Brazos River Lawsuit Raises Questions about Methods Texas Should Use to Modernize Its Surface Water Rights System

Jeremy Brown January 29, 2013

The Texas Commission on Environmental Quality (TCEQ) has rescinded a controversial order suspending certain water rights in the Brazos River basin. The agency had been scheduled to consider a recent modification to the order at its hearing this Wednesday.

In many ways, the order had served as a trial balloon of a policy the agency wants to use to manage water as drought and population growth continue to strain resources. Soon after its issuance, however, the order prompted the Texas Farm Bureau and two farmers to file a lawsuit seeking to enjoin its enforcement and to invalidate the administrative rule that had served as its basis.

That rule is relatively new, having only been promulgated last May, and provides the TCEQ with additional means of managing water rights during droughts. More broadly, it represents an attempt by the agency and the legislature to update the state's musty water rights laws to reflect contemporary economic and demographic realities.

Like other Western states, Texas primarily follows the prior appropriations doctrine. This doctrine is generally articulated – including in the Texas Water Code – as "the first in time is the first in right." When drought strikes and the state does not have enough water to satisfy all appropriations, senior rights holders must receive their full entitlements before junior rights holders can expect even a drop.

Because of historical settlement patterns, agricultural users often hold rights senior to those of municipal users. Obviously, this sort of setup is not the best match for a state that is a highly urbanized industrial powerhouse faced with a future of increasingly unreliable and inadequate water supplies.

The TCEQ drought curtailment rule marks a bold effort to modernize the doctrine. But that doctrine is well established, serving as the basis an entire system of property rights. It cannot be altered without affecting those property rights, as the Farm Bureau lawsuit argues, or without sending ripples throughout state water policy.

Drought Curtailment Statute

In 2009 and 2011, the TCEQ acted upon a call by a senior water rights holder by suspending the rights of junior holders. At that time, however, it was not certain the agency had authority to carry out such suspensions.

In its 2011 review of the TCEQ, the Sunset Advisory Commission recommended "clarify[ing]" that the executive director has authority to curtail water use during water shortages and droughts. The commission further suggested that the Water code should be amended "to ensure senior water rights are protected and adequate water supplies are available for domestic and municipal needs."

The commission did not discuss the tension inherent in the potentially conflicting policy goals of protecting senior water rights while ensuring supplies for domestic and municipal users whose rights could be junior. But the commission seemed to be implying that that agency should be allowed to deviate from the priority sequence of the appropriations system when imposing water use suspensions.

The Texas legislature attempted to implement the recommendations of the Sunset Commission through HB 2694. As initially introduced, that bill would have given the executive director authority to "adjust the allocation of water between water rights holders" during droughts or other emergency shortages.

By the time the bill was passed, however, the provision was weakened, so that in its final form, it only allowed the executive director to "temporarily adjust the diversions of water by water rights holders" in manner "in accordance with the priority of water rights established by" the section of the Texas Water Code, 11.027, that enshrines priority.

The final version of the bill, which added the drought curtailment statute to the Water Code as Section 11.053, included a separate provision that nevertheless could be read to allow deviations from appropriations priority. That provision requires the executive director "to conform[]" temporary curtailments "to the order of preferences established by Section 11.024."

Section 11.024 sets forth the preferences TCEQ must follow choosing from among competing applications for appropriation rights. These preferences are: (1) domestic and municipal uses; (2) agricultural and industrial uses; (3) mining; (4) hydroelectric power; (5) navigation; (6) recreation; and (7) other beneficial uses.

In a 1955, a federal court rejected a contention that the predecessor of Section 11.024 entitled the city of El Paso to the first claim to Rio Grande water. "Article 7471 simply regulates priorities prospectively in the subsequent issuance of appropriation permits, so that in acting on pending applications from time to time or in holding foresighted reserves preference will be given by this statutory guide, but said article does not manifest any intention to upset the normal time priority of then or thereafter outstanding permits once duly issued."

But a hierarchy of preferences that applies only to future appropriations would seem to have no place in a statute like Section 11.053 that governs the management of existing appropriations. The only way to reconcile the citation to Section 11.024 with the purpose of Section 11.053 is to assume that Section 11.053 incorporates the preferences from Section 11.024 but puts them toward different ends than Section 11.024 does.

