



Texas Public Policy Foundation
**LEGISLATOR'S GUIDE
TO THE ISSUES
2021-2022**

Water Rights in Texas

The Issue

Texas has two distinct legal systems governing water: ground-water and surface water. Surface water is owned by the state, which grants water rights to use specific volumes of water for beneficial uses. The [Texas Water Code](#) recognizes surface water rights issued in perpetuity as private rights that can be bought and sold and can only be cancelled for nonuse over an extended period of time.

Texas's 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), accounting for approximately 45% of the 8.9 million acre-feet in recommended strategy supplies up to 2070 in the [2017 SWP](#). 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). 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 to meet environmental and human needs. The 2017 SWP is the first to include environmental flow standards in water availability models used for evaluating water management strategy supplies.

Restrictions on interbasin transfers, particularly in the area surrounding Dallas-Fort Worth, constitute a key hindrance to the completion of water supply projects. SB 1 in the 75th Legislature 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.

In contrast to surface water, landowners in Texas hold a vested private property right in the groundwater beneath their

land. Both the Texas Legislature and courts have consistently reaffirmed this principle. Passed in the 82nd Legislature, SB 332 stated that "a landowner owns the groundwater below the surface of the landowner's land as real property." HB 4112, which passed in the 84th Legislature, strengthened groundwater ownership rights by codifying common law. Still, further work is needed to clarify whether the Texas Water Development Board's (TWDB) statutory authority to approve Desired Future Conditions (DFCs) set by Regional Groundwater Management Areas (GMAs) is consistent with the landowner's right to groundwater in place.

The landowner's property right in groundwater is often confused with the rule of capture. The rule of capture is corollary to the landowner's ownership right; it does not define the groundwater rights but explains the means by which a landowner may exercise the property right. In [Edwards Aquifer Authority v. Day](#), the Supreme Court held that the rule of capture is not inconsistent with ownership of groundwater in place.

Like fee title ownership of land, "absolute" ownership of groundwater is subject to reasonable regulation. Since 1949, local Groundwater Conservation Districts (GCDs) have been the main regulator of groundwater in Texas. In 1995, the powers of GCDs were expanded to include pumping limits on wells and tract size, and in 2001, SB 2 enlarged GCD authority including preservation of historic uses and creation of GMAs based on regionally shared aquifers. In 2005, HB 1763 significantly enlarged the scope of groundwater regulation through provisions about DFCs of an aquifer and Managed Available Groundwater (MAGs) determined and overseen by the TWDB.

This regulatory authority expands the state's role in groundwater regulation and is being used to limit or deny groundwater permits at GCDs. Although GCDs are recognized in law as the state's "[preferred method of groundwater management](#)," the system does not always function optimally. GCDs sometimes lack the resources and scientific expertise to make informed permitting and regulatory decisions. District boundaries are often based more on politics than hydrology, resulting in actions in one GCD that affect landowners outside the district boundaries. GCDs are exempt from many of the conflict of interest rules applicable to other government officials and regulators. In some cases, GCDs have imposed moratoria on groundwater development.

With the *Day* decision, Texas courts have begun to recognize that excessive regulation of groundwater can amount to a taking of property for which compensation is owed under the Texas and U.S. constitutions. Several features of the law governing GCDs make it difficult to mount a successful challenge to burdensome regulation. GCDs are not subject to the record keeping requirements of the state's Administrative Procedures Act, which can complicate judicial review. And if a landowner's challenge to GCD regulation

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fails in court, he must pay the GCD's attorneys' fees in addition to his own.

The 84th Legislature passed HB 200 that allows judicial appeal of DFCs made by GMAs. This legislation helps undo previously legislated water policy that obstructs effective, efficient, and appropriate use of water in Texas. Despite the obstacles presented by current groundwater law, challenges to GCD authority are increasing. One legislative session later, in 2017, SB 1009 passed to limit the list of items a GCD may require in a permit application in addition to what is already required by statute.

The Facts

- Texas surface water resources include 191,000 river miles running through 23 river basins, 9 major and 22 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 nearly 4 million acre-feet per year in additional supplies to meet Texas's demand for water in 2070.
- Texas has abundant groundwater resources: 9 major aquifers and 22 minor aquifers. Total groundwater in Texas aquifers is estimated at 17.1 billion acre-feet, and groundwater supplies were approximately 8.5 million acre-feet in 2010.
- By 2070, water demand in Texas is projected to increase by 17%, while groundwater supplies are expected to decrease by 24% between 2020 and 2070.
- Texas has 97 local groundwater districts covering all or part of 177 counties.

Recommendations

- Legally integrate the Regional Water Planning process with the Bay/Basin Environmental Flow process and 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](#)" that a water right amendment for only a change or addition of use is not subject to administrative hearing.
- Simplify the requirements for indirect reuse 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.
- Remove legal impediments to the private development of new groundwater supplies and to proper functioning of water markets in Texas.
- Review the operations of GCDs and GMAs to see what progress has been made in securing proper groundwater regulation and seek adjustments as needed.
- Reform the rules governing GCD record keeping and conflict of interest to promote greater uniformity of regulation.

Resources

[Rights to Use Surface Water in Texas](#), Texas Commission on Environmental Quality, GI-228 (Accessed July 15, 2020).

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

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

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

[Edwards Aquifer Authority v. Day](#), Tex. 369 S.W.3d 814 (2012).

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