Whiskey’s for Drinking; Water’s For Fighting: Environmental Flows Enter the Fray

The state of Texas is experiencing steady growth, and with that growth comes pressure on its most precious natural resource, water. As economic growth and development demand more surface water (water in bays, lakes, streams, rivers, etc.), concern has arisen regarding whether there will be enough water for “environmental flows.” Environmental flows include instream use—the naturally occurring flow of water—to maintain healthy aquatic ecosystems along rivers and inflows of fresh water to bays and estuaries for wildlife, recreation, and fishing (commercial and recreational). In Texas, the state holds the surface waters in trust for the public, and to remove or appropriate such water, one must apply for a permit from the Texas Commission on Environmental Quality (the Commission). An applicant must specify the planned “beneficial use” for the water. The Texas Water Code provides a non-exhaustive list of beneficial uses, including domestic and municipal, agricultural, recreation and pleasure, public parks, and game preserves. The Commission’s regulations define “beneficial use” to include instream uses or freshwater inflows to bays and estuaries.

Several environmental groups concerned about potentially inadequate environmental flows applied for instream use permits. Despite its own regulations the Commission decided that it does not have authority to grant permits for this purpose. In response to these applications and the Commission’s decision, the Texas legislature passed Senate Bill 1639, amending the Texas Water Code to place a two-year moratorium on granting permits for environmental flows. The law also establishes a commission to study the policy implications of and evaluate the legislative
options for balancing the demands of a growing population and with the needs of water-based ecosystems long-cherished as a part of Texas’ natural resource heritage.

My long-range goal is to inform the debate about environmental flows and the potential for evolving water rights, recognizing the interplay of other legal regimes such as the Endangered Species Act, a federal law bearing on this Texas problem (although other states share this dilemma). The objective of this proposal is to analyze existing Texas law, notwithstanding the moratorium, to determine whether it authorizes appropriation of water for environmental flows and to make policy recommendations for how best to resolve the competing demands for water. The central hypothesis of this proposed research is that the pre-existing scheme does authorize the Commission to grant permits for environmental purposes, while acknowledging that the current law may not be the best way to resolve this conflict. The rationale underlying this project is that the results of this research will translate into wiser use of water resources in the state in a manner that more accurately reflects the public interest in this unique natural resource.

I expect to test my central hypothesis and to achieve the objective of this proposal by pursuing the following specific aims.

1. Investigate the experiences of states with similar water laws and competing demands for water.
2. Clarify the existing law on water rights in Texas and compare it to that of the other states researched in Aim Number 1.
3. Evaluate the potential need for legislation and draft a proposal, as appropriate.
4. Generate a scholarly treatment of my results and publish it in appropriate places, including scholarly law journal and one or more targeted publications.
The proposed research is innovative because it is an exploration of the evolving concept of “beneficial use” in the context of the public’s heightened awareness of environmental issues. My expectations are that the results of this research will bring a scholarly approach to the debate, informing legal and policy-making decisions. The results of this research will underscore the role of the University of Houston as a leading urban, research institution. And, it will increase public awareness of methods to resolve clashes among the economy, the environment, tourism, recreation, and the natural beauty of Texas’ unique water-based ecosystems. Moreover, the research will draw attention to the assemblage of environmental law scholars at the University, contributing to the welfare of the state.