TCEQ Drought Rule Could Result in Takings

Jeremy Brown February 6, 2013

The National Oceanic and Atmospheric Administration predicts the current drought will continue or intensity for most of Texas over the coming months. The Lower Colorado River Authority has warned that, unless conditions improve, drought conditions this year could be worst on record.

In its current session, the Texas legislature has responded to drought primarily by looking to the long-term. The highest-profile bills filed to date would commit large sums to financing water infrastructure projects. Those projects would not be built for many years, though, and could offer no more than a psychic salve for current difficulties.

For the time being, the state will have to survive on existing infrastructure and skillfully deployed policies. These policies will vary. They could include standard-issue drought measures like watering restrictions or heightened protocol for water shortage reporting, as would be required under HB 252.

It is likely, too, that the state agency with the primary authority for water regulation – the Texas Commission on Environmental Quality (TCEQ) – will employ a controversial water management rule it promulgated last year.

At a glance, the rule simply institutionalizes the guiding principle of the water appropriations doctrine – first in time, first in right. It provides that, when a downstream senior appropriator makes a priority call, the TCEQ may suspend upstream junior appropriators whose diversions threaten the rights of the senior appropriator. The devil in this set of details is that TCEQ may choose to exempt certain rights holders from the suspension on the basis of what the regulations vaguely define as "public health, safety, and welfare concerns."

The rule upends the appropriations doctrine that has traditionally governed Texas water rights and, at the time TCEQ released the initial draft of the rule, some commentators warned that applying it in a way that carved out favored appropriators would result in unconstitutional takings.

TCEQ has maintained that the rule does not a pose a risk of takings. In the takings impact analysis it published with the rule, the TCEQ presents five arguments to support this view. As discussed below, none of the arguments are convincing. (Whether there actually could be a taking is a matter for another day; takings law is notoriously convoluted and, in the water context, especially so.)

1. Existing Statutes

The agency claims that two sections of the Texas Water Code – 5.013(a)(1) and 11.027 – grant it authority to selectively suspend. But that isn't the case. Section 11.027 merely codifies the "first in time" principle.

Section 5.013(a)(1) defines agency jurisdiction to encompass "water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights." At first blush, this statute may seem more promising, but TCEQ did not explain the specifics reasons it supposedly grants the authority.

The agency could have meant that "the issuance of water rights permits" includes some level of authority to subsequently modify those permits. In the only published case remotely on point, *Friends of Canyon Lake v. Guadalupe-Blanco River Authority*, an Austin appellate court found that the statute authorized the TCEQ's predecessor agency to amend a water permit upon application from a rights holder even if the application was incomplete. That case gives no reason to believe, however, that TCEQ could modify a permit unilaterally, without consent from the permittee.

Alternatively, the TCEQ may have intended that the phrase "enforcement of water rights" to support the curtailment rule. By suspending junior appropriators upon a priority call from a senior appropriator, the TCEQ is no doubt enforcing the water rights of the senior appropriator. But enforcement does not require the agency take the added step of exempting certain junior rights holders from the suspension.

2. Reallocating Supplies

TCEQ next argues that, in exercising the curtailment rule, it is not so much exempting preferred junior rights holders from suspensions as it is reallocating water that resulted from the suspension but would otherwise go unused. The agency explains: "If a senior water right is not able to use the water that it is authorized to under the law and needs that water, the junior water right holder does not have a right to that water and it is not a statutory or constitutional taking … The same reasoning applies to a temporary suspension or adjustment based on emergency shortage of water because the executive director action will be based [on] the rights of a senior or superior right water holder."

This argument is somewhat disingenuous. The executive director action – the suspension order -is "based" on the rights of the senior appropriator making the priority call only to the degree that those rights dictate the priority date and require that a certain volume of additional water reach the appropriate diversion point. Beyond those two parameters, the permit is developed at the discretion of the executive director.

