



# Interbasin Transfers: A Water Solution for Texas

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## Findings

- Interbasin transfers are one of the key strategies to ensure that Texas can meet future water demand.
- Texas surface water rights operate under the “prior appropriation doctrine” where older water rights are more “senior” and hence less likely to be curtailed in a time of shortage.
- Since 1997, Texas’ so-called “junior rights” provision strips water rights of their seniority if they are involved in an interbasin transfer.
- Since 1997, almost no new interbasin transfers subject to the junior rights provision have been permitted.
- The Texas Legislature should repeal the junior water rights provision.

## Introduction

Interbasin transfers\* of surface water have a long history in Texas. As early as 1900, the state approved a transfer of 168,000 acre feet of water from the Colorado River Basin for use in the Lavaca River Basin.<sup>1</sup> There are currently over 150 interbasin transfers active in Texas, and some areas, such as Dallas, receive a majority of their water through interbasin transfers.<sup>2</sup> Fifteen of the 44 recommended ground and surface water transfer projects listed in the 2012 State Water Plan involve interbasin transfers.<sup>3</sup>

The appeal of interbasin transfers is easy to understand. If one region of the state has an abundance of water while another faces a potential water shortage, an obvious solution is for the area in shortage to purchase water from the area with a surplus. This “voluntary redistribution” of water is contemplated in state law as a major strategy to ensure Texas can meet its growing water needs.<sup>4</sup>

Because those seeking an interbasin transfer must purchase a water right from holders in the basin of origin, interbasin transfers can benefit all parties, not just the receiving basin. Indeed, an analysis commissioned by the Texas Water Development Board by R.W. Beck found that a selected group of interbasin transfers had significant economic benefits for the basin of origin, ranging from \$68 billion to \$1.3 trillion.<sup>5</sup>

Nevertheless, interbasin transfers have often proven to be controversial, raising concerns

about whether sales of water out of a particular basin could leave that basin without sufficient water to meet its own future needs, or current economic opportunities. Interbasin transfers may also raise environmental concerns, due to the alteration of streamflows and the possible introduction of non-native aquatic organisms into a basin, though these concerns are usually exaggerated and can easily be resolved by treatment before transfer.

## Historical Protection for the Basin of Origin

Interbasin transfers have long been subject to special requirements under Texas law to ensure that the interests of the basin of origin are protected. In *San Antonio v. Texas Water Commission*,<sup>6</sup> the Texas Supreme Court held that the Texas Commission on Environmental Quality (TCEQ) was prohibited from granting a permit for an interbasin transfer where doing so would “prejudice any person or entity.” To determine whether a particular interbasin transfer would result in prejudice, the court held that the TCEQ should undertake “a balancing process” under which a permit for an interbasin transfer would be denied “if the benefits from the diversion were outweighed by detriments to the originating basin.”<sup>7</sup>

## SB 1 and the “Junior Rights” Provision

Beginning in 1997, however, Texas regulations governing interbasin transfers underwent a fundamental change. As part of the omnibus water bill SB 1, numerous new restrictions were placed on interbasin transfers.

\* Texas law defines an interbasin transfer as the taking or diverting of state water from a river basin and transferring such water to any other river basin. Texas Water Code 11.085(a). As such, state regulations governing interbasin transfers do not apply to transfers of groundwater, which constitute a different property interest and are regulated under a different set of institutions.

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Under the new law, permit applications were required to include substantial amounts of additional information.<sup>8</sup> SB 1 also required two hearings before a permit could be granted (one in the basin of origin and one in the receiving basin),<sup>9</sup> and mandated that the TCEQ request review and comment on the permit application from every county judge of every county located partially or wholly in the basin of origin, each mayor of a city with a population of 1,000 or more located in whole or in part in the basin of origin, all groundwater conservation districts located in whole or in part in the basin of origin, and each state legislator in both basins.<sup>10</sup>

But, the potentially most significant burden imposed on interbasin transfers was the introduction of the so-called “junior rights” provision. While the corpus of surface water in Texas is legally owned by the state, the Texas Water Code authorizes the TCEQ to issue rights to use water held in perpetuity. Such usufructuary rights are recognized as private rights and entitle the owner to a given amount of water from a particular diversion point for a particular use. Such surface water rights can be bought and sold with little state involvement if the purpose of use, point of diversion, and rate of diversion are not changed in the transaction.

