Coming Up for Air in the Sea of Texas Water Resource Planning

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Overview

• Summarize state water supply planning process and new state water plan
• Explore challenges for Texas city attorneys in water supply planning and policies
  • The high cost of implementing new water strategies
  • A lack of settled law in some key areas
  • Mixed signals on water policy from the state legislature
Let’s Take a Quiz

• What % of Texans don’t know for sure where their water comes from?
• What does water cost?
  – State surface water fee per acre-foot (326,000 gal):
  – Average River Authority charge per a-f:
  – Rate per 5,000 gallons in Lakewood Village:
  – Rate per 5,000 gallons in Dilley:

Ima Hogg? Ura Hogg!

Average monthly residential water use

• Grand Saline: 1,700 gallons
• Westlake: 71,000 gallons
Water Planning in Texas

Historic background

- **Pre-Senate Bill 1**: Six “top-down” plans prepared by State agencies; all proposed transfers from areas of surplus to areas of need
- **Senate Bill 1 (1997)**: Regional plans prepared by stakeholders in sixteen areas of the state are compiled into a state plan
- **Senate Bill 2 (2001) and Senate Bill 3 (2007)**

State Water Planning Process (In Each Region)

- Quantify current and projected population and water demands
- Evaluate strategies for adding supply based on:
  - Quantity/reliability
  - Cost
  - Impacts to the environment and agriculture
  - Time to implement
- Recommend strategies, estimate costs/time line
- Provide for significant public participation
Importance of State Water Plan

Why should you care whether your water supply project is included in the State water plan?

- Eligibility for state funding assistance
- Eligibility for state permits (e.g., a surface water right)

State Water Plan – Management Strategies to Meet Future Needs

- **Conservation** - Municipal, agricultural, industrial
- New *surface water* development
- New *groundwater* development
- **Reuse** – Direct and indirect
- **Desalination** – Brackish and seawater
- **Land Stewardship** to increase runoff
State Water Plan – Groundwater Planning

• **SB 2 (2001)** – Required TWDB to divide the State into 16 Groundwater Management Areas
• **HB 1763 (2005)**
  – Empowered groundwater districts to set production limits
  – Required GMAs to establish desired future conditions for aquifers, which TWDB translates into managed available groundwater amounts
  – GMA groundwater amounts must be included in updates of regional water plans

State Water Plan – Kudos and Criticism

• Praise for regional, stakeholder-driven approach
• Regional plans well-accepted
• Criticism for parochial (us vs. them) approach
• Unresolved conflicts between regions
• Groundwater planning criticized re: local governance issues
Challenges for Texas Cities – City Water – Still a Bargain

**What’s it worth?**
- $2.6 million per acre-foot?
- Availability and low cost of water has fostered view of water as a commodity
- No natural encouragement for conservation
- New supplies will be much more expensive
- Rates will increase
- We’ll know its worth when the well runs dry

Challenges for Texas Cities – Unsettled Law

*City of Del Rio v. Clayton Sam Colt Hamilton Trust* – What does a groundwater owner own?
- City bought land from Trust
- Trust reserved water rights, but City drilled well
- Trust sued, asserted “absolute ownership” theory
- City claims that groundwater is not owned until produced; cannot be severed from surface rights
- Court of Appeals rules for Trust, accepts absolute ownership theory
Challenges for Texas Cities – Unsettled Law

**Guitar Holding Co. v. Hudspeth County UWCD**
- West Texas farmers secure preferred permits based on historic use (per Water Code Ch. 36)
- Farmers want to market permits for M&I use
- Is a preferred right for an “existing use” transferable to a different type of use?
- Supreme Court says no – the preferred right is tied to the purpose of use
- Some groundwater districts are scrambling

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Challenges for Texas Cities – Unsettled Law

**Bragg v. Edwards Aquifer Authority** - When do groundwater regulations constitute a taking?
- Pecan orchard requiring lots of water
- Limited water use in historic period results in small permit
- Must groundwater be considered separately from the rest of the property?
- Trial court says no - found no taking
Challenges for Texas Cities – Unsettled Law

