

Caddo Lake: Marshall's water rights and lake's needs at root of litigation

By JULIA ROBB

Marshall News Messenger 07-20-04

Between them, the two sides in the battle between the city of Marshall and Caddo Lake interests have spent more than \$1 million.

And that could only be the beginning of both the financial and the political costs.

So much controversy has been spawned that lake issues have been the focus of the last few city and county elections.

Some Marshall residents are so angry at the stance others have taken on the lake issue that they confess hard feelings.

Marshall has spent \$359,402 fighting litigation instigated by the coalition and the Caddo Lake Institute money it could have spent fixing roads or replacing aging water pipes.

Both sides claim the moral high ground.

For instance, the institute believes that Marshall is partially responsible for one of the lake's major difficulties — that about 7,000 water acres lack oxygen, thus fish, during the summer months.

Coalition members suspect that the city takes water from Caddo Lake — without a permit — by backflowing Big Cypress Bayou, said member Dwight Shellman, Caddo Institute president.

Big Cypress, the city's sole source of water, flows from Lake O' the Pines to Caddo Lake.

Marshall's permit only allows the city to take Big Cypress water as it flows past its intake; three miles east of the Highway 43 bridge.

And Marshall seemingly takes lake water each summer when Big Cypress is at its lowest flow and Caddo is in dire need of fresh oxygenated water, according to Shellman.

Caddo's profusion of aquatic plants absorb a large percentage of the lake's oxygen, therefore the lake's oxygen content depends on how much fresh water flows into the lake from Big Cypress as well as from Black Cypress, Little Cypress and James Bayou.

Shellman said he suspects that Marshall has always pulled water from the lake and that is backed up by a KSA engineers report on Marshall's water supply, released in August, 1979.

That report says that "reverse flow from Caddo Lake to the intake structure is common during periods of low flow in Cypress Bayou...historic streamflow records indicate that the natural flow in the Bayou would be less than the permitted amount for several months of most years.

"...These withdrawals have in the past been small and have had little or no effect on the lake's level. However, as the city's demands increase, and/or the city of Shreveport begins withdrawals from the lake, lake elevations could be

substantially reduced during dry months."

Shellman believes the situation worsened in 1998 when the city replaced its water intake on Cypress Bayou.

The engineering firm that did the work set the intake about 12 feet below the original structure and the pumps are more powerful, Shellman has said.

Shellman does not dispute that Marshall is entitled to 16,000 acre feet of water a year and the city is now using only 6,000 acre feet, from 6 to 9 million gallons each day, depending on the season.

They say they just want the city to take water from the bayou, and/or other sources, not the lake.

The Northeast Texas Municipal Water District releases much of the water that flows down Big Cypress to Caddo Lake.

When asked if the city is taking water from Caddo, water district manager Walt Sears said while he cannot verify that Marshall actually takes water from Caddo. "In drought conditions, it is possible for Marshall to withdraw from the stream more water than is in the stream.

"It has to do with the lake's position, and the position of the intake structure."

Sears said he would not "dispute that at times the creek has little or no flow and Marshall was extracting significant amounts of water."

The water district is a government agency that controls the sale of Lake O' the Pines water to municipalities and business.

Sears said his district releases more water down Big Cypress than it is required to do by law because officials are concerned about Caddo.

"...The Lake O' the Pines has enough water so it's not necessary to invade Caddo. Sometimes it is necessary to choose between people and the habitat, but this is not one of those times," Sears said.

Marshall spokesmen have several kinds of responses to the backflow accusation, many of which seem conciliatory and at least one which could possibly solve any possible problems.

Mayor Ed Smith has said that the city intends to buy an additional 6,000 acre feet of water per year from Sears' water district, a plan that Sears has verified.

Both men say Marshall and the water district are in negotiations over the water's price.

If Marshall buys the water, Smith, City Manager Frank Johnson and City Attorney Todd Fitts say the city will release the water downstream during low flow times, which should help the lake.

And if the city intake is pulling water from the lake, Johnson said city officials will make sure the intake is replaced.

When told that coalition spokesmen accuse the city of filing a conservation plan with the state that says the city will lower Caddo Lake before implementing the plan, Smith said the city will look at the plan and change it, if need be.

Last fall, Johnson pointed out, city commissioners asked staffers to report on

alternative water resources for the city, one of which might be the creation of a city reservoir.

City officials have also asked their Austin attorneys to hire an engineering firm to study the city's water resources, and possible needs for the future, said Fitts.

Johnson said that Marshall would even return 105 percent of the water it might use for industrial purposes to Big Cypress Bayou, when scientists tell the city that returning 102 percent is adequate. An added 2 percent would make up for any evaporation or other kind of loss that could occur as the water flowed downstream.

The Caddo Institute wants Marshall to return its surplus water to Big Cypress rather than the Sabine River — something the institute claims Marshall is required to do — and Smith said the city would consider doing that, "assuming it would help" the lake.

