

The Recent Evolution of Texas Water Policy and Law

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In recent years, the Texas Legislature elevated the priority of water policy with the symbolic designation of specially reserved Senate Bills (S.B.) “1” in 1997 and “2” in 2001. These landmark water bills indicate the State’s interest in addressing water issues caused by limited water resources and increasing demand for water from a rapidly expanding population. S.B. 1 re-engineered key components of the framework of Texas water law – promoting conservation, water reuse, a more efficient water market, and an extensive decentralized planning process designed to capture local demand and supply statistics and plans. Passage of S.B. 2 brought additional infrastructure financing and further implementation of S.B. 1, along with the creation of dozens of groundwater districts.

Texas’s 2003 biennial legislative session ended in early June. Bills proposing further restriction of the Rule of Capture, which governs Texas groundwater use, mandatory requirements for instream environmental flows, and repeal of interbasin transfer limitations failed, but received significant attention and are certain to arise again during the next legislative session.

Groundwater: Limited Rule of Capture

Although the Rule of Capture continues to survive in Texas (and only in Texas), the doctrine has been limited by statute and has been criticized and threatened in a recent Texas Supreme Court case. The Texas Water Code now provides that groundwater districts are the “state’s preferred method of groundwater management” and that groundwater rights are recognized “except as may be limited or altered by rules promulgated by a district.”¹ This statutory change is significant, and appears to be the trend in Texas law. This trend is further sanctioned by the Texas Supreme Court, which has recognized that the days of the Rule of Capture are limited.² In *Sipriano v. Great Spring Waters of America, Inc.*, the

Court recognized that what was so “secret [and] occult” to us in 1904 [in the *East* case³] – the movement of groundwater – was no longer so,” and that unregulated pumpage was unacceptable. Although the Rule of Capture was not overturned in *Sipriano*, the Court was clear that its position on the doctrine had changed but that it was refraining from attacking the doctrine in deference to the Legislature: “Given the Legislature’s recent efforts to regulate groundwater, we are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix” Justice Nathan Hecht concurred, expressing that “for now – but I think only for now – *East* should not be overruled.”

This new regulatory framework, embodied in Chapter 36 of the Texas Water Code, has great promise. The new laws provide that districts may regulate groundwater withdrawal through a permitting process that limits production, well spacing, well size, production-to-tract size, and transport beyond district boundaries – restrictions that some liken to the “reasonable use” doctrine adopted in other western states. Groundwater districts now overlie the vast majority of the state’s groundwater resources, and it is only a matter of time before the newer districts develop studies, data, and regulations to comprehensively manage these groundwater resources.

Chapter 36 of the Texas Water Code provides for local control of groundwater by districts under the policy that “those in the best position to manage groundwater are those closest to the resource itself.”⁴ As a result, the rules among the districts vary and are tailored to the unique nature of the local geology, groundwater conditions, and demands of the regulated community.

Surface Water: Centralized, Permit-Based

Distinct from local control of groundwater, surface water use is governed through a centralized permit system managed by the

Texas Commission on Environmental Quality (TCEQ). This system was established pursuant to the Water Rights Adjudication Act of 1967, and designed to adjudicate water rights claimed under English, Spanish, Mexican, and Republic of Texas law. Most claims were finalized and permits granted by the early 1980s.

The permit grants a right to put water to a “beneficial use” under a time-based priority wherein the holder of an older, more senior permit has priority over those junior in time. The definition of beneficial use has become a point of controversy, as one conservation group has attempted to acquire a permit solely for the purpose of maintaining instream, or environmental, flows. The beneficial-use requirement has traditionally been met by actually diverting, taking, or storing water, and this attempt to seek a permit for non-use has been elevated statewide to a major priority. Although, in mid-2003, TCEQ denied the conservation group’s application, the group has appealed the decision to state court, and recent legislative action now requires that TCEQ place a hold on permit applications to allow a two-year study of related issues.

Given the significant percentage of permitted rights that have not been put to beneficial use for more than the statutory 10-year period, permit cancellation has arisen as a hotly debated issue. With authority already on the books for TCEQ to cancel unused permits, cancellation presents TCEQ with a political conundrum, given that many of the unused rights belong to the agriculture community and are often held by politically influential interests.

Interbasin Transfers: OK for Groundwater

As even a cursory review of Texas water law indicates, water is managed under a bifurcated system which often views groundwater and surface water as mutually exclusive resources. Nowhere is the conflict

more prevalent than with the statute restricting interbasin transfer of surface water, but not groundwater. Because, procedurally, a surface water permit must be amended to allow for a change in the location of use, this statute mandates that the amendment for an out-of-basin transfer must replace the seniority date with a new “junior” priority date.⁵ This statute has effectively halted applications for interbasin transfers of surface water. While the legislative intent of the “junior rights” provision was to protect in-basin water users, a significant side effect has been the shift to a reliance on groundwater, for which there are no similar restrictions.

In 2001, the concept of “conjunctive use” was defined by the Legislature as “the combined use of groundwater and surface water sources that optimizes the beneficial characteristics of each source.”⁶ It was melded into the statutory water planning process and included as a component for a groundwater district’s preparation of a management plan and assessment of groundwater permit applications.⁷ But, to date, the dilemma with interbasin transfers remains. Furthermore, no other enforcement mechanisms exist to require the integration of conjunctive use into water planning decisions.

Challenges for Tomorrow

The Texas Legislature, judiciary, and regulatory agencies have made great strides in developing water management policy in recent years. As the state’s populace and thirst for water continue to grow, the laws will continue to evolve. Given that the water industry is accustomed to making long-term decisions and structuring transactions that transcend the years, it will be important to track these developments in anticipation of further change.

Jason T. Hill assisted in preparation of this article. Contact Michael Gershon at mgershon@lglawfirm.com or (512) 322-5872.

References

- 1 Texas Water Code §§36.0015, 36.002.
- 2 See *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 78-83 (Tex. 1999).
- 3 See *Houston and Texas Central Railway Co. v. East*, 81 S.W. 279 (Tex. 1904).
- 4 Lt. Gov. Bob Bullock & Gen. Counsel Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas’ Future Water Needs*, 30 Tex. Tech L. Rev. 53, 65 (1999).
- 5 Texas Water Code §11.085(s).
- 6 Texas Water Code §§9.001, 36.001.
- 7 Texas Water Code §§36.1071, 36.113, 36.118.

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