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## WATER RIGHTS

### THE ISSUE

#### Surface Water Rights

Texas law has long recognized private property interests in surface water and groundwater. Like most western states, Texas has adopted the prior appropriation system to allocate quantities of surface water through “use” rights. An exception to this legal system is landowners’ riparian rights for domestic and livestock use. Under a categorically different legal regime, Texas case law repeatedly upholds the landowner’s property interest in groundwater beneath the surface and the right to “capture” the privately owned groundwater.

For surface water, Texas law declares that the state owns the corpus of the surface water but grants private rights to use specific volumes of water for statutorily enumerated beneficial uses (Texas Water Code (TWC 11.0235(a))). The Texas Commission on Environmental Quality (TCEQ) issues and administers surface water rights. Each water right is assigned a priority date. Earlier priority dates are legally entitled to appropriate water before rights with later priority dates in times of water shortage. This is the “first in time is first in right” principle of the prior appropriation system. The priority date of a water right is the holder’s most valuable property interest in the right. Infringement of a senior right is protected by TCEQ enforcement authority.

As a “use” right, a surface water right is quite different than a private property right conferred by fee title ownership of land. The water right is a defeasible interest. The state can cancel the right if wasted, abandoned or not used under the stipulated beneficial use. Conservation of water is not a form of non-use. A surface water right, however, confers key property interests. A typical surface water right is held in perpetuity, unless specified as a seasonal or term right. Most importantly, surface water rights are clearly fungible and, thus, can be sold with minimal state review.

Since the passage of the landmark legislation SB 1 in 1997, river authorities, municipalities, and water utilities have grappled with plans to increase available water supply, urgently needed by our growing population. New water right appropriations, amendments, and reuse authorizations required by key projects are indefinitely delayed, if not precluded, because of protracted legal disputes about fundamental provisions of the Texas Water Code. Legislative clarification of key sections of the Texas Water Code regarding water right amendments, reuse, and environmental flows are needed to implement projects to increase water supply.

### THE FACTS

- ★ Texas has abundant water resources: 191,000 river miles running through 23 major river basins, nine major and 20 minor aquifers, seven major and four minor bays and estuaries, as well as 2,125 miles of shoreline along the Gulf of Mexico.
- ★ Active water markets depend upon clearly defined property interests in water, efficient regulatory process, and consistent agency decision.

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- ★ A simple application for an amendment to add industrial use to a municipal-use water right has been pending for eight years. Even after a Texas Supreme Court ruling, the legal parameters for this simple amendment are unclear.
- ★ New water right applications for pure instream use, i.e., for the right in perpetuity to leave the water in the stream and not use it, still pend in Texas courts. Water at issue in these permit applications approximates all the remaining unappropriated surface water in the state—millions of acre-feet.

## RECOMMENDATIONS

- ★ Clarify the “Four Corners Provision” (TWC 11.122(b)) that a water right amendment application solely for change or addition of a beneficial use is not subject to an administrative hearing.
- ★ Clarify the requirements for a bed-and-banks authorization in TWC 11.042 and 11.046, to facilitate indirect reuse of water, potentially the most cost-effective water supply strategy.
- ★ Further clarify in 11.042 that authorization for indirect use of “privately owned groundwater” is not subject to the same requirements as indirect reuse of surface water.
- ★ Clarify that instream use is not an expressly authorized purpose of appropriation (i.e., beneficial use) in a new water right application and that TCEQ cannot issue a new water right for pure instream use.
- ★ Enunciate policies that reinforce the value of water marketing for efficient, timely implementation of water-supply strategies in the State Water Plan.

## RESOURCES

- *Rights to Use Surface Water in Texas*, Texas Commission on Environmental Quality, GI-228.
- *Science Advisory Committee Report on Water for Environmental Flows* (Oct. 26, 2004) prepared for Study Commission on Water for Environmental Flows.

