

**TEXAS WATER LAW - CLE INTERNATIONAL
CAN (CHANGES IN) POLICY SAVE US**

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I. INTRODUCTION

The title of this paper summarizes this brief review of fundamental Texas laws/policies related to water that are, in my opinion, in need of modification. There is no doubt that the future of the state depends upon a continued growth in developed water supplies for a growing population. Current laws and policies, often established over a century ago, are in need of revision or modification in light of the modern reality. This includes a need to re-examine our policies that seem to be based on the expectation that water is abundant, readily available and inexpensive. What follows are short summaries of areas of the laws/policies which should be examined for modernization. I recognize that changing these policies is not easily accomplished and would necessarily require elaborate, detailed analysis and revision to existing law. Changes as sweeping as those suggested would likely take years to implement. These are the main trunks of policy trees that are not complete until branches and leaves are added. They are meant to provoke thought and debate.

II. SURFACE WATER

1. First in Time, First in Right

This principal is embedded in state law in most states west of the Mississippi and served a distinct policy purpose when adopted over a century ago. The policy encouraged the use and development of the states' surface waters for economic development and activity. The policy was designed to protect those investments made in reliance on surface water with a priority system based upon date of issuance. Despite being the law for more than a century the law had never been, except in limited circumstances, applied in Texas to address actual shortages in Texas rivers. That changed with the drought of 2011, resulting in priority calls on a number of major rivers in the state. The state originally tried to exempt electric power producers and municipal users from these curtailments and the courts rejected this effort, relying on the first in time principle. As a result, importance of use, economic benefit of use and adverse impacts associated with suspension of use played no role in the curtailments needed to accomplish ensuring senior water rights were met. Future curtailments could result in catastrophic economic dislocation and threaten economic development in the state. Somehow, "value" or importance of the use of surface water must be factored into measures adopted to address shortage. This element of surface water law deserves re-examination. I believe any solution must compensate less valued senior uses if their rights are curtailed or adversely affected, a cost that should be imposed on higher valued users with less senior rights.

2. Use It or Lose It

While rarely invoked, Texas law provides for the cancellation of all or a portion of a water right if it is continuously not used for a period of 10 years. This policy was adopted at a time when it was important to ensure that those seeking permission to use state water actually had a demonstrable use requiring the amount of water sought. While maintaining the policy of

cancellation for continuous non-use of the entire permit, the state should modify this policy to permit continuous non-use accomplished by the water right holder through implementation of water conservation strategies or changes in method of use. Throughout the Western United States, including Texas, having an obligation to use the water often results in their being absolutely no incentive to conserve. Allowing owners to market “conserved” water would incentivize investment in conservation and move water from lesser to higher value uses.

To make this investment in conservation, rights no longer needed should be transferable in a market. Cities would readily invest in agricultural conservation if the water could be used by their citizens. Industry also could enter this market.

3. State Water Should Not Be Virtually Free

While the state levies a very small fee for the administration of surface water permits recognized by the state, the user does not pay for the value of the state water appropriated. This not only encourages excessive use, it fails to provide any incentive to water rights holders to reduce consumption or implement conservation, which costs much more. A system that charged a value price for water actually used (and very little for water actually saved or conserved) would make a material difference in water used, particularly during times of shortage. Agricultural users, as is traditional, would pay a much smaller unit cost. Municipal and industrial users would pay the majority. This money could be a perpetual money source for state funding of water development projects.

4. Remove Impediments to Marketability of Surface Rights

Surface water rights in Texas are virtually unmarketable. Changing the location or purpose of use, even if the diversion point remains the same, triggers the opportunity for a protracted administrative process which, if protested, is uncertain at best and inevitably quite expensive. The state should seriously examine changes in policy which will stimulate a market for transfer of existing water rights of low value use to much higher value uses with minimal regulatory impediments.

5. Establish a Policy of Authorizing Diversion of Flood Waters for Storage as Groundwater

Current state policy requires a demonstration that, generally, the water will be available at least some portion of the time. Recharge enhancement during above average flows of unappropriated water should be easily obtainable, without a contested case hearing. Recharge rehabilitation and enhancement should be pursued and implemented as expeditiously as possible. ASR has shown the value of below ground storage. Let’s improve aquifer storage more naturally and use water that is generally not helpful to the environment or the state. The realistic amounts that could be so stored would not materially affect flows or discharges to the gulf and could substantially replenish groundwater supplies.

