

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

THE ARANSAS PROJECT,
Plaintiff,

v.

BRYAN SHAW, ET AL.,
Defendants.

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CIVIL ACTION NO. 2:10-cv-00075

REPORT OF PLAINTIFF'S EXPERT
LARRY R. SOWARD
JULY 28, 2011



Larry R. Soward

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I. EXECUTIVE SUMMARY

1 I have been asked by Plaintiff in the matter of *The Aransas Project v. Shaw, et al.* to provide
2 testimony about how the State of Texas has regulated surface water rights and uses, taking into
3 account the current laws, regulations, policies and procedures relating to surface water rights and
4 uses. I have been told the Plaintiff primarily seeks a Habitat Conservation Plan (“HCP”) for
5 their principal form of relief. This testimony informs the legal options available to the Texas
6 Commission on Environmental Quality (“TCEQ”) if such relief is ordered by the Court in
7 protecting the Whooping Cranes.

8 I currently anticipate that my testimony will address the major categories of information and
9 opinions stated in the Table of Contents for this report. As discussed below, each of the above-
10 noted categories includes additional information and/or opinions that I will discuss during my
11 testimony.

12 My observations and opinions in this matter are based on my experience as a Commissioner on
13 the TCEQ from October 2003 to August 2009, as well as my experience as the Executive
14 Director, Chief Hearings Examiner/General Counsel and Assistant Chief Hearings
15 Examiner/Hearings Examiner at the Texas Water Commission. Additional information about my
16 qualifications, education, and experience is provided in my *curriculum vitae*, attached as Exhibit
17 LRS-1.

18 I begin by presenting a brief general discussion of Texas laws and regulatory schemes, historical
19 and current, relating to surface water rights and uses. I then discuss the various authorities
20 granted to the TCEQ by current law to manage surface water rights and uses in times of shortage
21 or other emergency, if and how the TCEQ exercises these authorities, and any limitations that
22 may exist to the exercise of these authorities. Finally, I discuss some possible actions the TCEQ
23 might take to effectively manage surface water rights and uses in times of shortage or other
24 emergency, if it were to exercise the power and authority given to it by law, expressed or
25 implied.

26 To the extent allowed, I may supplement this report with additional information and opinions,
27 particularly if additional information should be made available for my review.

28 I have not testified in court in the past four years. I am receiving \$200 per hour for working on
29 preparation for this testimony and for deposition and court time.

II. DISCUSSION

31 **A. A General Discussion of Texas Laws and Regulatory Schemes, Historical and** 32 **Current, Relating to Surface Water Rights and Uses.**

33 The history and complexity of Texas laws relating to surface water rights and uses are reflective
34 of the governmental history of Texas, Texas’s combination of Spanish water law elements with
35 traditional English common law, as well as the legal fragmentation of the hydrologic cycle
36 prescribed by Texas water law. In this latter regard, unlike science where all water is regarded as
37 part of the whole, endless hydrologic cycle, the Texas Legislature and Texas courts have divided

1 water into separate and distinct legal classes, where several classes of underground and surface
2 water are recognized, with different rules of law governing the ownership and use of each class.

3 Generally speaking, groundwater belongs to the owner of the overlying surface who may pump it
4 to the surface from underground for their use.¹ I will not here attempt an overview of
5 groundwater rights in greater detail. However, to be clear, groundwater rights have been
6 regulated in Texas to protect endangered species, such as with respect to the Edwards Aquifer,
7 Comal Springs and San Marcos Springs.

8 Regarding surface water, some landowners have riparian rights, and others have rights that are
9 regulated within the framework of prior appropriation and related doctrines. In what follows, I
10 provide an overview of these rights, recognizing that many additional details exist.

11 **1. Riparian Rights**

12 Surface water rights laws determine who is entitled to use the available water supply, in what
13 quantities, for what purposes, and often when and where the water may be used. Texas is one of
14 several dual-doctrine states that recognize both riparian and prior-appropriation doctrines, which
15 are dissimilar in almost every respect. The judicially-created riparian doctrine, which accords
16 water rights to those who own riparian land (land adjacent to a surface watercourse), was
17 introduced into Texas during the Spanish settlement of the region. These Spanish laws and
18 policies governing colonization and granting of lands and water ownership and uses, were
19 continued essentially unchanged by the Mexican government after 1821 and later by the
20 Republic of Texas until 1840. Extensive tracts of land with appurtenant water rights were
21 granted by these governments in Texas.

22 More comprehensive riparian rights were attached to all lands granted by the Republic and State
23 between 1840 and 1895, an era when vast tracts of Texas land passed from the government into
24 private hands. In 1840, the Congress of the Republic of Texas adopted the common law of
25 England (with some exceptions) and with it acquired the English riparian doctrine, which was
26 somewhat different from the Spanish. However, the basic concept remained that private water
27 rights were tied to the ownership of land bordering a natural river or stream. Riparian
28 landowners had a right to use the water, provided that the use was reasonable in relation to the
29 needs of all other riparian owners, and they retained the right to use water so long as they owned
30 the land adjacent to the water.

31 **2. Prior Appropriation**

32 Under the appropriation doctrine, water rights are not related to land ownership, but instead are
33 acquired by compliance with statutory requirements. The appropriation doctrine has been the
34 fundamental basis for surface water law in Texas since the Irrigation Act of 1889², when the
35 Legislature declared unappropriated surface waters to be the property of the public and said they
36 “may be acquired by appropriation.” Under the appropriation doctrine, an appropriator receives

¹ The law as to the ownership of percolating groundwater in Texas is well settled through the Texas Supreme Court case *Houston & T. C. Ry. v. East*, 98 Tex. 146, 81 SW 279 (1904), where the strict common-law or “English” rule was established such that the owner of the overlying land can pump and use the groundwater with few restrictions, whatever the impact on adjacent landowners or other groundwater users.

