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A Commentary on Texas Water Law and Policy

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Texas has an extremely diverse hydrological picture: the eastern part of the state generally has plenty of water, the western half has hardly any. This is sometimes called the I-35 boundary problem, referring to the interstate highway, which runs from Laredo through San Antonio, Austin, Dallas/Fort Worth, and Denton. About 80 percent of the 19 million Texans live east of I-35 and they receive up to 55 inches of rain annually while consuming 56 percent of the state's water. West of I-35, the remaining 20 percent of Texans use 44 percent of the water and average as little as seven inches of rain annually. Quite clearly, east and west Texas have different water needs and requirements and the problem in the past has been how to resolve these differences in terms of laws and policies.[1]

In the fifty year planning horizon required by Texas law, the Texas Water Development Board (TWDB) regards two factors as critical: population increase and patterns of water consumption.[2] The population of Texas has increased from 9.5 million in 1960 to the current 19 million, and it is expected to double within the water-planning horizon. Texas is now the second most populous state behind California. It should be noted that the fastest growing part of the state is the U.S.–Mexico border along the Río Grande in El Paso, Laredo, McAllen, and Brownsville. Immigration and large families account for this population increase, which will place increasing demands on water in the future.

The second factor to be considered by Texas in water planning for the future is patterns of water consumption. As is true for most of the west, the percentage of water used by agriculture in Texas has declined and the need for municipal water has greatly increased. In 1990, agriculture accounted for 65 percent of all water used in Texas, but that use declined by 20 percent from 1980 and is expected to drop even further by 2040. Conversely, municipal water use is increasing rapidly. Industrial use is not great in the state, although there is a problem of water pollution from industrial enterprises. The central question facing Texas over the next fifty years is whether Texas will have enough water to meet municipal needs.

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1. *See* SUSAN HADDEN & WILLIAM P. HOBBY, POLICY RESEARCH PROJECT ON WATER FOR THE ENVIRONMENT, LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, POLICY RESEARCH REPORT NO. 111, SQUEEZING A DRY SPONGE: WATER PLANNING IN TEXAS 22-23 (1994).

2. *See* TEXAS WATER DEV. BD., WATER FOR TEXAS: TODAY AND TOMORROW, RECOMMENDATIONS FOR THE 1992 UPDATE OF THE TEXAS WATER PLAN 7 (1992).

TEXAS WATER LAW

Texas water law reflects historical use and the power of those who need water the most, i.e., farmers and ranchers. Basically, Texas water law has reflected the rural dominance of the state legislature for most of the state's history and that state law has protected the water rights of farmers and ranchers. It was not until the redistricting of legislative seats resulting from court decisions in the 1960s that Texas finally began to see urban interests predominate in the state legislature. In the case of water, it was not until the 1980s that urban legislators finally began to seriously reconsider Texas water law and policy from other than agriculture or livestock use.

Texas has two separate doctrines of law, one for surface water and one for groundwater.[3] It should be noted that surface and groundwater, thus, have different allocation rules, distinct conflict resolution frameworks, and separate administrative agencies. Under both Spanish and Mexican law, the doctrine of prior appropriation applied. After independence from Mexico, Texas adopted the riparian water doctrine and for well over a century there was genuine confusion over water law and water rights.

In 1889 Texas returned to a modified prior appropriation law, passing an Irrigation Act under which all unappropriated water became the property of the state. A person could claim water rights from the state based on first-in-line, first-in-right, and whether the water was put to beneficial use. The 1889 law and a subsequent 1895 law were flawed because (1) there was no statutory procedure for verifying claims (and these claims could only be resolved through litigation), and (2) the relationship between riparian and appropriated was never stated nor clarified.