Interpreted in this way, Section 11.053 could empower the TCEQ executive director to suspend or adjust water rights in way that follows the priority system of Section 11.027 and, "to the greatest extent possible," the usage preferences of Section 11.024. The section does not set forth the approach the executive director must follow when the priority system and usage preferences conflict. The statute includes additional factors, beyond the scope of this post, that the executive director must consider that could theoretically act as tiebreakers.

Still, a certain amount of tension may at times be inevitable. In those instances, the most equitable solution would probably be to temporarily reduce all junior diversion rights rather than exempt municipal users at the discretion of the executive director. But the statute, as written, does not provide this guidance.

Drought Curtailment Rule

Section 11.053 directs TCEQ to adopt regulations that implement the drought curtailment rule. The section only requires that the regulations: (1) define the "drought" or "emergency shortage" conditions that can trigger the rule; (2) establish the terms of curtailment orders, including the longest permissible duration; and (3) set up notice, hearing and appeal procedures for curtailment orders.

TCEQ issued final regulations in April 2012. The most contentious provision provides that, when the executive director issues an order suspending or adjusting water rights, he "may determine not to suspend a junior water right based on public health, safety, and welfare concerns."

The regulations do not spell out which water rights the TCEQ should preserve due to "public health, safety, and welfare concerns." But the comments submitted in response to the initial version of the regulations make clear that stakeholders understood the intent of the provision was to establish an implicit policy preference for satisfying the needs of water needs of urban users at the expense of agricultural users.

The Texas Farm Bureau warned that this preference devalued agricultural and industrial rights. And the TCEQ, in response to a question from the Trinity River Authority, went so far as to state – without citation to any statutory or regulatory provision – that "[t]he executive director may not suspend municipal water rights based on public health and welfare concerns."

By expressly privileging municipal users over agricultural users, however, the curtailment rule breaks with a fundamental principle of the appropriations doctrine – which allocates water on the basis of priority rather than use. That position also seems to go beyond the language in the statute.

Section 11.027, as discussed above, prefers municipal to agricultural uses but does not transfer vested water rights according to those preferences. Similarly, for more than 40 years, the Texas Water Code has included a statute that allows municipal users to obtain emergency access to water but leaves them liable for the fair market value of that water. That statute, Section 11.039, does not temporarily reallocate rights during droughts and emergency shortages, as the Section 11.053 curtailment rule effectively does.

The TCEQ has claimed, however, that Section 11.053 adheres to the appropriations doctrine. In its final draft regulatory impact analysis of the rule, the agency contended that it "is reasonably exercising its police powers to protect public health and welfare when it does not cut off junior municipal users for senior calls. The fact that a junior water right is not being cut off does not change the fact that other junior water right holders are subject to the senior call."

This explanation assumes priority is a matter of official ranking rather than of practical impact. If the agency treats a junior water right like a senior water right, then the junior water right ceases to be junior in anything other than name. The junior right becomes more reliable and more valuable – and other rights that have suddenly fallen behind it in the pecking order become less so.

Other Policy Solutions

The curtailment rule raises numerous policy questions. At a micro level, these concern the structure of the rule. Should the rule require municipal and power users to demonstrate a certain level of commitment to conservation before they are spared the axe of a suspension or curtailment? Should due process considerations require the agency to hold hearings before, rather than after, the executive director issues an order? Should the TCEQ commissioners themselves be required to approve an order before it takes effect?

But more broadly, it is not obvious that orders issued under the curtailment rule offer the best means of managing water resources during droughts. In fact, in the long-run, the rule could prevent municipal and power users from obtaining adequate water supplies.

By disrupting the appropriations system, the rule could inject uncertainty into water rights and depress water markets. But it is water markets – acting through water banks and intrabasin transfers – that promote the socially desired allocation and sustainable pricing of finite water resources. While water transfers come with their own challenges, they could leverage the legal norms and established property rights of the appropriations system

In some respects, Section 11.039 already operates as a quasi-market system of water transfers. Though it applies only during emergencies and may necessitate involuntary transfers, it resembles a market much more than does the drought curtailment rule. In requiring that a transferee compensate a transferor the fair market value of the water, it ensures transferors receive compensation, and it forces transferees to absorb the costs of their water use.

If nothing else, the protracted process and towering administrative costs that Texas endured in the twentieth century, when converting legacy riparian rights to appropriations rights, should caution against embarking lightly on another systematic makeover.

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