² Tex. Gen. Laws 1889, Ch. 88.

1 a vested right to use the appropriated surface water, but the ownership of the corpus remains in
2 the State. Since 1895, land acquired from the state has no longer carried riparian water rights as
3 a matter of course.³ Instead individuals must secure rights to appropriate water from the state
4 through procedures prescribed by statute. However, the Irrigation Act of 1889, and the 1895 Act
5 which succeeded it, preserved the superior position of preexisting riparian rights.

6 **3. Coordinating Riparian and Prior Appropriation Rights Holders**

7 State water agencies and water users had great difficulty in coordinating the diverse
8 Spanish/Mexican and English riparian rights and later appropriation rights, all of which were
9 typically in effect on the same streams. Because permit holders were required to file annual
10 reports, reasonably accurate long-term records of appropriative water use exist. However,
11 unrecorded water-rights claimants (riparians and some unrecorded certified filings) existed in all
12 major river basins, and the extent of their claims and the amount of water they were diverting
13 each year were unknown. This likely large but unquantified water use made coordinated
14 administration and management of the state's surface water resources difficult, if not impossible.

15 Subsequent to the 1895 Act, several unsuccessful legislative attempts were made to eliminate or
16 more accurately define riparian rights. However, as late as 1968, the state's water regulatory
17 agency had no record of the number of riparian water users in any major river basin, the extent of
18 their claims, or the amount of water they were using.

19 **4. Water Rights Adjudication Act 1967**

20 After a massive and prolonged effort to judicially adjudicate surface water rights in the Lower
21 Rio Grande basin,⁴ it was recognized that a purely judicial determination of water rights for the
22 entire state was unworkable. Thus, the Water Rights Adjudication Act⁵ was passed in 1967 to
23 remedy the situation by setting up a complex administrative and judicial adjudication procedure.
24 All rivers in Texas have been adjudicated, even though a small number of claims may still
25 remain on appeal in Texas courts.

26 Under the Act, the riparian rights system was merged into the appropriation system, thus
27 consolidating the allocation of Texas surface water into a unified water permit system. All those
28 claiming to hold a water right, except for domestic and livestock purposes, were required to
29 submit to this adjudication process, which ultimately determined all water rights in a given river
30 basin, and the priority, extent, place and purpose of the water right adjudicated. Claimed water
31 rights that were not successfully pursued through this process were extinguished. Following
32 adjudication, riparian rights and other heretofore unrecorded water rights were for the first time
33 limited to a specific maximum quantity of water. Permits also became subject to cancellation for
34 nonuse. The potential for more efficient surface water management, administration, and planning
35 was thus greatly increased.

³ Tex. Gen. Laws 1913, Ch. 171

⁴ *State v. Hidalgo County Water Control and Improvement District No. 18*, 443 S.W.2d 728, Court of Civil Appeals -Corpus Christi (1969).

⁵ Now Texas Water Code Chapter 11, Subchapter G (Sec. 11.301 et. seq.).

1 Since the implementation of the Water Rights Adjudication Act of 1967, anyone wishing to use
2 surface water (exclusive of diffused surface water (runoff) and domestic and livestock uses) must
3 receive permission from the state in the form of a water rights permit.⁶ Issuing permits for water
4 rights is the responsibility of the state water regulatory agency, now the TCEQ.

5 **5. Current Texas Water Laws**

6 Under current Texas water laws, surface water is owned by the state and held in trust for the
7 citizens of the state.⁷ The state grants the right to use this water through a water rights
8 appropriative system set forth in statute.⁸ This appropriative system is operated under the
9 expressed state policy that the maintenance of a proper ecological environment of the bays and
10 estuaries of Texas and the health of related living marine resources is of great importance to the
11 public's economic health and general well-being,⁹ and the requirement that the TCEQ, while
12 balancing all other public interests, must consider and, to the extent practicable, provide for the
13 freshwater inflows and instream flows necessary to maintain the viability of the state's streams,
14 rivers, and bay and estuary systems in the regular granting of permits for the use of state
15 waters.¹⁰

16 Authorizations to appropriate water may allow either an impoundment right (the right to store
17 water in a reservoir), a diversion right, often referred to as a run-of-the-river right (the right to
18 pump it from the stream), or both. A water rights permit can be issued only if the TCEQ
19 determines that unappropriated water is available in the source of supply and that the proposed
20 appropriation is intended for a beneficial use,¹¹ does not impair existing water rights or any
21 vested rights of riparians, and is not detrimental to the public welfare.¹² It is the expressed policy
22 of the state that in order to conserve and properly utilize state water, the public welfare requires
23 not only recognition of beneficial uses but also a constructive public policy regarding the
24 preferences between these uses, and that in appropriating state water, preference shall be given to
25 the uses prescribed in statute.¹³

26 Any applicable environmental flow standards must be considered in the permitting process as
27 well as other assessments.¹⁴ In issuing water rights permits, the TCEQ may impose stream flow
28 restrictions and other conditions and restrictions in any permit issued to protect the priority of
29 senior water rights.¹⁵

30 An appropriator receives a vested usufructory interest¹⁶ in appropriated surface water --- the right
31 only to use the water. Texas water laws are clear that the corpus of the water continues to be

⁶ Texas Water Code Sec. 11.121.

⁷ Texas Water Code Secs. 11.021(a) and 11.0235(a).

⁸ Texas Water Code Chapter 11.

⁹ Texas Water Code Sec. 1.003.

¹⁰ Texas Water Code Sec. 11.0235 (b) and (c).

¹¹ See Texas Water Code Sec. 11.023.

¹² Texas Water Code Sec. 11.134(b)(2) and (3).

¹³ Texas Water Code Secs. 11.024 and 11.123.

¹⁴ Texas Water Code Sec. 11.134(b)(3)(D).

¹⁵ Texas Water Code Sec. 11.1351.

¹⁶ Texas Water Code Sec. 11.022.