"We're willing to look at any reasonable concern," he said, but added that it could cost the city millions to build the infrastructure to make it possible to discharge water to Caddo.

Shellman said he believes the city's conciliatory words are nothing but "puffery." He's heard such conciliatory remarks before and nothing happened, he said, inferring that city officials are acting in bad faith.

"Until they do the deal, it's just talk," he said.

"Look at what happened the last time the institute and the coalition agreed to settle the many issues that are currently being litigated between themselves and the city," Shellman said.

(Both sides have pounded out settlement agreements before that never made it to finality).

The litigation began in 2001 when city officials applied to the state for an industrial permit amendment that would allow them to sell untreated water to a proposed power plant in the Sabine Basin watershed.

The plant was to be located in Marshall, but parts of Marshall are located in the Cypress Basin and parts lie in the Sabine Basin. Cypress Bayou, from which Marshall takes its water, is, naturally, in the Cypress Basin, where Caddo Lake is also located.

Caddo Coalition leaders and 200 land owners asked the Texas Commission on Environmental Quality to hold a hearing — the nature of which resembles a trial — before the state could grant Marshall's request for an amendment to sell raw water.

The coalition was concerned because 75 percent of water sold for municipal use returns to its source, while only 25 percent of the water used for industrial purposes returns to its source, according to coalition literature.

(At other times, coalition leaders have pointed out that should Marshall sell water for industrial purposes, it could use up to 11,000 additional acre feet a year, which would triple the city's lake diversions.)

But the state denied that it needed to hold such a hearing and granted the amendment.

Marshall also asked the commission to allow it to transfer water from the Cypress

Basin to the Sabine Basin, for the power plant. Also, city officials thought they needed formal approval to sell water to their customers in Marshall's portion of the Sabine Basin.

The TCEQ approved both amendments without the hearing.

Then the coalition and two landowners appealed that decision to the State District Court in Austin, which ruled in the coalition's favor. The TCEQ must hold the hearings on both amendment requests, it said.

Marshall and the TCEQ then appealed to the Court of Appeals in Austin and lost on one amendment request and won on one amendment request.

The court said that the state must hold an amendment hearing about the industrial water permit, but okayed the amendment to sell water to its Sabine customers.

Marshall and the TCEQ appealed to the Texas Supreme Court, which will hear oral arguments Oct. 21.

Fitts said Marshall has appealed to the high court because the issue involves more than Marshall. It involves the whole state.

"Other people are watching this because it will set a precedent regarding a city's ability to modify their water permits," he said.

In November 2003, both parties tried to settle the litigation and now both claim that the other was to blame for the failure to do so.

It appears from language that the city both inserted and deleted from the proposed settlement, and that it did keep for itself the right to continue various kinds of litigation while not allowing the coalition to do the same thing.

But Fitts explained that "We wanted to resolve the issue on the raw water sales, our industrial permit.

"Because the Court of Appeals had already ruled on the raw water amendment," he said, "we felt like we needed a higher court to overrule that lower court decision.

"Because if we reached the settlement at that point we would have to go back for the hearing, because there was nothing the coalition could do to give us that permit."

Fitts said the institute had agreed it would not contest the city's request for the industrial permit, "but we had no guarantee that that would happen."

Kept in the settlement was an agreement that the city would not withdraw water from Caddo Lake and a gauge would be placed in the bayou to measure whether the bayou had sufficient water for city use.

Also retained was the city's agreement that it would enter into a long-term contract with the water district, to ensure it would have sufficient water without Caddo Lake.

"They have said their biggest issue was our taking water from Caddo Lake during low flow times," Fitts said. "We agreed to increase the flow of water by buying water from the water district.

"So now what's your problem, coalition?" Fitts said.

After the city sent its version of the settlement back to the coalition's Austin attorney, Fitts said the city never officially heard from the coalition again.

In February, however, the institute filed a lawsuit against the TCEQ, again in Travis County District Court. The suit seeks to force the TCEQ to reconsider its decision not to grant a water rights petition hearing to the institute.

The institute wants water rights on Caddo Lake for conservation purposes.

But the suit asks for a declaratory judgment on several matters, one of which seeks to confine Marshall's water source to the water captured while flowing past the Big Cypress intake.

The institute also asks that Marshall be forced to participate in a state hearing before it can sell water to other water basins, such as the Sabine, unless it confines its water sales to its "historic area of service and sales."

Shellman says that "historic area of service" means within city limits and "sales" means to its current customers. That language, however, is not clarified in the lawsuit.

When asked if he believes the city and the coalition will ever make peace, Fitts said he is "an optimist and I want to say yes," because he has spent time at Caddo Lake and knows its people.

"But I don't know," he said. "The experience during the last three years, since I became city attorney, has shown me otherwise.

"They say we are being run by the water lobby. But they obviously have issues that are important to them beyond Caddo Lake.

"Both sides have big issues."