If the sole purpose of the order is to protect the entitlement of the senior appropriator, the executive director would theoretically impose the order on the smallest portion of the river needed to accomplish that purpose. As a consequence, the volume of water passing through the river would increase, but only enough to ensure the senior appropriator received its full entitlement. There would still not be much water that, in the words of TCEQ, the "senior water right is not able to use." There would certainly not be enough for TCEQ to set aside to satisfy the appropriations of entire classes of preferred rights holders.

To create such a bounty, TCEQ would have to expand the scope of the order. At that point, the order would be "based" on the rights of the senior appropriator *and* the policy preferences of TCEQ. The analogy TCEQ cited in its takings impact analysis, of water being leftover when a senior rights holder does not use its full appropriated share, would not hold.

A recent application of the rule illustrates this point. Last fall, Dow Chemical, which operates a plant in Freeport, near the mouth of the Brazos River, made a priority call. The watershed was in drought at Dow's diversion point and, according to a finding of fact TCEQ made at that time, "Dow is currently unable to divert the amount of water it needs and that is authorized under its water rights due to low flow in the river.

The table below shows Dow's water rights. At the time the company made the priority call, it was using 84,898 of its authorized water. Put another way, Dow was using all 20,000 acre-feet of its appropriation with a priority date of February 28, 1929 and 64,898 of its appropriation with a priority date of February 14, 1942, leaving the company entitled to an additional 85,102 acre feet of water from its February 14, 1942 appropriation.

Dow Chemical – Certificate of Adjudication 12-5328		
Diversion (acf/year)	Priority Date	Use
20,000	February 28, 1929	Industrial
150,000	February 14, 1942	Industrial and Municipal
65,000	April 4, 1960	Industrial
3,136	March 8, 1976	Municipal

The TCEQ thus suspended all waters rights junior to February 14, 1942, from all points on the Brazos downstream of Possum Kingdom Lake, with the exception of rights belonging to municipal and electric users. According to a complaint filed by the Texas Farm Bureau against the Brazos order, the TCEQ suspended 141,090 acre feet of water per year but permitted municipal and electric holders to continue to use 3,076,056 acre feet of junior appropriations per year. These figures suggest that, assuming the river system engineering allowed, the agency could have enforced Dow's senior rights by issuing a more geographically confined order that suspended the rights of some municipal and power users.

3. Blaming the Drought

The TCEQ further argues that the rule cannot result in a taking because it is the drought – rather than the application of the drought rule – that reduces flows, forcing a senior appropriator to make a priority call and the agency to impose a curtailment order. "Thus, the 'drought' and 'other emergency shortage of water' sections of this rulemaking are actions that are not takings because junior water rights take water under their water rights subject to senior rights, or are taken in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose."

This description portrays the agency as a passive and somewhat helpless actor in the face of adverse meteorology. But that isn't so. The appropriations doctrine is borne of scarcity; its animating purpose is to provide an orderly and trusted method of allocating water at times when appropriations exceed available water supplies. Drought conditions require that TCEQ enforce the appropriations regime; they do not require that the agency selectively deviate from the appropriations regime by effectively overruling the established priority of rights for the benefit of preferred users.

4. Maintaining Priority

The TCEQ claims that the exercise of the curtailment rule does not constitute a taking because it does not alter existing water rights. "The commission disagrees that any taking is implicated by these rules because the 'more senior' junior water right holder is still junior to the senior water right making the call or being protected, and may legally be cut off by the call, whether or not the municipal user is cut off."

The fundamental problem with the curtailment rule is not that it regards junior holders as junior to the senior holder making the priority call but that it treats junior holders as junior to even more junior preferred holders. The rule reshuffles appropriators, subverting established priorities, in two ways.

First, as described approve, the rule allows the TCEQ to decide the reaches of the river along which to suspend water rights. If the appropriation of the senior holder making the call could be satisfied by imposing the suspension along only 100 miles of a river, but the agency instead imposes the suspension along 400 miles so as to reserve water for preferred junior holders, then the agency is treating the upriver junior holders who have been discretionarily suspended as junior to the municipal and electric users who receive these reserved flows.

