NATURAL RESOURCES

A look at developments in Texas water law.

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In 1917, following a severe drought, Texas voters approved the Conservation Amendment to the Texas Constitution, instructing the state that its duty and responsibility is to protect and conserve natural resources, including surface water and groundwater.[1] The Legislature, in turn, has undertaken a number of important initiatives to manage groundwater and surface water. The result is two different sets of laws: one for groundwater and another for surface water. But neither legal scheme fully accomplishes the mandates of the conservation amendment. What follows is a discussion of some of the developments in Texas water law and suggestions for improving these legal tools.

A discussion of Texas water law must begin with the question of whether it makes sense to maintain two different legal schemes for surface water and groundwater. Currently, surface water is owned by the state, and those seeking to divert and use it must apply to the state for a permit to do so. Groundwater, on the other hand, is owned by the landowner and is subject to the "rule of capture." In areas where groundwater districts have been created, groundwater pumping is subject to regulation—in effect, modifying the rule of capture. But these two legal schemes assume that surface water and groundwater are independent of each other; in reality, the two are not so distinct.

According to the "Texas Aquifer Study" in 2016 by the Texas Water Development Board, an estimated 9.3 million acre-feet of groundwater flows from major and minor aquifers to surface water in an average year, representing an average of 30% of the water flowing in Texas rivers. In some areas of the state, groundwater is the sole source of flow in many streams and rivers. These stream flows are impacted by groundwater pumping. Decisions regarding use of surface water and groundwater should therefore be informed by the connection between the two. Some initial steps toward recognizing the connection between surface water and groundwater appear promising but require much more funding and support.

Among the measures undertaken by the state to protect and conserve groundwater is the creation of groundwater conservation districts. As explained by the Legislature, groundwater districts are intended to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater—this includes prevention of the degradation of water quality. They accomplish this by allocating groundwater withdrawal through a permitting scheme and by adopting "desired future conditions," which are based on groundwater availability models. Not only have these districts been effective at protecting and conserving groundwater, but they allow for robust public participation.

The election of groundwater district board members allows the public to participate in democratic solutions to their groundwater issues. Groundwater consumers have the ability to influence and affect how their groundwater is regulated and protected by choosing the governing members and participating in public meetings. The Legislature expressly stated that these locally elected, locally controlled groundwater conservation districts are the preferred method of groundwater management.

But groundwater districts' authority is limited. First, not every part of the state has a groundwater conservation district. Aquifer boundaries do not follow groundwater district boundaries, and so, a groundwater district's conservation and protection efforts are impacted by unregulated groundwater pumping outside of the district. Moreover, because Texas law continues to attempt to apply the rule of capture to groundwater, groundwater district members must weigh the threat of litigation when regulating use of groundwater. Often, it is the landowner with a small pump and those who seek to conserve their groundwater who are most impacted by groundwater districts' unwillingness to limit large pumping projects. A full recognition of correlative rights in groundwater would aid in striking the proper balance between use and conservation. The Texas Supreme Court has acknowledged correlative rights in groundwater.[2] However, groundwater districts have been reluctant to recognize correlative rights in the face of litigation threats by those seeking large permits. The effective weighing of correlative rights in groundwater would strike a better balance of landowners' interests than the current approach that emphasizes the rule of capture and the ownership of groundwater in place.

While state law recognizes the authority of groundwater districts to prevent the degradation of water quality, districts have not fully realized this authority because of the threat of the state raising preemption arguments. Further, although state law requires districts to consider impacts to surface water when issuing permits and impacts to spring flow when adopting desired future conditions, districts lack the resources to fully fund investigative studies regarding groundwater availability and the interaction of surface and groundwater at a local level, and districts again face the threat of litigation, were they to limit pumping because of predicted impacts to surface water.

The regulatory scheme for surface water protection is quite different than the groundwater laws. Texas surface water is owned by the people and held in trust by the state. Diversion and use permits are issued by the Texas Commission on Environmental Quality. While the surface water regulatory scheme does not consist of democratically elected, locally controlled entities, there are regional water planning groups that consist of various stakeholders, which adopt regional water management plans that are, in turn, incorporated into the state's water management plan. And the Legislature has created committees or "teams"—Bay and Basin Expert Science Teams—to recommend environmental flow protections. But as with groundwater districts, the surface water management efforts are lacking and have not fulfilled the mandates of the conservation amendment.

The surface water rights permitting scheme can be described as a "first in time, first in right" scheme. With only rare exceptions, the oldest rights have the first claim to water during times of shortage. Most rights granted before 1985 do not include protections for environmental flows to maintain water quality, fish and wildlife habitat, and recreational use in the state's streams, rivers, and coastal bays and estuaries.[3]

The Legislature has recognized that protecting the "biological soundness of the state's rivers, lakes, bays, and estuaries is of great importance to the public's economic health and general well-being."[4] Inadequate flows result in more species being proposed for listing as threatened or endangered, which creates greater uncertainty for water management. In 2007, the Legislature established a process to help define environmental flow standards for rivers and bays to "provide certainty in water management and development and to provide adequate protection of the State's streams, rivers and bays and estuaries."[5] That legislation calls for an ongoing review of adopted flow standards, strategies to meet flow standards, and accounting measures. But the state has not provided the necessary resources to support ongoing implementation of this legislation.[6] Thus, the anticipated outcomes of this piece of legislation have yet to be fully realized.

Further, because the surface water permitting system is administered by a state agency consisting of appointed commissioners, it is difficult to ensure that local communities' priorities are incorporated. Local communities possess knowledge of uniquely local issues and concerns, can provide an essential voice in determining how best to conserve and protect their water resources, and determine the most cost-effective measures for developing water supplies. Participation in the state permitting process can be costly, and the state agency does not necessarily consider factors that are important to the local community, such as whether cost-effective measures like improved conservation efforts can provide additional water supply, obviating the need for costly ventures like construction of a new reservoir or development of desalination plants, which are not only expensive but threaten existing natural resources important to the local community and its economy.

In short, the necessity of solving how to protect our water resources and how best to ensure that local communities maintain a significant voice in decisions that impact their water supplies continues to be of utmost importance. **TBJ**

NOTES

1. Tex. Const. Article 16, § 59.
2. 369 S.W.3d 814, 831 (Tex. 2012).
3. Hess MJ, *Instream flows—an environmental perspective of Texas laws,* Texas Water Law Institute (2005); see also Act of May 26, 1985, 69th Leg., R.S., ch. 795, §§ 1.047-10.012.
4. Tex. Water Code § 11.0235.
5. Act of May 28, 2007, 80th Leg., R.S., ch. 1430, 2007 Tex. Gen. Laws 5832.
6. *See Course Correction: How Texas Can Unlock the Unrealized Potential of Senate Bill 3 For Achieving Meaningful Environmental Flow Protection, Texas Living Waters Project,* https://texaslivingwaters.org/deeper-dive/course-correction-how-texas-can-unlock-the-unrealized-potential-of-senate-bill-3-for-achieving-meaningful-environmental-flow-protection/.

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