It was the drought of the 1950s that brought change and a resolution of the legal conundrum (as the drought of the 1990s was to bring a new water law). A series of suits filed in the Lower Río Grande finally resulted in the appointment of a water master to allocate river water to rights holders.[4] The federal government's share of river water was allocated among municipal and agricultural interests with municipal water rights

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3. *See* C. Johnson, Evolution of the Texas Law of Water Rights, Presentation at a CLE Conference on Texas Water Law, Austin, Tex. (Dec. 1996); R. KAISER, LEGAL AND INSTITUTIONAL BARRIERS TO WATER MARKETING IN TEXAS (1994); R. Kaiser, *Texas Water Marketing in the Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH L. REV. 181, 234-35 (1996). In actuality, there are four separate classifications of state water, but practically only two legal doctrines.

4. *See* F. Andrew Schoolmaster, *Water Marketing and Water Rights Transfers in the Lower Río Grande Valley, Texas*, 43 PROF. GEOGRAPHER 292, 296 (1990).

having the highest priority. In 1967 the legislature finally addressed the question over confused water rights and passed the Water Rights Adjudication Act. For the first time, administrative remedies for adjudicating water rights became available and riparian rights were subject to a beneficial use provision. All unappropriated water required a permit for use granted by the state. As a result, all of the surface water in Texas is now appropriated. The only exception is the upper region of the Río Grande, from the New Mexico state line to Fort Quitman, Texas, and this has yet to be adjudicated, although there are several pending law suits aimed at resolving the legal water rights question.

Up to the passage of the new water law in 1997, there were several issues under Texas surface water law. One is that a water permit required a public welfare factor that was never clearly spelled out. A 1985 Amendment to the water law included instream protection of marine life, bays and estuaries, water quality, and fish and wildlife habitat. The primary reason for passage of this environmental protection amendment was the recognition of the economic value of water for recreation, boating, fishing, and hunting. By 1990, the Texas Parks and Wildlife Department (TPWD) estimated the value of such use at $4.7 billion annually, and that was a significant figure to state legislators.

The 1895 Act had established a priority list for water rights beginning with irrigation, mining, milling, and stock raising, and later expanded to include navigation, recreation and pleasure, public parks, and other uses. All of these preferences apply at the time of permitting, which means, of course, that farmers and ranchers are most likely to be first in time under the prior appropriation doctrine. In 1931 the state passed the Wagstaff Act, which, at least theoretically, gave municipalities priority in the subsequent appropriation of water. The general feeling of water rights lawyers is that the Wagstaff Act has not been tested in the courts and it is unlikely to be either applied or interpreted.

Under both constitutional and statutory provisions, any transfer of water from one basin to another is prohibited. Appropriative rights may be transferred with state approval but it is a lengthy process and seldom used.[5]

Finally, in 1993 the Texas Water Bank was established by the TWDB to encourage Texas water rights holders to conserve water by depositing it in the bank. Texas was following the lead of California and the Water Bank was regarded as a tool to fight the drought then beginning to plague the state. It was hoped that such a bank would encourage the marketing of water rights and thereby lead eventually to a more realistic pricing of water as a good.

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5. *See* Kaiser, *supra* note 3, at 89.

Groundwater law in Texas falls under the absolute ownership rule, sometimes referred to as the "right of capture," or the English rule. Under its provision, the driller of a well may pump out as much water as needed or wanted. There are almost no constraints on the pumping of groundwater in Texas. The Texas Supreme Court has held that the owner of a well may be liable for "willful waste," but this is almost impossible to prove and no decision has been handed down on it. Under provisions of the law, groundwater districts may be established but these have proved to be very weak regulatory efforts. In the case of the Edwards Aquifer, there has been a long and bitter dispute over groundwater management. In 1997 a new groundwater district took over management of the aquifer, however, it may be some time before its performance is reviewed. For all practical purposes, in the state of Texas groundwater remains an absolute property right with almost no consideration given to public welfare.