City of Aspermont v. Rolling Plains GCD -
What enforcement authority does a groundwater district have over a city?
• No authority to sue to collect fees/penalties – sovereign immunity not waived
• Authority to seek declaratory judgments and injunctions
• Don’t worry about paying the fees – they’ll just throw the Mayor in jail

Speaking of Unsettled Law

Justice Hecht, concurring opinion in Ozarka case (reaffirming rule of capture):
• “It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV”
• “I agree ... it would be inappropriate to disrupt the processes created and encouraged by [SB 1]”
• “[F]or now-but I think only for now-[the East case ] should not be overruled”
Challenges for Texas Cities – Mixed Signals from the Legislature

The legislature *discourages* marketing of *surface water* – Interbasin transfer restrictions in Senate Bill 1

- Procedural hurdles – Notices, extensive hearings
- Transferred right becomes junior to all other rights in basin of origin
- Interbasin transfers have virtually halted

The legislature *encourages* marketing of *surface water* by streamlining the water rights amendments process (SB 1)

- Appeared to allow simplified process for permit amendments (diversion point, purpose of use)
- *City of Marshall v. City of Uncertain* – Whether the simplified process can be used is determined in an ad-hoc, complex process
Challenges for Texas Cities – Mixed Signals from the Legislature

The legislature *encourages* marketing of *surface water* by requiring environmental flow assessments in each river basin (SB 3)

- Surface water rights/transfers have been subject to ad hoc review and setting of instream flow conditions
- Environmental flow determinations will lend predictability for new permits/amendments
- Determinations will take time – basin by basin

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The Legislature *encourages* development and marketing of *groundwater* by restricting the transfer of surface water

- SB 1 restrictions have shut down interbasin transfers
- Was the impact on groundwater development an intended consequence of the SB 1 restrictions?
The legislature *encourages* marketing of *groundwater* by prohibiting groundwater districts from restricting exports of groundwater (SB 2)

- Striking contrast to the restrictions enacted by Legislature on out-of-basin exports of surface water

The Legislature *gives mixed signals* on marketing of *groundwater* in the groundwater planning process (HB 1763)

- Short-term uncertainty while determinations are made of groundwater availability
- Is the available amount a cap?
- If so, will it bring long-term certainty, or fights between those who have permits and those who don’t?
Challenges for Texas Cities – Mixed Signals from the Legislature

The legislature opens the door on the topic of new reservoirs – SB 3
- Preferred sites for new reservoirs designated
- Protections for in-basin interests
- Areas in which reservoirs are prohibited also designated
- Proposed projects remain mired in controversy

Challenges for Texas Cities – Mixed Signals from the Legislature

The legislature encourages desalination
- Seawater vs. brackish groundwater
- 2005 - State funding for two pilot seawater desal projects and seven brackish water desal projects
- El Paso Utilities operates a brackish desal plant
- Concerns remain about high energy needs and brine disposal
Challenges for Texas Cities – Mixed Signals from the Legislature

The Legislature gives *mixed signals* on *reuse*

- Indirect vs. Direct Reuse
- Downstream reliance on return flows
- Direct reuse – simple administrative approval
- Indirect reuse - SB 1 included express statutory authority for indirect reuse permits
- Language is confusing and appears to create no advantage over securing a new unreliable “run of the river” permit

Funding for new water supplies – What role should the state have?

- State Water Plan identifies $ needs and gaps
- State continues to give away surface water
- SB 2 Proposal (2001):
  - $1/resident annual fee paid by counties
  - Sales tax on water/ww services
  - Annual fee for state water rights
  - Created Water Infrastructure Fund (this one passed)
- 2007 State Budget provided state funds for WIF
- How to link who pays with who benefits?
What Does the Future Hold?

• Policy choices will pit cities against rural areas, Dallas against Houston, environmentalists against new water projects, historic use against new use

• State legislature needs to provide consistent, rational policy direction

• Courts need to resolve fundamental issues on the nature of water rights and the extent of regulatory authority

Conclusion-Good News, Bad News

• Good: Texas has an incredibly detailed plan for how to deal with looming shortfalls in water supply

• Bad: You can’t drink a plan

• “The issue is a sort of paradise for lawyers”