

JOSIAH NEELEY: Texas shouldn't block interbasin transfers

By Josiah Neeley / Texas Public Policy Foundation | Posted: Friday, May 2, 2014 11:29 pm

Imagine that you're buying a new car. You pick out the model you want, haggle over the price, and jump through all sorts of hoops to secure financing. But when they pull your new car around, it's for a different, much less valuable year than the one you bought. "Sorry," says the dealer when you object, "the law says that you can buy whatever car you want, but I can only give you this one."

Sounds crazy, right? Yet something very similar is happening now with Texas' water.

Surface water in Texas governed by what's known as the "prior appropriation" system, which follows the principle of "first in time, first in right." Water rights are issued by the state for a given purpose, amount, and point of diversion, which may be bought and sold. If there is ever not enough water to meet all existing rights, water rights are given priority based on the date they were issued. Newer or more "junior" rights are curtailed first, while older or "senior" rights can continue to receive their water. For this reason, senior water rights tend to be more valuable than more junior rights, and fetch a higher price on the market.

But according to a state law passed in the 1990s, this normal priority procedure does not apply to water that becomes part of an interbasin transfer (which is simply a transfer of surface water from one of Texas' river basins to another). Under the so-called "junior rights provision" water subject to an interbasin transfer loses its seniority in the priority system. The junior rights provision thus creates a situation where the act of buying a water right erases much of the value of that right. As a matter of economic logic, a sale of water will only take place if the buyer values the water in question more highly than the seller. The junior rights provision, however, creates a gap between how valuable the water is to a potential buyer and to a potential seller.

This has become a major disincentive to interbasin transfers. According to an analysis conducted by Todd Votteler, Kathy Alexander & Joe Moore in a 2006 issue of the State Bar of Texas Environmental Law Journal, after the junior rights provision went into effect the number of new non-exempt interbasin transfers approved by the Texas Commission on Environmental Quality (TCEQ) declined dramatically.

To some extent, concerns over interbasin transfers are understandable. People worry about whether sales of water out of a particular basin could leave that basin without sufficient water to meet its own future needs, or current economic opportunities. For that reason, interbasin transfers have long been subject to special requirements to ensure that the interests of the basin of

origin are protected. Most interbasin transfers of surface water cannot occur if the TCEQ concludes that “the benefits from the diversion were outweighed by detriments to the originating basin.” The junior rights provision goes far beyond this, imposing burdens on interbasin transfers regardless of whether there is legitimate opposition to a particular transfer.

That’s bad news for Texas. Not only have Texans been using interbasin transfers as a way of meeting their water needs for more than a hundred years, but state plans on how to meet future water needs rely heavily on such transfers. Fifteen of the 44 recommended ground and surface water transfer projects listed in the 2012 State Water Plan involve interbasin transfers.

To the extent that interbasin transfers do involve harms to those in the basin of origin, these are better dealt with directly, rather than by throwing up barriers to all transfers. If Texas is going to have enough water for the future, it needs to make sure it doesn’t stop up beneficial transfers just because they cross from one basin to another.

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