THE ADMINISTRATIVE AND POLICY FRAMEWORK FOR TEXAS WATER

Three major state agencies are involved in water policy in Texas: the Texas Water Development Board (TWDB), the Texas Natural Resources Conservation Commission (TNRCC), and the Texas Parks and Wildlife Department (TPWD). The TWDB has primary responsibility for water planning and must create a state water plan every six years, with a biennial update. It also provides loans and grants for water and wastewater treatment plants and for water supply facilities. The TWDB is headed by six commissioners appointed by the Governor for six-year terms. The TNRCC is the relatively new environmental super-agency created in 1992. Its primary responsibility for water management is permitting of water use and water pollution control. So far the TNRCC is still ironing out its administrative responsibilities as well as a rather tumultuous political history under, first, a liberal Democratic Governor, Ann Richards, and now, Republican George Bush. Mary Kelly of the Texas Center for Policy Studies has severely criticized the enforcement efforts of the TNRCC.[6] The TPWD is chiefly responsible for enforcing the environmental provisions of the water law. Although initially regarded as an agency "captured" by the state hunting and fishing lobby, the TPWD has recently embarked on its new responsibilities with some enthusiasm and has proved to be resourceful in enforcing these environmental provisions. In addition to these three agencies, several other agencies also play some role in water policy, including the General Land Office, the Department of Agriculture,

6. *See* MARY E. KELLY, AUSTIN, TEXAS, CENTER FOR POLICY STUDIES, TNRCC ENFORCEMENT: RECORDS OR RHETORIC? (1966).

the Texas Railroad Commission, and the Texas State Soil and Conservation Board, as well as local soil conservation districts.

In addition to these agencies, there are hundreds of state-created agencies involved with water policy:[7]

- 800 rural water supply corporations
- 750 investor-owned water supply cooperatives
- 230 water control-improvement districts
- 18 water improvement districts
- 42 freshwater supply districts
- 36 levee improvement districts
- 44 drainage districts
- 19 irrigation districts
- 26 navigation districts
- 48 water control/underground water conservation districts
- 20 river authorities (these authorities control 34 percent of all state surface water rights)
- 590 municipal utility districts (MUDs)
- 750 cities over 100 population that operate their own water and sewage facilities.

Obviously, there are a large number of water users and authorities, and there is likely to be overlapping or confusing jurisdiction in many cases. This enormously increases the complexity of the policy making, implementation, and enforcement process. As a result, one of the chief complaints about water policy is that it is fragmented and lacks central control. Not only does this make statewide planning a difficult procedure, but it also offers the historical users protection against surrendering their water rights. For instance, the river authorities for the larger rivers are completely independent of state authorities, and they have already voiced concern over potential state interference in their own activities through the planning process.[8]

Which leads to the next question: how does the state of Texas plan? On one point there is little dispute: it was the terrible drought of the 1950s that led to the first statewide attempts to develop a state water plan. The drought also brought a focus on water supply and led to the building of dams and reservoirs to insure future water supply. In 1920 Texas had 11 dams, by 1950 it had 66 dams, and by the end of the decade there were an additional 105 dams. Now there are 189 dams with a capacity of 60 million acre-feet, but there is little prospect for building more and planners have all but abandoned water supply infrastructure projects for the future.

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7. *See* HADDEN & HOBBY, *supra* note 1, at 23.

8. *See* LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, POLICY RESEARCH PROJECT REPORT NO. 77, TEXAS WATER MANAGEMENT ISSUES xxii (1987).

A political note should be added, and that is that many of these dams built during the 1940s–1960s were the result of the political power of Lyndon Johnson in Washington and his so-called 8F crowd back in Texas. The 8F designation came from the hotel room number (in the Rice Hotel in Houston) of George Brown of the Brown and Root Construction Company, which was the power behind the Texas political elite for almost fifty years.[9] Brown and Root built many of the water infrastructure projects in Texas, while also providing the financial support for the political machine of Lyndon Johnson and John Connally. Most of these infrastructure projects were financed by the federal government, which was influenced by the political power of the Texas delegation, including Lyndon Johnson and Sam Rayburn.

