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The Rights of a River

Environmentalists Stake a Radical Claim to the Water in the Guadalupe

BY JAKE BERNSTEIN

Two years ago last July, a local river foundation traveled to TNRCC headquarters in Austin to apply for a water permit. What appeared on the surface to be a routine bureaucratic procedure was in fact one of the more radical acts in Texas environmental history. A system of water law that traditionally punishes the environment had suddenly become the most potent tool in its defense. And with one action, a conflict that could shape both the future of Central Texas and the coast was launched.

Dianne Wassenich recalls that on the day they gave the application to the Texas Natural Resource and Conservation Commission, the clerk stamped the papers without reading them closely. "We said, 'you better take a look at that.'"

The 52-year-old former baker is sitting on a bench in a shady spot on the banks of the San Marcos River with her husband Tom, a former restaurateur. The two are members of a small nonprofit called the San Marcos River Foundation (SMRF). Wassenich is currently the executive director, but at the time she was president of the board.



San Marcos River Foundation Executive director Dianne Wassenich flanked by board officers John Tolbert and Therese Whalen. *Jana Birchum*

What SMRF did that day was lay claim to nearly all the available water left in the Guadalupe River, as much as 40 billion gallons a year. Their goal is not to sell the precious liquid to thirsty factories and subdivisions, but instead to allow it to travel to coastal estuaries freely. There it nourishes a seafood industry, a tourism economy, and an endangered species, the last wild flock of whooping cranes on the planet.

The application gives SMRF a seat at the table with the water merchants who plot Central Texas' future. It's a pride of place the environment has never occupied before. Even

though they followed the rules that have traditionally benefited water development, SMRF is not welcome by quasi-governmental water operators. These are "not those cute, furry, irresponsible little cartoon characters," as one water executive put it. By championing a private property right for the environment, SMRF ironically places lawmakers and regulators in the uncomfortable position of repudiating the very system upon which they rely.

Dianne Wassenich traces the SMRF application to an epiphany she and other board members had while folding newsletters one day. The group, founded in 1985 by local residents to protect the San Marcos River, wanted to be more effective environmental defenders. Already they had realized that to safeguard the river they had to preserve the entire watershed. That included not just the San Marcos, but also the Guadalupe River it joins further downstream, the Comal and San Marcos Springs that feed the rivers, the San Antonio River that comes in near the coast, and the estuaries in the Gulf of Mexico where the river meets the sea.

The spring of 2000 had brought disturbing news from San Antonio Bay and Aransas Bay, both fed by the Guadalupe River. Lack of fresh water from the river had increased salinity in the bay. This in turn had reduced blue crabs and shrimp among other species that depend on the fresh water inflow. The crabs make up 80 percent to 90 percent of the whooping crane diet.

The cranes that come to Texas to fatten up for the winter couldn't find enough food. At the same time, they had to burn precious energy flying upstream to look for water to drink. In the 1993-1994 season and then again in 2000-2001 low crab populations contributed to the deaths of 7 and 6 cranes respectively. With only 174 wild cranes in existence, it doesn't take much of a decline to send the birds over the edge. While most Texas politicians might be unmoved by the possible extinction of the whoopers, it's worth noting that 100,000 people annually come to see the birds during their mid-October to late-April stay, injecting about \$6 million into the coastal economy, according to the U.S. Fish and Wildlife Service.

Ostensibly the TNRCC and the Texas Parks and Wildlife Department are supposed to ensure that the bays and estuaries get enough fresh water. Since 1985 the TNRCC has been required to consider instream flows and environmental needs when it looks at new permit applications. Both agencies have also produced studies and models in an attempt to divine how much fresh water should be arriving downstream and during what months of the year.



The Guadalupe River as it meanders to the sea. Jake Berrish

In 1998, Parks and Wildlife had published a study entitled *Freshwater Inflow Recommendation for the Guadalupe Estuary of Texas*. The study recommended 1.15

million acre-feet of water (an acre foot is equal to 12 inches of water spread across an acre of land) as the minimum annual flow needed to sustain maximum productivity in the bay ecosystem. The amount far exceeds what the TNRCC is earmarking toward the bays.

"They kept on granting water rights without looking at the studies they generated," complains Wassenich.

Part of the problem originates with Texas' archaic water system that dates to the 1800s, before basic science like connections between surface and groundwater were incontrovertible. In the Lone Star State all surface water belongs to the government, and a person can only remove water once the TNRCC issues a permit. The agency cannot allocate water someone else has already claimed. Thus Texas water rights place more of a premium on *when* someone obtained their right to use water than how it's used. The doctrine in this regard is summed up in the saying, "first in time equals first in right." The rights of the newest permit holder are "junior" to all those who came before, which means, with some exceptions in times of scarcity, junior water rights are at the back of the line.