Typically, 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 cases of conflict.<sup>11</sup> For this reason, senior water rights tend to be more valuable than more junior rights, and fetch a higher price on the market. Some version of the prior appropriation doctrine has been used by Texas and the western states for more than a century.

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 inter-basin transfer] is junior in priority to water rights granted before the time application for transfer is accepted for filing.”<sup>12</sup>

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. As a matter of economic logic, a sale of water will only take place if the buyer values the water in question more highly than the seller. The junior rights provision, however, creates a gap between how valuable the water is to a potential buyer and to a potential seller. This has the potential to be a major disincentive to interbasin transfers.

### **The Junior Rights Provision Impedes Some Water Transfers, but Encourages Others**

While the junior rights provision applies to interbasin transfers of surface water generally, certain types of interbasin transfers are exempt from the provisions of Texas Water Code 11.085(v). Interbasin transfers of groundwater are likewise unaffected by the junior rights provision.\* To the extent the junior rights provision was having a major effect, we would expect not only to find a decrease in non-exempt interbasin transfers, but also a corresponding increase in exempt surface and groundwater interbasin transfers, as projects look for alternate sources of water supply. Thus, one way to quantify the effect of the junior rights provision would be to compare the numbers of these different types of transfers before and after SB 1 went into effect.

Precisely this analysis was conducted by Todd Votteler, Kathy Alexander, and Joe Moore in a 2006 issue of the *State Bar of Texas Environmental Law Journal*. After SB 1 went into effect, the number of new non-exempt interbasin transfers approved by the TCEQ declined dramatically. At the same time, the number of exempt interbasin transfers of surface water and proposed interbasin transfers of groundwater both increased sharply after 1997.<sup>13</sup> This suggests that the junior rights provision is having a significant impact on the number and character of water transfers in the state.

\* While not subject to TWC 11.085, groundwater transfers are subject to regulation by Groundwater Conservation Districts, and may require permits for export.

A similar conclusion can be drawn from the Beck Report, commissioned by the Texas Water Development Board (TWDB) to study the effect of the junior rights provision on interbasin transfers. As the Beck Report noted, it “was unable to find transactions” to which the junior rights provision applied because there were “only limited transactions in which the priority date of the water right changed, and, in the cases where these transactions were discovered, the change in the priority date did not have an effect as the water rights senior to the transferred water right were already owned by the same entity.”<sup>14</sup>

Again, this is precisely what one would expect were the junior rights provision proving to be a substantial barrier to new interbasin transfers. As noted above, the junior rights provision means that water subject to an interbasin transfer loses part of its value when it is transferred from buyer to seller. The more value that is lost through the transfer, the more likely it is that a buyer and seller will not be able to agree on a price for the water. However, the loss of a senior priority date is not significant in the unusual situation where the buyer in question also owns all water rights with priority dates between the original and new priority date for the transferred water. For example, if an interbasin transfer results in a priority date changing from 1990 to 2014, but all the competing water rights with priority dates between 1990–2014 are already owned by the buyer, then changing the priority date for the water right from 1990 to 2014 will not diminish the value of that water for that buyer.

Thus, the fact that interbasin transfers are rare suggests that the junior rights provision is posing a substantial impediment to new transfers. And this is borne out by the fact that the transfers that do occur have tended to involve an unusual situation where the buyer also owns more senior water rights.

### Interbasin Transfers and the State Water Plan

Over the long term, the junior rights provision and other restrictions on interbasin transfers could prove to be a major obstacle to the state meeting its growing water needs. SB 1 requires Texas to develop long-term contingency plans to ensure the state will have enough water to meet its needs. Under this process, 16 Regional Water Planning Groups develop comprehensive plans which the TWDB compiles into the official State Water Plan.

For many regions, interbasin transfers are a key strategy. The Beck Report found that “there is a heavy, if not sole, reliance on interbasin transfers to meet the projected needs of the regional water planning groups.”<sup>15</sup> But it remains unclear whether many of these projects will be able to move forward under current restrictions.