1 owned by the state and held in trust for the citizens of the state.¹⁷ Furthermore, an appropriator is
2 not guaranteed that water under the water right will always be available. These vested interests to
3 use state water are perpetual rights regarded as property interests¹⁸ that may be bought, sold, or
4 leased, but they are subject to forfeiture and cancellation, in whole or in part, for non-use.¹⁹ In
5 this regard, however, the Texas Supreme Court has made it clear that unless and until
6 cancellation occurs, a paper water rights holder — even one who has never used all of its water
7 — retains all rights and the water tied up by that owner is deemed unavailable for appropriation
8 by others.²⁰

9 Permits to appropriate state water are issued under the prior appropriation doctrine, with the
10 expressed statutory principle that “as between appropriators, the first in time is the first in
11 right.”²¹ The priority date of a water right, determined by the date of the permit application,²²
12 establishes the holder’s place in the line of all water users. The holder of the document with the
13 earliest date on a given stream is said to be the most senior, the holder of the document with the
14 next earliest date the next most senior, and so on.

15 **6. Surface Water Uses Exempt from Permits**

16 Some uses of surface water are statutorily exempt from permitting requirements. Of greatest
17 significance are domestic and livestock uses. In the 1967 Water Rights Adjudication Act,
18 domestic and livestock (D&L) users were exempted from the obligation to declare their
19 historical withdrawals and have them formally recognized.²³ Current Texas statutes also provide
20 that riparian domestic and livestock water users are also exempt from any requirement to secure
21 a permit to appropriate water for such uses.²⁴ Therefore, such eligible riparian landowners may
22 directly divert from normal stream flow, by pumping or gravity, water for domestic and livestock
23 uses. Their rights are superior to appropriative rights.²⁵ The D&L use must be on land owned by
24 the diverter and adjacent to the stream. The diverter may not sell the water or the water right
25 separately from the land, and, if the property is sold, this exemption stays with the property. The
26 annual D&L diversion amounts are limited, not by numerical diversion rates directly specified in
27 the Texas Water Code or TCEQ rules, but by statutes, rules, and traditional understandings
28 circumscribing the meaning of “domestic and livestock purposes.” For purposes of this
29 permitting exemption, “domestic use”²⁶ and “livestock use”²⁷ are defined in TCEQ rules. This
30 exemption also allows a D&L user to build a reservoir of up to 200 acre-feet in capacity on a

¹⁷ Texas Water Code Secs. 11.021(a) and 11.0235(a).

¹⁸ Texas Water Code Secs. 11.040(a) and 11.084.

¹⁹ Texas Water Code Secs. 11.030, 11.146 and 11.171 et. seq.

²⁰ *Lower Colorado River Authority v. Texas Department of Water Resources*, 689 S.W.2d 873 (Tex. 1984).

²¹ Texas Water Code Sec. 11.027.

²² Texas Water Code Sec. 11.141.

²³ Texas Water Code Sec. 11.303(a)(2) and (1).

²⁴ Texas Water Code Secs. 11.121 and 11.142 (a).

²⁵ Texas Administrative Code, Title 30, Section 297.21(a).

²⁶ Texas Administrative Code, Title 30, Section 297.1(18).

²⁷ Texas Administrative Code, Title 30, Section 297.1(28).

1 non-navigable stream when they own all land where water will be impounded for non-
2 commercial domestic and livestock purposes.²⁸

3 **7. Limited-Term Rights**

4 To maximize use of state waters, the TCEQ also issues permits for limited-term rights in basins
5 where the water supply is fully appropriated but not yet being fully used. Typically, these
6 limited-term rights take the form of either term permits²⁹ or temporary permits.³⁰ Term permits,
7 issued mainly to industries, mines, and agricultural enterprises, usually are for 10 years, but can
8 be renewed if that water is still not being used by other water rights holders. Temporary permits
9 are issued for up to three years, and typically for road construction projects, where the water is
10 used to suppress dust, to compact soils, and to start the growth of new vegetation. Term permits
11 and temporary permits do not have priority dates, are not property rights, and are not issued in
12 basins affected by drought. In a drought or other water shortage period, these limited-term rights
13 are the first to lose lawful access to water. The TCEQ may also issue seasonal permits³¹ and
14 emergency authorizations to appropriate water.³²

15 **8. Protecting Water Rights**

16 In Texas, two different practices are used to protect water rights: relying on an honor system, as
17 users do in most river basins where there is no watermaster coverage, and appointing a
18 watermaster, as has been done in several river basins. Relying on an honor system among water
19 users to protect water rights is obviously problematic, since water rights holders and domestic
20 and livestock users must rely on private remedies³³ and on making complaints and seeking
21 TCEQ enforcement participation for any dispute resolution,³⁴ all of which do not typically
22 operate in practically appropriate timeframes. The TCEQ is ultimately responsible for protecting
23 water rights and ensuring that water is only diverted according to permitted levels and
24 conditions. To enforce water rights, the TCEQ has the authority to pursue civil penalties in
25 court,³⁵ assess administrative penalties³⁶ or issue field citations.³⁷

26 Beyond acting on complaints, the TCEQ's almost sole enforcement method to protect water
27 rights comes from watermasters appointed to oversee water rights in a river basin.³⁸
28 Watermasters may be judicially created,³⁹ legislatively created,⁴⁰ or created by the TCEQ on its
29 own motion or upon petition by 25 or more water rights holders in a river segment.⁴¹ There are

²⁸ Texas Water Sec. 11.142(a).

²⁹ Texas Water Code Sec. 11.1381.

³⁰ Texas Water Code Sec. 11.138.

³¹ Texas Water Code Sec. 11.137.

³² Texas Water Code Sec. 11.139.

³³ Texas Water Code Sec. 11.0841.

³⁴ Texas Water Code Sec. 11.041.

³⁵ Texas Water Code Sec. 11.082.

