November 3 2003.

Committee Findings and Recommendations

The Subcommittee conducted public hearings in Austin, Dell City and Marfa (See Appendix E). Correspondence received provided additional information. The Subcommittee formulated the following findings and recommendations based on testimony, correspondence and research.

Recommendation 1.1 - Amend the Natural Resources Code to require School Land Board approval of all leases of land or granting of other interests in real property that is part of the Permanent School Fund which have a primary term, or a primary and extended term, that will exceed ten years.

To eliminate current confusion regarding leasing authority of commercial properties at the GLO, the School Land Board should be responsible for all leasing authority.

Recommendation 1.2 - Amend the Natural Resources Code to require the School Land Board to adopt a clear set of rules for the leasing of groundwater from Permanent School Fund lands.

The School Land Board should adopt clear and detailed rules regarding the leasing of groundwater from Permanent School Fund lands. The rules should include, but not be limited to, the following requirements:

- regional water planning groups and local groundwater conservation districts to be notified when the School Land Board receives proposals to lease groundwater rights;
 - contracts shall be negotiated by the School Land Board directly with the lessee;
 - buyers or lessees of groundwater from Permanent School Fund lands must comply with local groundwater district rules and permitting requirements;
 - buyers or lessees must comply with state and local regulations;
 - leases for groundwater rights shall be separate and apart from oil and gas leases;
- and

- lease proposals submitted by a municipality or political subdivision of the state shall include a letter of interest, approved by the governing body of the municipality or political subdivision, and contain such things as:
 - 1) an estimated total annual amount and daily volume of water needed;
 - 2) any water quality requirements;
 - 3) a delivery time frame;
 - 4) an estimated delivered price; and
 - 5) a statement of commitment to abide by all local and state laws and regulations.

The School Land Board shall publish subsequent proposed rules in the *Texas Register*. Advance notice that proposed rules will be published in the *Texas Register* should be given to the Attorney General's Office, Texas Parks and Wildlife Department, Texas Commission on Environmental Quality, Texas Water Development Board, Texas Department of Agriculture, and members of the legislature.

Recommendation 1.3 - Amend the Natural Resources Code to require that groundwater sale or lease proposals from Permanent School Fund and Permanent University Fund lands meet all competitive bidding requirements, unless:

- *the contract is between the state and another agency or political subdivision of the state;*
- *the contract is between the state and an end user of the water; or*
- *the contract is for the supply of water of less than 125,000 gallons per day.*

State groundwater sales or leases shall utilize an open bidding process to prevent questionable or perceived conflicts of interest and to maximum returns to the state.

Recommendation 1.4 - Amend the Natural Resources Code to increase the number of members of the School Land Board from three to five.

A five-member board would provide broader representation and greater expertise regarding

functions and duties of the School Land Board. The Lieutenant Governor shall appoint one of the additional members, and the Governor, from a list of candidates identified by the Speaker of the House, shall appoint the other.

Recommendation 1.5 - Amend the Natural Resources Code to prohibit out-of-state exportation of groundwater from state-owned lands.

Groundwater produced from state-owned lands should be reserved for in-state use. Maintaining Texas' water supply is critical to ensure current and future viability of the state.

Recommendation 1.6 - Require regional water planning groups, which include Permanent University Fund lands, to appoint the Executive Director of University Lands as a non-voting member.

Regional water planning could be affected by the sale or lease of groundwater from Permanent University Fund lands. As a non-voting member of the regional water planning group, the Executive Director of University Lands will have the opportunity to discuss with the regional water planning group any significant proposals to sell or lease groundwater from Permanent University Fund lands that may impact the region. Currently, a representative of the GLO is a non-voting member of the regional water planning group which contains Permanent School Fund lands.

Recommendation 1.7 - Amend the Water Code to allow proposals to produce or transport groundwater from Permanent School Fund and Permanent University Fund lands to be included as a recommended water management strategy in regional or state water plans or as amendments and updates to regional or state water plans.

Regional water planning groups have the responsibility and authority to determine regional water needs over a 50-year time frame and to recommend supply projects to meet those needs. Major lease proposals from Permanent School Fund and Permanent University Fund lands could

significantly affect the planning process. Therefore, proposals to produce or transport groundwater from Permanent School Fund or Permanent University Fund lands should be included as a recommended water management strategy in regional or state water plans.

Recommendation 1.8 - Amend the Natural Resources Code to require that all buyers or lessees of Permanent School Fund and Permanent University Fund lands, located within a groundwater district, be subject to all rules and regulations of the groundwater conservation district.

Groundwater districts are created to manage the groundwater in an area through rules developed, adopted and promulgated by the district and, therefore, must treat all users of water originating from within the district equally. Current law is not clear as to whether buyers or lessees of Permanent School Fund and Permanent University Fund lands are bound by the rules of a groundwater conservation district. Exempting buyers or lessees of groundwater from Permanent School Fund and Permanent University Fund lands from district regulations could easily undermine a district's ability to manage the aquifer or portion of an aquifer for which it is responsible.

Recommendation 1.9 - Repeal Section 11.3271, Water Code.

During the 78th Regular Legislative Session, Subchapter G, Chapter 11, Water Code, was amended by adding Section 11.3271. The amendment clarified the Rio Grande watermaster has authority, pursuant to rules prescribed by the Texas Commission on Environmental Quality, to use the Rio Grande river as a means to transport groundwater sold to a downstream user. Permitting such a water use would contradict future conservation and best management practices as the state continues to encourage conservation as a strategy to meet future water needs.

Recommendation 1.10 - Advise the 79th Legislature to continue to study the ability and advisability of all state agencies to lease groundwater from their own lands.

Although this interim charge specifically requested the Subcommittee "study proposals to lease Permanent School Fund and Permanent University Fund lands and their water rights for the purposes of developing and marketing water," other state agencies own land that could also be leased for the purpose of developing and marketing water. In order for the legislature to gain a full understanding of the abilities of other state agencies to lease groundwater, this issue should continue to be studied.

Issues Outside the Boundaries of the Subcommittee's Charge

This section of the report identifies concerns expressed to the Subcommittee which, although relevant, are beyond the scope of the Subcommittee's specific charge. Therefore, the Subcommittee identifies the following issues for consideration by the Senate Select Committee on Water Policy:

- creation of a statewide groundwater conservation district - administered by existing state agencies - to govern lands not included in a local groundwater conservation district;
- feasibility of requiring municipalities, prior to receiving groundwater from other areas of the state, to adopt and implement a water conservation plan;
- effects of the transportation of groundwater from one region to another on the environment and local communities and economies;
- ability of groundwater conservation districts to obtain the necessary science and data in order to best manage their water resources;
- role and authority of regional water planning groups in the water planning process;
- historic use; and
- rule of capture.