III. GROUNDWATER

1. Mandate New Management Goals

Current groundwater district planning allows groundwater districts to set “desired future conditions” for their aquifers 50 years from the planning date. This goal is inherently biased toward limiting increasing production. Most groundwater conservation districts have set desired future conditions to limit groundwater production, particularly large-scale development of groundwater resources. The state has massively abundant groundwater resources in the eastern part of the state. These can be developed and managed to provide centuries of water supply to the citizens of Texas without harming the resource or displacing existing use. Management goals should be established based upon maximum sustainable production with minimal adverse impacts. (See No. 9 below.)

2. Historic Use Should Only Be Protected for the Length of the Investment-Backed Expectation (Except in Certain Circumstances)

All historical use was undertaken with zero protection of the investment made in terms of regulatory oversight. If neighbors used it such that your use was foreclosed, you had not remedy. There was no protection. Groundwater district law has completely reversed this policy. Now, the goal of management in most groundwater conservation districts is the protection of that historic use from new users (who have conserved the water). This use was undertaken and the investments made with no protection of the investment. In many instances, the amount of land (and water) actually owned was small. A one-acre tract could support a massive well. While protection of these users has merits and is consistent with court precedent in takings claims, it should not be the principal goal of long-term management of the resource. A far more equitable approach, and certainly one more consistent with the actual ownership of the groundwater, would grandfather these historic uses until the investment initially made has been recovered. Thereafter, all use would be regulated consistently.

3. Utility Service Area Should Equal Acreage Authorization

Current law allows a groundwater conservation district to consider the service area of a utility in determining the area from which the water will be withdrawn. State law should be amended to require groundwater conservation districts to consider a service area as the equivalent of owned groundwater for groundwater-based utilities and groundwater conservation districts should be authorized to prohibit new domestic wells on properties within the service area of a utility.

4. Mitigation

One of the fundamental functions of a groundwater conservation district in the future should be authorization to charge a mitigation fee district-wide for all users that can be used by the district to address impacts of existing groundwater production. All users would then be invested in both conservation and reduction of impacts caused by their production. The primary focus of GCDs should not be limiting production; it should be addressing the impacts of increased production.

5. Regulation Should Be by Aquifer, Not by Groundwater District Boundary

Aquifers should be managed aquifer-wide, not based upon geographic boundaries bearing no relationship whatsoever to the groundwater resource. Total authorized production of aquifers should be established by the state (Texas Commission on Environmental Quality or Texas Water Development Board) and allocated within groundwater conservation districts. White areas of the state should be managed by the state.

6. Requirement for Export Permit Should Be Eliminated

Current law allows for groundwater districts to require a separate permit if the intended use requires the export of the groundwater from the groundwater district.

Requiring an additional permit for the export of water unduly increases the administrative burden and establishes additional criteria which must be met before the export can be authorized. This substantially curtails movement of groundwater and bears no relation to actual impacts to the aquifer. The aquifer will respond the same whether the water is used locally or remotely. No reason for the distinction exists in connection with groundwater management. It should be eliminated.

IV. WATER PRICING

1. Retail Water Rates Should Reflect Water Value

Current law requires that water utility rates be based on cost of service with no consideration given to the “value” of the water itself. Water utility rates should be authorized which reflect the value of the water supplied in addition to its initial cost of development and the cost of service. This would promote conservation and substantially reduce discretionary use which does not provide an economic return (landscape watering). While utilities currently employ inverted block rates to disincentivize excessive use, these methodologies should be substantially strengthened, making the cost of discretionary use, particularly in times of shortage, extremely expensive.

2. Conservation Incentive

All utilities should be required to structure their rates to provide meaningful conservation incentives which reward customers for conservation over and above baseline use. By doing so, utilities would be sending a price signal that conservation has value which would undoubtedly encourage reduction in water use. In short, inverted block rates should provide serious disincentives for discretionary water use. Landscape watering should be expensive. Until prices are set at levels that make conservation cost effective, conservation will be discretionary.