As SMRF fretted about the river and the estuaries, the board had been studying a legislative innovation called the Texas Water Trust. Those who have water rights they aren't using or don't need can either donate or temporarily put them in the water trust. Theoretically this will keep the liquid in the river. (Even though the trust was set up in 1997, as of yet no one has placed a water right in it.) SMRF was exploring the water trust because someone with an old irrigation right had donated five acre-feet of water to the foundation and they didn't know what to do with it. As they investigated, Wassenich learned of a Hill Country resident who had filed an application for an acre-foot of water to ensure that a local creek kept on flowing. Under Texas water law, one can apply for a permit based on a variety of uses, from municipal to cattle raising to freshwater inflows for bays and estuaries.

As they talked and prepared the newsletter for the post office, someone suggested that they apply to the TNRCC for a water right permit for the Guadalupe River that would be big enough to ensure the bay remained healthy. This way, they could guarantee no one else would claim the water before it reached the estuaries. Fortuitously, in the 1998 Parks and Wildlife study the state itself had put a figure on how much water the bay needed, so they wouldn't be picking an arbitrary number.

Borrowing against its endowment, SMRF raised the \$50,000 fee the TNRCC requires to apply for a permit. That July the environmental group asked the agency for 1.15 million acre-feet a year to be left in the river, either in the water trust or under the custodianship of Parks and Wildlife. By December 2000, the TNRCC deemed the application complete and gave it a priority number. Unless the TNRCC rejects the permit, all applications after that date are now junior to SMRF's.

Todd Chenoweth, section manager for Water Rights Permitting and Availability at the TNRCC, remembers the day the SMRF application arrived at his office. Although the TNRCC had processed permits for applicants who wanted to keep water in a river or creek, those permits were a few hundred acre-feet at most. Here was a group that wanted billions of gallons! Attaching a monetary value to the SMRF request is difficult. Still, to give a sense of how valuable water can get in Texas, according to the Texas Center for

Policy Studies, in El Paso, available water rights can sell for as much as \$750 per acre foot. SMRF was asking for 1.15 million acre feet.

"I don't know how I can recreate that magic moment," Chenoweth says from his office. "It was certainly shocking. It had not occurred to me that such an application was possible, yet I could sit there and see where all of the pieces were in place for [it], so I was also surprised that no one had connected those dots before."

One group was particularly surprised by the SMRF action, the Guadalupe-Blanco River Authority (GBRA). River authorities in Texas are quasi-state nonprofit agencies generally formed along watershed boundaries. The authorities supply and treat water, provide flood control, hydroelectric facilities, and even sometimes sewage treatment. While river authorities cannot charge for water as a commodity, they do levy fees on their water customers based on the costs of construction and services like dams, pipelines, and treatment. Most authorities such as the GBRA cannot tax residents, but they all can issue revenue bonds. In Central Texas, where there is still some water available to slake the needs of a rapidly growing population, river authorities are literally the spigot for development. For example, in the ongoing growth wars west of Austin, the Lower Colorado River Authority has consistently come to the aid of developers fighting the city of Austin, providing both water and electricity to sprawling suburbs.

Environmentalists criticize the river authorities for catering primarily to engineering contractors, consultants, and developers. They assert that these "water developers" tend to emphasize huge infrastructure projects—like dams—instead of more efficient uses of water. The river authorities counter that since they are nonprofits and don't sell the actual water, they are well positioned to balance all competing interests among user groups.

The GBRA, which was founded in the 1930s, covers the Central Texas watershed of the Guadalupe and Blanco Rivers. As Bill West, GBRA general manager explains it, his river authority had big plans for the same water SMRF wants. West sits in a conference room in the GBRA's headquarters, a squat 1960s building in Seguin located down the street from a concrete statue of the world's largest pecan. He's a tall man who has been in the water business for decades. Spread out before him are the charts and graphs he uses to make presentations.

"It was a very bold move by a relatively small group of people," he says of the SMRF application. "It is something that I would have anticipated somebody like the Sierra Club would have filed, but not the San Marcos Foundation."

But the GBRA failed to anticipate a claim on *their* water or they would have made one themselves. The GBRA is about to launch phase one of a \$600 million plan called the Lower Guadalupe Basin project that hopes to take groundwater from areas near Refugio, Victoria, Goliad, and Calhoun counties and mix it with Guadalupe River water from near Tivoli before pumping it to San Antonio. Later phases of the project are more ambitious and costly, if not downright odd. Water will be caught at the bottom of the river and pumped back to the top. Some water will even be siphoned from the Colorado River and fed to the Guadalupe River.