Several regional water planning groups have noted the disincentive effect of the junior rights provision and have called for it to be modified or repealed. Regions C and H, for example, call for the repeal of the junior rights provision in their most recent water plans, stating that “[t]he effect of [the 1997] changes is to make obtaining a permit for interbasin transfer significantly more difficult than it was under prior law and thus to discourage the use of interbasin transfers for water supply.”<sup>16</sup> Region N likewise urged repeal of the junior rights provision in its most recent water plan, and Region I recommended an additional exemption for contracts reserving sufficient supply to meet 125 percent of demand in the basin of origin.<sup>17</sup> By contrast, Region F has stated that the junior rights provision should not be repealed unless and until proper protections for the basin of origin are included in state law.<sup>18</sup>

### Recommendation and Conclusion

The Texas Legislature should repeal the junior rights provision.

Texas needs to ensure that basins of origin are adequately protected against any negative effects of interbasin transfers. The current system, however, does not do that. Multiple exemptions mean that simply blocking interbasin transfers could potentially result in water leaving a basin through other methods. Additionally, burdensome restrictions on the permitting process, including the junior rights provision, discourage interbasin transfers regardless of any harm to the basin of origin.

To the extent that interbasin transfers do involve harms to those in the basin of origin, these are better dealt with directly, rather than by throwing up barriers to all transfers. Texas law governing interbasin transfers should be reformed, and the process for permitting interbasin transfers overhauled to ensure both that valuable transfers can go through and that the rights of all parties are respected. ★

## Endnotes

- <sup>1</sup> Todd Votteler, Kathy Alexander & Joe Moore, "The Evolution of Surface Water Interbasin Transfer Policy in Texas: Viable Options for Future Water, Water Grabs, or Just Pipe Dreams?" 36 *St. B. Tex. Env'tl. L. J.* 125 (2006).
- <sup>2</sup> Todd H. Votteler, *A Relationship Between Restrictions on Interbasin Transfers of Surface Water and the Proliferation of Large Groundwater Supply Projects?*, presentation at Texas Groundwater 2004: Towards Sustainability (18 Nov. 2004).
- <sup>3</sup> 2012 Water for Texas, Texas Water Development Board (Jan. 2012).
- <sup>4</sup> Texas Water Code 16.051(d).
- <sup>5</sup> *Socioeconomic Analysis of Selected Interbasin Transfers in Texas* ("Beck Report"), R.W. Beck, Inc., 2-4 (Oct. 2007).
- <sup>6</sup> 407 S.W.2d 752 (Tex. 1996).
- <sup>7</sup> *Ibid* at 759 (Tex. 1996) (internal quotations and citations omitted).
- <sup>8</sup> Texas Water Code 11.085(k)(2)(C).
- <sup>9</sup> Texas Water Code 11.085(d).
- <sup>10</sup> Texas Water Code 11.085(f).
- <sup>11</sup> Texas Water Code 11.027.
- <sup>12</sup> Texas Water Code 11.085(s).
- <sup>13</sup> Votteler et al, *supra*, note 1, 126, Figure 1.
- <sup>14</sup> Beck Report, 2-5.
- <sup>15</sup> *Ibid* at ES-2.
- <sup>16</sup> 2011 Region C Water Plan, 8.11 Region C Water Planning Group (Oct. 2010); 2011 Regional Water Plan, 1-38, Region H Water Planning Group (Aug. 2010).
- <sup>17</sup> Regional Water Plan, 8.1.2, Coastal Regional Water Planning Area Region N (Sept. 2010); 2011 Update of the Regional Water Plan, ES-18, East Texas Regional Water Planning Area (Sept. 2010).
- <sup>18</sup> 2011 Region F Water Plan, 8-9 Region F Water Planning Group (Nov. 2010).

## About the Author



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Prior to joining TPPF, Josiah worked as an Associate for the firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana, specializing in Constitutional Litigation, and clerked for the Honorable Roger Vinson, a federal district court judge in Pensacola, Florida. He has a B.A. in Government and Philosophy from the University of Texas and a J.D. from the Notre Dame Law School.

