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There's No Accounting for Water – Water Accounting Plans in Texas

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Introduction

Various types of accounting requirements have been included in Texas' water rights for many years. However, there was little consistency in the types of accounting required or how that accounting was reflected in the water right. In recent years, the Texas Commission on Environmental Quality (TCEQ) has been requiring more consistent accounting requirements for some types of applications. Rather than including every complex detail of every calculation in a permit condition, TCEQ requires an applicant to develop an accounting plan, reviews the accounting plan, and includes a requirement to maintain the accounting plan in the water right. Accounting plans are spreadsheets that provide detailed information, often on a daily basis, about the operation of a water right. The plans can document whether operations are in compliance with the underlying permit and can aid in water right enforcement. This discussion of accounting plans and their use in Texas water rights builds on and adds to a previous paper by the authors and Dr. Andres Salazar¹. Some sections of this paper use material from that previous paper.

Texas Water Rights

Since accounting plans are a tool in the operation and enforcement of Texas water rights, it is necessary to have a basic understanding of how water rights work in order to understand the use of accounting plans. State water is defined in Texas Water Code (TWC) § 11.023(a) as:

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Under TWC § 11.121, except for appropriations which are exempt from permitting, no person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the TCEQ to make

the appropriation. In addition to overseeing the permitting process, the TCEQ is also responsible for enforcing the proper operation of water rights.

In Texas, as in many western states, the use of surface water is subject to the prior appropriation doctrine. The prior appropriation doctrine determines who is allowed to use the limited supplies available in dry times, when there is not enough water for all water right holders to take all they need. To put a complex issue in simple terms, the prior appropriation doctrine is based on the principle that “first in time is first in right.” This means that between appropriators, the oldest or most senior water right gets the first chance to use water in preference to newer or more junior water rights. If water is still available after the most senior water right is fully satisfied (either by using all the water they are entitled to use or by using all the water that they need), the next senior right is allowed to use the remaining water, and so in order of priority through all water rights in a basin. In a semi-arid area like Texas, all water right holders generally can get all the water that they need in wet times. During dry periods, it may be necessary to restrict use by junior water rights so that senior rights can use the limited supplies available.

The seniority of a water right is indicated by its priority date. The priority date is generally the date on which an application for a water right is filed with TCEQ. (The application is considered to be filed when it is “administratively complete,” which means that TCEQ has all the information needed to process the application. This may be later than the date that the application is first submitted to TCEQ). Amendments to existing water rights often request additional authorizations that are given their own priority date, more junior than that of the original permit. As a result, many major water rights have multiple priority dates, associated with different authorizations.

Brief History of Accounting Plans

The use of more modern accounting plans for water rights is a relatively recent development in Texas water law. Historically, water right holders have been required to report

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