³⁶ Texas Water Code Sec. 11.0842.

³⁷ Texas Water Code Sec. 11.0843.

³⁸ Texas Water Code Secs. 11.326, 11.402, 11.451 and 11.552.

³⁹ Texas Water Code Sec. 11.401 et. seq. [Subchapter H].

⁴⁰ Texas Water Code Sec. 11.551 et. seq. [Subchapter K].

⁴¹ Texas Water Code Sec. 11.451 et. seq. [Subchapter I]; see also Sec. 11.326.

1 currently three watermaster operations in the state: the Rio Grande Watermaster; the South Texas
2 Watermaster (covering the Guadalupe, Lavaca, Nueces and San Antonio River Basins and the
3 Lavaca-Guadalupe, Nueces-Rio Grande and San Antonio-Nueces Coastal Basins); and, the
4 Concho River Watermaster, which covers the Concho River segment of the Colorado River
5 Basin and is operated as part of the South Texas Watermaster program.

6 A watermaster is responsible for the day-to-day management of the river and the supervision of
7 the use of state water by all water rights holders and domestic and livestock users. Generally, the
8 watermaster ensures compliance with water rights by monitoring stream flows, reservoir levels
9 and water use and by coordinating diversions. A watermaster is authorized to regulate the
10 controlling works of reservoirs and other diversion works in times of water shortage, as is
11 necessary because of the rights existing in the streams of his division, or as is necessary to
12 prevent the waste of water or its diversion, taking, storage, or use in excess of the quantities to
13 which the holders of water rights are lawfully entitled. He is given broad authority to conduct
14 necessary or appropriate activities in situations of imminent threat to public health and safety or
15 the environment.⁴²

16 Before diverting, a water right holder must notify the watermaster of the intent to divert at a
17 specific time and the specific amount of water to be diverted.⁴³ Assuming that the water is
18 available and that the water right holder has not exceeded, or will not exceed, the annual
19 authorized appropriation of water, the watermaster then authorizes the diversion and records this
20 against the right. Watermaster “deputies” regularly and routinely make field inspections of
21 authorized diversions to insure compliance with the water right. If a water right holder does not
22 comply with the authorized water right or the rules of the TCEQ, the executive director or the
23 watermaster may refuse to allow a diversion, adjust the control works to prevent the owner from
24 diverting, taking, storing, or distributing water until he or she complies,⁴⁴ or pursue all other
25 formal enforcement actions applicable to water rights.

26 **9. Environmental Flows Legislation**

27 In 2007, the Legislature adopted a detailed process (known as S.B. 3) to address environmental
28 flow issues in the state's major river basin and bay systems, especially those systems in which
29 unappropriated water is still available.⁴⁵ In basins in which water is available for appropriation,
30 the TCEQ is authorized to establish an environmental set-aside below which water is not
31 available for appropriation. This authority applies only to new permits and amendments seeking
32 increased water.⁴⁶ All permits for new appropriations of water or amendments to existing water
33 rights that increase the amount of water authorized to be stored, taken, or diverted, must include
34 a provision allowing the TCEQ to adjust the conditions included in the permit or amended water
35 right to provide for protection of instream flows or freshwater inflows.⁴⁷ However, in basins in
36 which the unappropriated water that will be set aside for instream flow and freshwater inflow

⁴² Texas Water Code Sec. 11.327, 11.3271.

⁴³ 30 Texas Administrative Code Chapter 304, Sec. 304.15.

⁴⁴ 30 Texas Administrative Code Chapter 304, Sec. 304.33.

⁴⁵ Texas Water Code Secs. 11.0235 – 11.0237.

⁴⁶ Texas Water Code Sec. 11.147 (d).

⁴⁷ Texas Water Code Sec. 11.147 (e-1).

1 protection is not sufficient to fully satisfy environmental flow standards established by the
2 TCEQ, the Legislature directed that a variety of market approaches, both public and private, for
3 filling the gap must be explored and pursued. All water rights authorizations issued before
4 September 2007 are not subject to the environmental flows provisions of S.B.3.

5 **B. The TCEQ Has Been Granted Authority to Manage Surface Water Rights and Uses**
6 **in Times of Shortage or other Emergency.**

7 Management of surface water rights and uses in Texas under the appropriative system is subject
8 to the expressed state policy that the maintenance of a proper ecological environment of the bays
9 and estuaries of Texas and the health of related living marine resources is of great importance to
10 the public's economic health and general well-being,⁴⁸ and the requirement that the TCEQ, while
11 balancing all other public interests, must consider and, to the extent practicable, provide for the
12 freshwater inflows and instream flows necessary to maintain the viability of the state's streams,
13 rivers, and bay and estuary systems in the regular granting of permits for the use of state
14 waters.⁴⁹ The statutes place the responsibility to effectuate these policies and requirements on
15 the TCEQ, and likewise give the TCEQ powers and authority to effectively meet that
16 responsibility.

17 The TCEQ is expressly given the powers to perform any acts, whether specifically authorized or
18 implied by the Texas Water Code or other law, necessary and convenient to the exercise of its
19 jurisdiction and powers as provided by the Water Code and other laws.⁵⁰ [Emphasis added].
20 This statutory authority, on its face, gives the TCEQ very broad powers and authority. The
21 availability and exercise of such broad powers and authorities are especially critical to the timely
22 and effective management of water rights and uses in times of shortage and other emergency.

23 However, the Texas Legislature has limited some of these otherwise broad powers and
24 authorities. Furthermore, either as a matter of practice or policy, the TCEQ has chosen not to
25 exercise some of these possible broad powers and authorities. Importantly, a number of possible,
26 but heretofore unexercised, powers and authorities have not been evaluated and adjudicated by
27 Texas courts.