West describes the SMRF permit as a devious backdoor effort to limit growth, akin to the Endangered Species Act. (It's worth noting that once, in a lawsuit, GBRA sided with the

endangered fountain darters in a battle to protect the San Marcos and Comal springs.) The GBRA's largest customers seem to agree with West. By far the biggest potential consumer of Guadalupe River water is the City of San Antonio. Both city government and its water authority have written the TNRCC to urge them to reject the SMRF permit. Other Central Texas cities with visions of burgeoning suburbs, such as Kerrville and Victoria, have also protested.

The lobbying arm of the water merchants predicts doom and hellfire if the SMRF application is granted. The organization, the Texas Water Conservation Association (TWCA) anticipates a mad dash of environmental groups appropriating rivers across the state. (The TNRCC's Chenoweth says no comparable permits have been filed.)

In a September 2001 letter to its members, TWCA's general manager wrote: "The effects of foreclosing future water-supply development in major river basins of the State, the inescapable result of granting [SMRF's application], most surely will cascade across the State of Texas... The ultimate effect of allowing private control of the state's water resources for environmental benefit to the exclusion of meeting human water needs will be crippling."

SMRF's Dianne Wassenich bristles at the idea that her group is acting selfishly. "Their interests are consumptive and providing water for sale, not for preserving water and helping coastal communities," she says.

She frowns as clumps of lawn clippings from a golf course upstream float past. "All we are saying is 'Stop: Almost all of the apple is gone,'" she continues. "Let's save the seeds so there will be future apples. That's the difference between us."



Janie Blevins loves the river for more than the livelihood it provides her family

Jake Bernstein

The town of Seadrift recedes into the distance as Wesley Blevins motors his 16-foot skiff smoothly across San Antonio Bay. It's early yet, and he cautions that later, on the way back, the wind will pick up. The 56-year-old Blevins doesn't mind the wind, he says. A hard south wind comes up in early spring and turns the water chocolate. Blevins calls it the million-dollar wind because it blows the shrimp out of the Guadalupe delta lakes, and eventually, straight into the nets of boats like his, working the bay. His wife

Janie Blevins smiles in the skiff. "It brings our babies in," she says.

Blevins steers the boat, his leathery brown face staring into the wind. He started shrimping sometime about the age of three with his dad. His grandfather was also a shrimper on San Antonio Bay. Six of his brothers were shrimpers. Two of his sisters married shrimpers. Today in addition to his work as a commercial fisherman, he is the leader of the Calhoun County Shrimpers, in which capacity he tries to resuscitate an industry on the brink.

He stops the skiff not far from the mouth of the Guadalupe River in a brackish tidal lake. Blevins digs out a white pole from underneath his feet and reaches into the dark water. He pulls out the pole; it's full of slimy green algae. "The lakes produce thousands and thousands of shrimp," he says "but these days [the lakes] are clogged with algae in the summer because there is not enough fresh water. It gives the shrimp no place to go. You can't even throw a hook out here and fish because of all the slime. This used to be some of the best fishing in the whole state of Texas."

Blevins personally feels the money the water developers are stealing from coastal communities like Seadrift. A healthy flow of freshwater into the Guadalupe estuary produces more than \$20 million dollars in direct regional impact from commercial fishing, according to Texas Parks and Wildlife. A 1995 Texas A&M Sea Grant study pegged traveler revenue from the state's coastal recreation at \$866 million. A 1996 estimate of direct expenditures by saltwater fishermen in Texas was \$887 million. In total, Texas estuaries provide \$2.5 billion in non-polluting, self-sustaining industry, according to Parks and Wildlife.



Old-time shrimpers Phillip Sawyer and Wesley Blevins on the banks of the Guadalupe Jake Bernstein

The Blevins' are strong supporters of the SMRF application. The Calhoun County Shrimpers sent a favorable letter on the permit to the TNRCC. In fact, endorsements have come from all over the country. SMRF's struggle for the Guadalupe ecosystem convinced the national conservation group American Rivers to put the river on its top ten list of the nation's most endangered rivers this past April. Closer to home, 18 local organizations representing over 150,000 members have sent in letters of support.

The Blevins' skiff continues up the river. Willows, oaks, and even some cypress hang over the water. Alligators sunning on the banks dive for cover. An owl watches impassively from a tree. Wesley explains that brown shrimp come into the bay about May. The larger white shrimp, which need plenty of fresh river inflow to grow, are available about July 4.

Janie Blevins stops to admire a white water lily. It's not the backbreaking living they earn from commercial fishing that motivates her to fight for the Guadalupe, she says. "This is all we know. I may retire, but I still want to go up that river and see it alive."

