

# LCRA has long said it is obligated to give people water, but is it?

## River authority and its critics wrangle over whether it should exercise land use authority

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For decades, the Lower Colorado River Authority has insisted that it is obliged to sell its water to all comers as long as the supply in the river and the Highland Lakes holds out.

"If the water's available and we refused to provide it, I think we'd be derelict in our duties," L.C. Meyer told the American-Statesman in 1981, when he was assistant general counsel at the LCRA.

"We have a legal obligation to provide water on an indiscriminate basis," Tom Mason said when he became general manager of the LCRA in November.

But does it? The question is fundamental to the issue of growth in Central Texas, where it will go and how - or whether - it will be managed.

It turns out that the answer depends on what kind of water the LCRA is selling. Traditionally, the vast majority of its water is sold "raw" - untreated - and in large quantities to cities such as Austin, developers, industrial plants and farmers.

Since the 1990s, the LCRA has also treated and sold water on a retail basis to subdivisions, country clubs and the like, delivered by water lines from the river authority's treatment facilities, now scattered over 11 counties. Because some feed suburban sprawl, these systems are the LCRA's most controversial water enterprises.

They also might be the least defensible. Although the river authority's obligation to make raw water available when possible has historical and legal precedent, less basis exists for delivery of treated water.

Austin water lawyer Mike Booth says there's no case law on whether the LCRA is obligated to build the infrastructure to treat and transport water to serve developments in its basin.

"If LCRA has this water, can you compel them to build a treatment plant?" he asked. "I would probably argue that you can't. But if they had a treatment plant, (the courts) could require them to make the water available."

Regardless of what the courts say, the state could step in. "The Legislature would feel that if this area needed water and the LCRA could afford it, they would compel them to do so," Booth said.

**'May' vs. 'must'**

Some question whether the LCRA is legally bound to sell any water to anybody. "I don't believe any river authority is legally obligated to enter in any water supply contract with any entity, public or private," said Ron Kaiser, a Texas A&M University professor and author of the "Handbook of Texas Water Law."

The specific language in the LCRA's enabling legislation - the use of "may" rather than "must" - appears to give the river authority some choice in the matter. According to the Texas water code, "the authority may control, store, and preserve" Colorado River water, and it "may use, distribute, and sell those waters."

Both Booth and Mason point to another section of the code that entitles "any person" who is denied water from a supply "not contracted to others" to complain to the Texas Commission on Environmental Quality, which could order that the water be provided.

Kaiser says river water sales are usually motivated by economics.

"Most river authorities are in the business of being water marketers, as a wholesaler of water," Kaiser said. "They make money off of it. If they just sit there and hold that underlying water right, they're not making any income off that."

Though the LCRA's retail water and wastewater utility brings in \$44 million annually, it operates in the red. "Water is not a commodity," Mason said. "We're not in the water business to make money."

But the pursuit of that business - following development whenever and wherever it leads, instead of using its power over the tap to nudge where it should go - riles those who seek more land-use controls in Hill Country watersheds.

"You want them to be able to plan growth around where they put their water lines, not just put up water lines wherever there's growth," said Rick Lowerre, an Austin environmental lawyer. "That means they can't plan for growth, and, worse than that, they can trump cities and others who want to plan."

### **Little enforcement**

Environmental groups such as the Save Our Springs Alliance have long contended that the river authority's decisions to sell treated water west of Austin have led to profound shifts in land use in the areas of the Hill Country nearest Austin, from rural to suburban. The water enables not only new subdivisions, but also accompanying roads, businesses and parking lots.

Development has, in turn, jeopardized the Barton Springs portion of the Edwards Aquifer because litter, car oil and other forms of pollution are swept into creeks and eventually underground by rain.

The river authority does require its water customers to meet certain environmental standards, like setbacks from creeks and limits on impervious cover such as roads and parking lots, that are more stringent than anything in the rural areas in which it operates.

Though developers have to submit a conservation plan as well as a plan for cutting water consumption in times of drought, the LCRA has little ability to monitor adherence to the conservation plan. Despite explosive growth in the region, the agency is budgeting less for

permitting and inspections (\$481,000) than it did five years ago. (The total spent on environmental protection and water quality management has increased from \$1.9 million to \$2.63 million during the same period.)

Time and again, the Legislature has refused to give counties the power to zone, assess impact fees and make other land-use decisions. The LCRA can and does charge developers impact fees - they are factored into the cost of homes - but others would like the river authority to wield more muscle.

"LCRA could impose standards that would not totally block growth, but direct growth," Kaiser said.

The river authority doesn't see it that way.

"No board in our 74-year history has been interested in taking up land-use authority," LCRA spokesman Robert Cullick said. "That doesn't pre-empt them from doing it in the next session."

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