28 Following is a brief, general discussion of some of the broad powers and authorities, both
29 specifically authorized or implied, that the TCEQ can, or arguably can, exercise routinely, or in
30 times of shortage and other emergency, in its management and supervision of water rights and
31 uses. Statutory limitations placed on these powers, as well as significant instances in which the
32 TCEQ has not exercised its powers and authorities, are highlighted.

33 **1. The TCEQ Has Broad Powers to Manage Water Rights and Uses, Including**
34 **Managing the Water Rights and Uses With Consideration of Bays and Wildlife.**

35 In water rights permitting, the TCEQ is required to assess the effects issuance of a permit will
36 have on existing instream uses, water quality, fish and wildlife habitat, and freshwater inflow

⁴⁸ Texas Water Code Sec. 1.003

⁴⁹ Texas Water Code Sec. 11.0235 (b) and (c).

⁵⁰ Texas Water Code Sec. 5.102.

1 needs for bays and estuaries.⁵¹ The TCEQ is required to include in permits any conditions, such
2 as stream flow restrictions, considered necessary to maintain beneficial inflows to any affected
3 bay and estuary system, to maintain existing instream uses and water quality of the stream or
4 river to which the permit applies, and to maintain fish and wildlife habitats.⁵² Since the 2007
5 adoption of the S.B.3 process to address environmental flow issues in the state's major river
6 basin and bay systems, the TCEQ has been prohibited from issuing a permit for a new
7 appropriation or an amendment to an existing water right that increases the amount of water
8 authorized to be stored, taken, or diverted if the issuance of the permit or amendment would
9 impair any environmental flow set-aside established.⁵³ Permits for new appropriations and
10 amendments that increase the amount of water authorized to be stored, taken, or diverted, must
11 include a provision allowing the TCEQ to adjust the conditions included in the permit or
12 amended water right to provide for protection of instream flows or freshwater inflows.⁵⁴ Thus,
13 the S.B.3 provisions in the Texas Water Code give the TCEQ broad powers, but only over new
14 permits and amendments, to ensure freshwater inflows and instream flows necessary to maintain
15 the viability of the state's streams, rivers, and bay and estuary systems.

16 An integral and necessary part of all the required environmental assessments relating to impacts
17 on “fish and wildlife habitat,” “freshwater inflow needs for bays and estuaries,” “instream
18 environmental uses” and “recreation resources” involves the determination of any impacts on
19 endangered or threatened species.⁵⁵ In fact, flows necessary to protect a federally listed species
20 under the federal Endangered Species Act (ESA) or other species that are considered to be of
21 “high interest” (such as state-listed endangered and threatened species, self-sustaining wild
22 populations that are endemic to the affected stream or have significant scientific or commercial
23 value) are specifically required to be protected.⁵⁶ In the broad general powers granted to TCEQ
24 by Section 5.102 of the Water Code, the Legislature granted the agency authority to take actions
25 in light of “other laws.” Certainly, the ESA is one of the “other laws”⁵⁷ for which the TCEQ
26 may exercise broad powers over matters within its jurisdiction and authority.

27 **2. TCEQ’s Authority Under S.B. 3 Includes the Imposition of Environmental Flow**
28 **Conditions on New Permits, but TCEQ Can Suspend Them.**

29 However, despite authorizing these broad powers, the Texas Legislature has expressly placed
30 limitations on some. The TCEQ cannot issue a new permit for instream flows dedicated to
31 environmental needs or bay and estuary inflows; it can only approve an application to amend an
32 existing water right to change the use to or add a use for instream flows dedicated to
33 environmental needs or bay and estuary inflows.⁵⁸ With respect to the requirement that any
34 amendment to an existing water right that increases the amount of water authorized to be stored,
35 taken, or diverted must include a provision allowing the TCEQ to adjust the conditions included

⁵¹ Texas Water Code Secs. 11.147, 11.150 and 11.152; 30 Texas Administrative Code Chapter 297, Sec. 297.55.

⁵² Texas Water Code Sec. 11.147.

⁵³ Texas Water Code Secs. 11.1471.

⁵⁴ Texas Water Code Sec. 11.147 (e-1).

⁵⁵ Texas Water Code Secs. 11.147, 11.150 and 11.152; 30 Texas Administrative Code Chapter 297, Sec. 297.55.

⁵⁶ 30 Texas Administrative Code Chapter 297, Sec. 297.56.

⁵⁷ Texas Water Code Sec. 5.102.

⁵⁸ Texas Water Code Secs. 11.0235(d) and 11.0237.

1 in the amended water right to provide for protection of instream flows or freshwater inflows, the
2 TCEQ is not allowed to adjust any condition of the amendment other than a condition that
3 applies only to the increase in the amount of water to be stored, taken, or diverted authorized by
4 the amendment.⁵⁹ Also, current Texas law specifies that all permit conditions relating to
5 freshwater inflows to affected bays and estuaries and instream flow needs must be subject to
6 temporary suspension if necessary for water to be applied to essential beneficial uses during
7 emergencies,⁶⁰ and gives the TCEQ authority to do so when it finds that an emergency exists that
8 cannot practically be resolved in other ways.⁶¹ Since the primary condition under which a water
9 right would be suspended is a drought, bays and estuaries and instream flows are thus at double
10 risk under this limitation: first from the drought itself, and second from diversions of additional
11 water by upstream water rights holders. The authority to temporarily suspend permit conditions
12 relating to freshwater inflows to bays and estuaries and instream flow needs cannot be exercised
13 unless the TCEQ affirmatively finds that an emergency exists that cannot practically be resolved
14 in other ways. Thus, this restriction on that suspension authority appears to require the TCEQ to
15 exhaust all other ways to practically resolve the emergency before it suspends environmental
16 flow permit conditions, but that issue has not been adjudicated.