Today the SMRF application sits at the TNRCC undergoing technical review. "Assuming we decide it meets all the requirements of the statute, we will prepare a draft permit [for public comment]," explains Chenoweth. A draft permit could be available as soon as the end of the summer. The permit should then go to a preliminary public hearing that he says could happen by early fall.

Most supporters don't expect approval. It will take massive support for SMRF to even get a fair hearing by either the agency or the legislature. Only by mobilizing the people

affected by freshwater inflows—owners of refrigerated trucks that run seafood from the coast throughout the state; sporting goods stores that sell fishing poles, binoculars, and shotguns; and hotels that cater to tourists—can SMRF hope to make an impact, one partisan surmises. Deep-pocketed water developers will likely sponsor a public relations blitz painting environmentalists as greedily taking water away from consumers. Their most receptive audience for this argument will be in the Legislature where lobbyists for the water merchants hold sway.

"The TNRCC is afraid to be straight-forward about how bad the estuaries are because messengers are often killed," believes Dianne Wassenich. "If they could be straightforward with the Legislature without fear their funding would be cut, they would probably be saying what we are."

The GBRA's Bill West also doubts the TNRCC will act without first receiving some kind of signal from the Legislature. Although the Lege is out of session, an interim committee of the House Natural Resources Committee has been meeting and will likely make reference to SMRF's permit bid in their final report. It is entirely possible that during the session, legislators will find a way to make a SMRF-like application illegal.

"I would suspect that TNRCC would watch and see what happens in terms of the interim study report and then any resultant legislation before they take that permit application up," says West. "It would be political suicide for [TNRCC] to go one way or another."

Wassenich welcomes the opportunity to debate the issue of instream flows that most of the public knows little about. "We want to educate legislators," she says. "I think Texans have a strong feeling for their natural heritage, but when they lose it, it happens out of sight, one drop at a time."



GBRA General Manager Bill West

The rush for each side to advance their position has already begun. The GBRA contracted a scientific expert at Texas A&M to do a study on the whooping crane and freshwater inflows. It will likely counter the 1998 Texas Parks and Wildlife study that identified 1.15 million acre feet as the amount the estuaries need.

Cindy Loeffler, director of water resources at Parks and Wildlife, says her agency will stand behind their report. Although they know that because of variations in rainfall and the demands of more senior water rights, the bay rarely gets 1.15 million acre feet, it's still the optimum amount. "We don't want to see the frequency of how often the bay receives that amount of water decrease," she says.

Both sides are busily meeting with editorial boards and cranking out brochures of facts and positions that boil down to separate philosophies: big engineering versus conservation. The GBRA's West insists that a planning process at the legislature and among government agencies already exists to work out these issues. Environmentalists contend that the planning has been skewed against them.

SMRF recently issued a pamphlet pressing its case. It reads in part: "SMRF is respectfully taking its place in line behind all currently held water rights, which could be used much more efficiently. Many current water rights holders use inefficient irrigation methods and pump potable water through leaky pipes. Education is essential to teach industries to reuse wastewater and employ a myriad of other water strategies. These methods are much cheaper than the river authority's plan to pipe Guadalupe River water uphill for hundreds of miles, from the coast back to Central Texas."

Wassenich emphasizes that her group is following the rules and the TNRCC will be hard pressed to dismiss them. "We are not filing a lawsuit," she says. "We are not fighting anybody. We are trying to work within the system, exactly as they set it up. We have to figure out how much is left and what can be saved."

But if the TNRCC does decide it cannot legally grant the permit, SMRF's remedy is to head to district court, which they are ready to do.

"An environmental water right on the Guadalupe is completely viable, not only because the law allows it, but because there's still water available in the river," says Ilan Levin, one of SMRF's attorneys. "The TNRCC knows it. The Texas Legislature knows it. If state lawmakers want to set a bold policy on how we're going to keep the rest of Texas' rivers flowing, they should be commended and encouraged. But, if some legislators want to avoid the real policy issues and instead attempt simply to make the SMRF application go away, they would be crossing the line. There's no way they can do that without getting into serious constitutional problems."

The threat of a court battle clearly frustrates Bill West, but the GBRA's rhetoric is far from conciliatory. An entire system is at stake. "There is no question it is a precedent," he says. "You can discuss it from the standpoint of a water rights precedent or an environmental precedent, but it all boils down to how the state is going to manage its resources."

For environmentalists, in a rare instance, nature might actually get a proper hearing. Under Texas water law, until the SMRF permit is resolved, much of the GBRA's big-dollar water plans are junior to the coastal estuaries. "We can spend all the time in the world discussing these issues because our application has priority," notes Wassenich.