

### Surface Water Rights

#### The Issue

Unlike groundwater, which is owned by the landowner as a real property right, surface water is legally owned by the state in Texas. Texas owns the corpus of the surface water but allocates this water through the issuance of rights for beneficial use of the water. Most Texas surface water rights are held in perpetuity and can only be cancelled for non-use over an extended period of time (TWC 11.0235(a)). Such usufructuary rights are recognized as private rights and entitle the appropriator of a given amount of water from a particular diversion point for a particular beneficial use enumerated in law. Such rights can be bought and sold with minimal state review if the purpose of use is not changed in the transaction.

Like most western states, Texas has adopted the prior appropriation system to allocate quantities of surface water for specific beneficial uses. Texas' prior appropriation system operates under the principle of "first in time, first in right," meaning that older or "senior" rights are given precedence over newer or "junior" rights in times of water shortage. An exception to the prior appropriation system is the landowner's qualified riparian rights for domestic and livestock use.

Surface water is the most significant source for the water supply strategies identified in the State Water Plan (SWP). It is the source of approximately 3.8 million acre-feet of water needed by water user groups, accounting for 45% of the total recommended strategy supplies in 2070 in the 2017 SWP draft. However, state and federal regulatory impediments, and legal questions about water right amendments, interbasin transfers, indirect reuse authorizations, environmental flows, and federal endangered species protection now delay and could preclude key surface water projects.

In 2007, SB 3 created a multi-layered process to protect environmental flows leading to the Texas Commission on Environmental Quality's (TCEQ) adoption of Environmental Flow Standards for instream flows (rivers) and freshwater inflows (bays and estuaries). The law stipulated a bottom-up process with five layers: (1) Bay/Basin Stakeholder Groups; (2) Bay/Basin Science Teams for each river basin; (3) an Environmental Flow Advisory Group appointed by the governor; (4) a statewide Science Advisory Group; and finally (5) TCEQ adoption of Environmental Flow standards in rule.

Some models used to estimate needed environmental flows would require greater volumes than anticipated in previous SWPs and existing law. For example, a key strategy for the Dallas-Fort Worth region involves a transfer of 600,000 acre-feet of water from Toledo Bend Reservoir on the Sabine River. The science team in the Sabine Bay/Basin group recommends environmental flow requirements, which would decrease water available for this transfer, undermining this source of new supply for DFW. Science team reports have prompted federal authorities to interfere with

Texas water decisions. The 2017 update is the first SWP to include environmental flow standards in water availability models used for evaluating water management strategy supplies.

Environmental and human needs can both be met but should be legally integrated within the same process. In a state with widely varying rainfall and thus flows in our rivers, streams, and estuaries, environmental flows should be estimated to protect critical flows under drought conditions.

Restrictions on interbasin transfers also pose obstacles to the completion of water supply projects. Interbasin transfers are a key strategy for certain regions of the state, particularly in the area surrounding Dallas-Fort Worth. SB 1, however, added a new section to the Texas Water Code providing that "any proposed transfer of all or a portion of a water right [in an interbasin transfer] is junior in priority to water rights granted before the time application for transfer is accepted for filing." The junior rights provision thus creates a situation where the act of transferring a water right from a seller to a buyer erases much of the value of that right. This can be a major disincentive to interbasin transfers. HB 1153 in the 84th Legislature called for the much-needed repeal of the junior rights provision but was not passed out of committee.

#### The Facts

- Texas surface water resources: 191,000 river miles running through 23 river basins, 9 major and 20 minor aquifers, 7 major and 5 minor bays and estuaries, and over 3,300 miles of shoreline.
- Most of the state's existing surface water supply is stored in reservoirs.
- Surface water strategies in the 2017 SWP need to provide 4 million acre-feet per year in additional water supplies to meet Texas' demand for water in 2070.

#### Recommendations

- Legally integrate the Regional Water Planning process with the now separate Bay/ Basin Environmental Flow process. Assert the priority of human need for water.
- Establish policy objectives for environmental flow regimes to protect critical flows during drought and minimum standards for scientific rigor.
- Clarify the "Four Corners Provision" (TWC 11.122(b)) that a water right amendment for only a change or addition of use is not subject to administrative hearing.
- Simplify the requirements for indirect re-use of water in TWC 11.042 and 11.046.
- Articulate policy reinforcing the value of water marketing for efficient and timely implementation of water supply strategies in the SWP.
- Repeal the junior rights provision relating to interbasin transfers.

## Resources

[2012 State Water Plan](#), Texas Water Development Board (Jan. 2012).

[Rights to Use Surface Water in Texas](#), Texas Commission on Environmental Quality, GI-228.

[Solving the Texas Water Puzzle: Market Based Allocation of Water](#) by Ronald A. Kaiser, Texas Public Policy Foundation (March 2005).

[Draft 2017 State Water Plan](#), Texas Water Development Board (March 2016).