17 **3. TCEQ Can Take Into Account “other laws” When Deciding Whether the**
18 **Usufructory Right Can Be Exercised.**

19 Under authorized water rights, appropriators receive only a right to use surface water, and are not
20 guaranteed that water under the water right will always be available. While nothing in statute
21 expressly provides the TCEQ with authority to alter these rights, there is likewise nothing in
22 statute that expressly prohibits the TCEQ from altering water rights as it deems necessary or
23 appropriate in carrying out its duties and responsibilities to administer the state’s laws so as to
24 promote the judicious use and maximum conservation and protection of the quality of the
25 environment and the natural resources of the state.⁶² In fact, the TCEQ is expressly given the
26 “powers to perform any acts whether specifically authorized by this code or other law or implied
27 by this code or other law, necessary and convenient to the exercise of its jurisdiction and powers
28 as provided by this code and other laws.”⁶³[Emphasis added]. As previously stated, certainly the
29 ESA is one of the “other laws” for which the TCEQ is expressly given these broad powers in
30 exercising its jurisdiction and authority.

31 **4. The TCEQ’s Authority Includes the Return of Surplus Water to River.**

32 By law, appropriators are required to return any unused, surplus water back to the watercourse
33 from which it was taken if the water can be returned by gravity flow and it is reasonably
34 practicable to do so.⁶⁴ The TCEQ is authorized to include conditions in any water right granted
35 providing for the return of surplus water, in a specific amount or percentage of water diverted,
36 and the return point on a watercourse or stream as necessary to protect senior downstream water

⁵⁹ Texas Water Code Sec. 11.147(e-1).

⁶⁰ Texas Water Code Sec. 11.0235(c).

⁶¹ Texas Water Code Sec. 11.148.

⁶² Texas Water Code Sec. 5.120.

⁶³ Texas Water Code Sec. 5.102.

⁶⁴ Texas Water Code Sec. 11.046(a).

1 rights holders or to provide flows for instream uses or bays and estuaries.⁶⁵ Clearly, the TCEQ
2 has been given the authority to require unused, surplus be returned to the watercourse from
3 which it was taken, thus effectively limiting or precluding its reuse. This authority has not been
4 exercised by the TCEQ, even though it could be a useful tool in helping to ensure stream flow
5 levels that have been historically relied on by downstream water users and for environmental
6 flows. Once water diverted under a water right has been returned to a watercourse, it is
7 considered surplus water and therefore subject to reservation for instream uses or beneficial
8 inflows or to appropriation by others, unless expressly provided otherwise in the water right.
9 However, a statutory provision allows water appropriated under a water right, prior to its release
10 into a watercourse, to be beneficially used and reused by the holder of the water right for the
11 purposes and locations of use provided in the water right (commonly known as “direct reuse”).

12 Because protecting water rights and uses is especially critical when water shortages occur, TCEQ
13 watermasters manage and supervise diversions more closely in times of drought or other water
14 shortages. In river basins where no watermasters have been appointed, management and
15 supervision of diversions in times of drought or other water shortages is much less effective,
16 since here the TCEQ must rely on an honor system among water users or complaints from users
17 seeking TCEQ enforcement participation for dispute resolution.

18 In times of water shortage — less physical flow than is necessary for all water rights holders to
19 take all of the allocations authorized in their water rights—TCEQ watermasters manage
20 diversions based on the priority date of each water right, earliest first, regardless of the type of
21 use of the permitted right,⁶⁶ while ensuring the rights of domestic and livestock users are
22 satisfied. If restrictions or curtailments become necessary, junior water rights are suspended or
23 curtailed before senior water rights in the area, and the most senior holder is allowed to divert all
24 of his or her water before the next most senior gets any, and so on. Under this approach, an
25 upstream water rights holder who is junior to a downstream water rights holder is obliged in a
26 time of shortage, no matter what the water is used for or how urgent his or her need for the water,
27 to refrain from diverting so as to pass water down to the senior rights holder. However, the
28 TCEQ, under its general authority to protect the priority of water rights, enforces two specific
29 departures from this general rule. First, an upstream impoundment based on a junior water right
30 is required to pass water that is flowing into the reservoir (“inflow”) if: a downstream senior
31 right is not receiving its appropriated flow, the inflow into the reservoir is greater than the flow
32 being passed through the reservoir, and, if allowed to pass, the additional water could reach the
33 downstream water right holder under current stream conditions. Otherwise, no matter how much
34 water the reservoir holds and how senior the downstream diversion right is, the water in the
35 reservoir is not available. Thus, senior water right holders downstream of a reservoir have a right
36 to the current inflow into the reservoir, but they do not have any right to water that the junior
37 right holder has already legally impounded.⁶⁷ Also, if the owner of an upstream reservoir has a
38 bed and banks authorization⁶⁸ from the TCEQ and releases water that has been sold to a buyer
39 downstream, that water is not available to downstream appropriators. Even domestic and
40 livestock users and senior rights downstream do not have a right to this released water.

⁶⁵ Texas Water Code Sec. 11.046(b).

⁶⁶ 30 Texas Administrative Code Chapter 304, Sec. 304.21(a).

⁶⁷ TCEQ, Rights to Surface Water in Texas, GI-228 (Rev. 3/09).

⁶⁸ Texas Water Code Sec. 11.042.

1 Secondly, domestic and livestock users downstream of a diversion point that cannot get their
2 appropriated volume of water may require that upstream water use be reduced so that a sufficient
3 amount of water flows downstream for their use.

4 **5. The TCEQ Need Not Focus Exclusively on the “First in Time, First in Right”**
5 **Principle for its Drought Management Practices.**

6 When exercising drought management practices, the TCEQ currently focus exclusively on strict
7 time priority based on the “first in time, first in right” principle of the appropriative system.
8 However, beyond that statutory expression of this principle,⁶⁹ nothing elsewhere in the current
9 statutory structure of Texas’s appropriative rights system expressly requires this strict adherence
10 to time priorities in times of water shortage, or expressly prohibits the TCEQ from applying
11 proportional reductions to water rights holders as necessary drought management tools. In fact,
12 it is my opinion that other statutory and rule language, as discussed below, may indeed support a
13 less restrictive approach than that currently applied by the TCEQ. Therefore the “first in time,
14 first in right” principle is not the exclusive criteria to be applied in drought management
15 practices.