In 1957 the state legislature mandated statewide water planning and the fifty-year planning horizon was born. Since then, only four water plans (1961, 1969, 1984, and 1990) have been officially adopted by the state legislature. The 1990 plan was unique in several respects. For the first time the state plan discussed water management, not water supply. As a result, several new steps were taken to reduce water consumption, among them a state law requiring low-use plumbing fixtures. A host of incentives were built into the law encouraging water conservation methods in agriculture, with farmers being provided both funds and tax breaks to encourage taking advantage of conservation efforts. It was the first major effort of the state of Texas to actually deal with the need to protect its water supply for the future.

CURRENT DEVELOPMENTS, INCLUDING PASSAGE OF SENATE BILL NO. 1

In December 1996, Barry R. McBee, Chairman of the TNRCC, offered a new water plan for the forthcoming state legislature meeting in January of 1997. McBee noted that the last effort to comprehensively deal with the state's water came as a result of the drought of the 1950s, and the drought of the 1990s was equally severe and required new statewide planning. When the legislature convened, Senate Bill No. 1 (SB1) was introduced by Republican Senator J.E. "Buster" Brown, with the support of both the Governor, George Bush, and the Lt. Governor, Democrat Bob Bullock. At first the bill was given little chance of passing, since the Texas

9. *See*, ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER xv (1982). *See generally*, ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT (1990); JAMES W. LAMARE, TEXAS POLITICS: ECONOMICS, POWER AND POLICY (Wadsworth Publishing Co. 1998).

legislature rarely passes a new sweeping law in the first session. It normally takes at least three sessions for any substantial policy change.

The bill emphasized local or regional control over water resources. Regional water management plans were to be designed by regional water subdivisions developed by the TNRCC. Water management strategies are to be based on improved management of existing water supplies, improved water efficiency, water reuse and recycling, conjunctive use of groundwater and surface water, and other management techniques to preserve and protect water supplies. The state also adopted a comprehensive state drought plan (although it should be noted that it was one of the last western states to do so). Regional and local agencies must develop drought response plans through water conservation plans. In fact, every permit holder of more than 200 acre-feet must submit a water conservation plan. In addition, one provision of the bill does allow for emergency authorization for temporary transfer of a surface water right to a domestic or municipal user.

For those regions that border other states or Mexico, the bill authorizes regional and local agencies to develop joint plans outside the state. This provision also allows state funds to be spent on research and planning by Texas political subdivisions for the conservation and development of water resources outside Texas, if such research and planning will benefit Texas. This provision would appear to pave the way for those who live along the Río Grande to work with Mexico and New Mexico for joint management of water resources.

The bill also calls for the creation of priority groundwater districts that would have considerably more power than the older groundwater districts. Such districts would have to develop comprehensive groundwater management plans that address a host of water use issues, such as environmental protection, types of crops using groundwater, conjunctive use, water waste, and new requirements for well drilling. Although the law creates these new districts, it should be added that one criticism is that there is no change in the basic legal right of capture for groundwater.

Other provisions of the bill permit interbasin transfers after receiving a water right or leasing a water right (under this provision the city of Corpus Christi has already acquired access to water). The bill also calls for a statewide water resource data collection and dissemination network, as well as a Texas Natural Resources Information System (TNRIS) to assist local and regional agencies in their planning efforts. Although the bill calls for financial assistance to political subdivisions (and voter approved consolidation of these bonds under TWDB in the November 1997 election), critics of the bill regard the financial provisions as the weakest link in the new water policy structure. As the federal government withdraws from water financing, the state of Texas appears to be leaving regional and local agencies to finance many of their own water projects.

To the utter amazement of almost all observers, SB1 passed. In a legislative session marked by acrimonious partisan battles and the failure of any other major provision to pass, the success of SB1 was truly remarkable. Support of the leading Republicans and Democrats certainly helped, as did the predominance of urban representatives in the legislature. One also must speculate that the lack of strong opposition to the bill means that SB1 does not present a major threat to current water rights holders. What this does mean is that Texas has taken a major step towards effective statewide management of water resources.