Second, if the suspension creates flows of appropriated but mandatorily unused water, that water should be allocated on a priority basis. But the TCEQ withholds this water from junior irrigators and apportions to it to municipal and electric users who could be even more junior. By reallocating previously appropriated water according to policy preferences and then blaming that reallocation on priority call of the senior appropriator, the TCEQ is simply playing a regulatory shell game.

5. Police Power

Finally, the TCEQ rests the curtailment rule on its police powers. The agency claims the police powers doctrine imparts it with the "authority to protect the public health and welfare … [and] the duty not to manage water rights in a way that is detrimental to the public health and welfare."

To support this view, the TCEQ quotes from *Barshop v. Medina County Underground Water Conservation District*, a Texas Supreme Court case rebuffing several challenges to the facial validity of the Edwards Aquifer Act. There, then-Justice Greg Abbott observed that, under Article XVI, § 59(a) of the state constitution, "preserving and conserving natural resources are public rights and duties."

In the TCEQ takings impact analysis, and in *Barshop* itself, the police power is discussed in a way that resembles the public trust doctrine. Some environmentalists have argued that Article XVI, § 59(a), does give rise to a public trust doctrine in Texas, where as in most Western states the doctrine currently exists in only a hazy form.

Last year, however, an Austin trial court held that the doctrine could require TCEQ to regulate greenhouse gas emissions. Since the doctrine has traditionally applied to water, it could potentially be stretched to justify the curtailment rule. Rather than venturing such an argument, however, TCEQ sticks to a police powers doctrine that it has invested with public trust dimensions.

It is unclear, though, whether the drought curtailment rule would represent an appropriate use of police powers authority. A few Texas cities are up against a legitimate risk of running out of water. But for others, the threat is to creature comforts rather than sheer existence. Is it genuinely "detrimental to public health and welfare" if homeowners cannot fill swimming pools – or must pay prices to fill their pools that reflect the scarcity of water?

Some may consider such a scenario detrimental – the police powers doctrine has certainly been used to support all manner of regulations meant to provide aesthetic or recreational benefits. But even if the doctrine gives TCEQ the authority to use the curtailment rule and to tinker with appropriations priority, it does not necessarily give TCEQ the authority to do so without compensating those who sustain losses as a result.

In *Barshop*, the court recognized that, assuming a property owner "possess a vested property right in the water beneath their land, the State still can take the property for a public use as long as adequate compensation is provided." The same reasoning would apply to the drought curtailment rule. That is, the TCEQ could use its police powers to reallocate vested water appropriations through selective enforcement of a drought curtailment order but would have to compensate.

The TCEQ categorically and somewhat elliptically brushes past this notion of compensation. It cites to *Barshop* and to a Water Code Section – 11.134(b)(3)(C), which mandates that the TCEQ may grant an application for an appropriation only if the proposed appropriation "is not detrimnetal to the public welfare." And based on these citations, the TCEQ concludes "this rulemaking is either not covered by or is exempt from the coverage of Texas Government Code, § 2007.003(b)(13)"

Section 2007.003(b)(13) states that the Private Real Property Rights Preservation Act applies to governmental actions intended to advance health and safety. The act is a property rights law that, as its name implies, protects real property. While groundwater rights may directly connect to real property, as may surface water rights in a riparian regime, appropriations of surface water are not real property and would presumably not fall under the act.

Curiously, TCEQ fails to cite the provision in the Texas constitution – Article I, Section 17 – that actually is the basis for takings claims and that could ensnare reallocations under the drought curtailment rule.

drought TCEQ Texas water

Popular Tags

Texas (55)
water (46)
energy (20)
drought (17)
fracking (15)
natural gas (13)
endangered species (12)
oil and gas (10)
groundwater (8)
climate change (8)
court cases (7)
epa (6)
conservation (5)
pollution (5)
TCEQ (5)

Leave a Reply

Your email address will not be published. Required fields are marked *

Name *

Email *

Website

Comment

POST COMMENT