16 **6. The Watermaster and Executive Director are Given Broad Authority to Act**
17 **During Water Shortage.**

18 Watermasters, and the Executive Director where no watermaster has been appointed, are given
19 broad authority to act in times of water shortage. Watermasters are given broad authority to
20 conduct necessary or appropriate activities in situations of imminent threat to public health and
21 safety or the environment⁷⁰ and may take any reasonable action appropriate to alleviate
22 emergencies.⁷¹ TCEQ rules specify that when available flow in a river is not sufficient to meet
23 the demands of existing authorized diversions or impoundments for downstream senior rights,
24 demands for domestic and livestock purposes that are not included under any water right, or
25 other minimum streamflow requirements that the commission determines necessary for purposes
26 other than protection of downstream senior and superior water rights, the watermaster may: (1)
27 cancel or modify, as needed, any existing declaration of intent to divert or impound; (2) order
28 that water right holders with reservoir(s) allow inflows to pass through such reservoir(s) to the
29 extent necessary to honor downstream senior water rights, demands for domestic and livestock
30 purposes, minimum streamflow requirements, minimum release requirements, and other
31 conditions; (3) order that persons with reservoirs exempt from permitting allow inflows to pass
32 through such reservoirs for the protection of downstream domestic and livestock users; (4) order
33 that diverters limit or cease diversions to the extent necessary to honor downstream senior water
34 rights, demands for domestic and livestock purposes, minimum streamflow requirements,
35 minimum release requirements, and other conditions; or (5) take any other action necessary to
36 ensure that downstream senior water rights, demands for domestic and livestock purposes,
37 minimum streamflow requirements, minimum release requirements, and other conditions, are
38 administered in accordance with applicable laws.⁷²

⁶⁹ Texas Water Code Sec. 11.027.

⁷⁰ Texas Water Code Sec. 11.327, 11.3271.

⁷¹ 30 Texas Administrative Code Chapter 304, Sec. 304.41.

⁷² 30 Texas Administrative Code Chapter 304, Sec. 304.21(c).

1 This rule is clear that the Watermaster’s authority is not restricted to decisions based exclusively
2 on the “first in time, first in right” principle. Should the Commission determine that “other
3 minimum streamflow requirements” are necessary for purposes “other than protection of
4 downstream senior and superior water rights,” then the Watermaster has broad authority to
5 regulate diversions.

6 **7. No Rule Prohibits the TCEQ, During Times of Emergency or Water**
7 **Shortage, From Considering Endangered Species; Instead, the TCEQ Has**
8 **Authority to Continue to Supervise Each Water Right.**

9 Thus, TCEQ rules clearly give the watermaster significant, broad authority to act in times of
10 shortage, not only to protect senior water rights, but also to ensure that minimum streamflows,
11 minimum release requirements and “other conditions” are honored and satisfied. Certainly such
12 “other conditions” would include the “other minimum streamflow requirements that the
13 commission determines necessary for purposes other than protection of downstream senior and
14 superior water rights.” [Emphasis added]. However, despite its expressed authority to determine
15 and impose such “other minimum streamflow requirements,” to my knowledge, the TCEQ has
16 never exercised such authority. Yet, there is no provision in statute or its rules that would
17 prohibit the TCEQ, during times of emergency or water shortage, from considering the needs of
18 fish and wildlife habitats and impacts on endangered or threatened species as “other conditions,”
19 and adopting and imposing minimum streamflow requirements determined necessary for their
20 protection.

21 As a matter of routine policy and practice, water rights permits issued by the TCEQ include the
22 following provision: “this [certificate of adjudication/permit] is issued subject to the Rules of the
23 [commission] and its continuing right of supervision of State water resources consistent with the
24 public policy of the State as set forth in the Texas Water Code.” By acceptance of the water
25 right, the water rights holder acknowledges and agrees that the holder will comply with all the
26 terms, provisions, conditions, limitations and restrictions embodied in such water right.⁷³ On its
27 face, this provision announces a very broad policy by the TCEQ that it can continue to
28 “supervise” the water right even after issuance, as may be necessary or appropriate to carry out
29 its duties and responsibilities in effectively managing the state’s water resources. Certainly such
30 continuing right of supervision of water rights could be a significantly important authority to
31 exercise in times of drought or other water emergencies. However, the TCEQ historically has
32 placed a very narrow, restrictive interpretation on this permit provision, not interpreting it to give
33 any authority to alter water rights unless requested by the water rights holder.

34 This is especially critical to the TCEQ’s ability to address freshwater inflow needs for bays and
35 estuaries and instream environmental flows. In establishing the environmental flows process, the
36 Legislature expressly recognized that effective implementation of the S.B.3 approach for
37 protecting instream flows and freshwater inflows will require more effective water rights
38 administration and enforcement systems than are currently available in most areas of the state.⁷⁴
39 The Legislature also found “that while the state has pioneered tools to address freshwater inflow
40 needs for bays and estuaries, there are limitations to those tools in light of both scientific and

⁷³ 30 Texas Administrative Code Chapter 297, Sec.297.59(c).

⁷⁴ Texas Water Code Sec. 11.0235(f).

1 public policy evolution.”⁷⁵ Furthermore, “while the state's instream flow studies program appears
2 to encompass a comprehensive and scientific approach for establishing a process to assess
3 instream flow needs for rivers and streams across the state, more extensive review and
4 examination of the details of the program, which may not be fully developed until the program is
5 under way, are needed to ensure an effective tool for evaluating riverine environmental flow
6 conditions.”⁷⁶ The Legislature has also expressly found “that the management of water to meet
7 instream flow and freshwater inflow needs should be evaluated on a regular basis and adapted to
8 reflect both improvements in science related to environmental flows and future changes in
9 projected human needs for water. In addition, the development of management strategies for
10 addressing environmental flow needs should be an ongoing, adaptive process that considers and
11 addresses local issues.”⁷⁷

12 Therefore the Legislature found that this evolving, on-going, and adaptive process would be the
13 preferred method for identifying and protecting environmental flows in the rivers and into the
14 bays of Texas.

