Surface Water Rights

The Issue

Unlike groundwater, which is owned by the landowner as a vested property right, surface water in Texas is legally owned by the state. Specifically, Texas owns the corpus of the surface water but allocates this water through the issuance of rights for beneficial use of the water. Most Texas surface water rights are held in perpetuity and can only be cancelled for non-use over an extended period of time. (TWC 11.0235(a)) Such usufructuary rights are recognized as private rights and entitle the owner to a given amount of water from a particular diversion point for a particular use. Additionally, such rights can be bought and sold with little state involvement if the purpose of use is not changed in the transaction.

Like most western states, Texas has adopted the prior appropriation system to allocate quantities of surface water for specific beneficial uses. Texas' prior appropriation system operates under the principle of "first in time, first in right," meaning that older or "senior" rights are given precedence over newer or "junior" rights in times of water shortage. An exception to the prior appropriation system is the landowner's qualified riparian rights for domestic and livestock use.

The current 2012 State Water Plan (SWP) includes water supply strategies to produce 4.4 million acre-feet of new surface water by 2060. Surface water accounts for more than a third of new water anticipated from strategies in the 2012 SWP. Many of these projects, however, are being hindered by state and federal regulatory impediments. Legal questions about water right amendments, indirect reuse authorizations, environmental flows, and federal endangered species protection now delay and could preclude key surface water projects.

In 2007, enactment of SB 3 established a program to protect environmental flows. The law created a multi-layered process leading to the Texas Commission on Environmental Quality's (TCEQ) adoption of Environmental Flow Standards for instream flows (rivers) and freshwater inflows (bays and estuaries). SB 3 stipulated a bottom-up process with five layers: 1) Bay/Basin Stakeholder Groups and 2) Bay/Basin Science Teams for each river basin, 3) an Environmental Flow Advisory Group appointed by the Governor, 4) a statewide Science Advisory Group, and finally, 5) TCEQ adoption of Environmental Flow standards in rule.

Some models involve greater volumes for environmental flows than anticipated in the State Water Plans and existing law. For example, a key strategy for the DFW region involves a transfer of 600,000 acre-feet of water from Toledo Bend Reservoir on the Sabine River. The Science Team in the Sabine Bay/Basin group recommends environmental flow requirements which would decrease water available for this transfer, undermining this source of new supply for DFW. Science Team reports have prompted federal authorities to interfere with Texas water decisions.

Environmental flows and human needs can both be met but should be legally integrated within the same process. In a state with widely varying rainfall and thus flows in our rivers, streams, and estuaries, environmental flows should be estimated to protect critical flows under drought conditions.

Restrictions on interbasin transfers also pose obstacles to the completion of water supply projects. Interbasin transfers are a key strategy for certain regions of the state, particularly in the area surrounding Dallas-Fort Worth. SB 1, however, added a new section to the Texas Water Code providing that "any proposed transfer of all or a portion of a water right [in an inter-basin transfer] is junior in priority to water rights granted before the time application for transfer is accepted for filing." The junior rights provision thus creates a situation where the act of transferring a water right from a seller to a buyer erases much of the value of that right. This has the potential to be a major disincentive to interbasin transfers.

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The Facts

- Texas surface water resources: 191,000 river miles running through 23 river basins, 9 major and 20 minor aquifers, 7 major and 4 minor bays and estuaries, and 2,125 miles of shoreline along the Gulf of Mexico.
- Most of the state's existing surface water supply is stored in reservoirs.
- Surface water strategies in the SWP expect to provide 9 million acre-feet per year in additional water supplies.

Recommendations

- Legally integrate the Regional Water Planning process with the now separate Bay/Basin Environmental Flow process. Assert the priority of human need for water.
- Establish policy objectives for environmental flow regimes to protect critical flows during drought and minimum standards for scientific rigor.
- Clarify the "Four Corners Provision" (TWC 11.122(b)) that a water right amendment for only a change or addition of use is not subject to an administrative hearing.
- Simplify the requirements for indirect re-use of water in TWC 11.042 and 11.046.
- Articulate policy reinforcing the value of water marketing for efficient and timely implementation of water supply strategies in the SWP.
- Repeal the junior rights provision relating to interbasin transfers.

Resources

2012 State Water Plan, Texas Water Development Board (Jan. 2012).

Rights to Use Surface Water in Texas, Texas Commission on Environmental Quality, GI-228.

Science Advisory Committee Report on Water for Environmental Flows, prepared for Study Commission on Water for Environmental Flows (26 Oct. 2004).

Solving the Texas Water Puzzle: Market Based Allocation of Water by Ronald A. Kaiser, Texas Public Policy Foundation (Mar. 2005).