15 **8. New Legislation Gives the TCEQ Authority During Periods of Drought to**
16 **Adjust the Diversions of Water by Water Rights Holders, Which may be**
17 **Done on a Basis other than Strictly Priority.**

18 In keeping with this “continuing right of supervision” concept, a new statutory provision added
19 to the Water Code by the 2011 Legislature authorizes the Executive Director of the TCEQ,
20 during a period of drought or other emergency shortage of water, as defined by rule, to issue
21 orders temporarily suspending the right of any person who holds a water right to use the water,
22 and temporarily adjusting the diversions of water by water rights holders.⁷⁸ Even though this
23 new provision provides that such temporary suspensions or adjustments are to be “in accordance
24 with the priority of water rights established by Section 11.027 (the “first in time, first in right”
25 provision), it does not expressly require the Executive Director to suspend or adjust junior water
26 rights before senior water rights in the area are suspended or adjusted. It allows temporary
27 suspension of the water right of “any person who holds a water right to use the water,” and
28 temporary adjustment of the diversions of water by “water rights holders.” [Emphasis added].
29 The use of the term “any person” in this law is clear, meaning any water rights holder. The fact
30 that the statute uses the term “any person” indicates the Executive Director has the authority to
31 issue temporary suspensions regardless of the time priority.

32 In ordering suspensions or adjustments under this authority, the Executive Director is required to
33 ensure that the beneficial use of state water is maximized, to the greatest extent practicable
34 conforming to the order of preferences established by statute.⁷⁹ This balancing requirement can
35 be critical in times of water shortage. For example, a city’s water right providing potable water
36 for its residents may be junior to a water right either upstream or downstream for agricultural
37 irrigation, mining, or even recreation and pleasure. If the authority to suspend or adjust is
38 restricted to the priorities of water rights affected, the city would be unable to fully satisfy the

⁷⁵ Texas Water Code Sec. 11.0235(d-4).

⁷⁶ Texas Water Code Sec. 11.0235(d-4).

⁷⁷ Texas Water Code Sec. 11.0235(d-4) and (d-5).

⁷⁸ Texas Water Code Sec. 11.053, added by H.B. 2694, Sec. 5.03; effective September 1, 2011.

⁷⁹ Texas Water Code Sec. 11.024.

1 water needs of its citizens because senior, but less preferred, uses would prevail as senior rights.
2 However, the law is clear that the “higher preferred use for the appropriation of water for
3 domestic and municipal uses shall be and remain superior to the rights of the state to appropriate
4 the same for all other purposes.”⁸⁰ Accordingly, to ensure maximum beneficial use of state
5 water while protecting this legislatively mandated superior preference, it is my opinion that the
6 TCEQ must be able to suspend or adjust water rights on bases other than strictly priority.

7 In ordering a suspension or adjustment under this new authority, the Executive Director is also
8 required to ensure that the impact on water rights holders is minimized.⁸¹ Certainly proportional
9 suspensions or adjustments to water rights would effectuate this requirement, while suspension
10 or adjustment based solely on priority would mean that senior water rights holders would get all
11 of their authorized water but junior rights could likely get none of their authorized water.

12 The Legislature did place one significant limitation on this new authority. In ordering a
13 suspension or adjustment, the TCEQ cannot require the release of water that, at the time the
14 order is issued, is lawfully stored in a reservoir under water rights associated with that
15 reservoir.⁸²

16 Because this new authority is newly-enacted and only effective beginning September 1, 2011, its
17 full scope has not been tested or adjudicated. It is very probable that if the TCEQ exercised the
18 full scope of the authority given by this provision, litigation will ensue, most likely initiated by
19 affected water rights holders.

20 **C. In My Opinion, There are Actions Available that the TCEQ Might Take to Manage**
21 **Surface Water Rights and Uses in Times of Shortage or other Emergency.**

22 Other than strictly focusing on the protection of senior water rights, to the exclusion or detriment
23 of other rights, some with even more beneficial uses, there are other possible actions the TCEQ
24 might take to effectively manage surface water rights and uses in times of shortage or other
25 emergency. Following is a brief, general discussion of some of those possible actions that might
26 be taken if the TCEQ were to exercise the broad powers and authorities given to it by law, both
27 expressed and implied.

28 **1. Temporarily Suspend or Adjust Water Rights.**

29 Already discussed above are suspensions or adjustments of water rights to maximize beneficial
30 uses of state water in accordance with legislatively mandated preferences of use; proportional
31 suspensions or adjustments to minimize impacts on all water rights holders; and, the numerous,
32 broad actions that can be taken by watermasters to protect water rights and the needs of fish and
33 wildlife habitats and impacts on endangered or threatened species during times of emergency or
34 water shortage.

35 **2. Not Issue New Term Permits and Suspend Such Authorizations.**

⁸⁰ Texas Water Code Sec. 11.024(1).

⁸¹ Texas Water Code Sec. 11.053(b)(2), added by H.B. 2694, Sec. 5.03; effective September 1, 2011.

⁸² Texas Water Code Sec. 11.053(b)(6), added by H.B. 2694, Sec. 5.03; effective September 1, 2011.

1 One obvious and straight-forward action that can be taken in times of water shortage is refusal to
2 issue any new term permit, temporary permit or seasonal permit, and suspend all authorizations
3 under existing term permits, temporary permits or seasonal permits. Suspension of these types of
4 permits occurred on the Brazos River during the drought in 2011 (May 18, and June 27 letters to
5 water rights holders).

6 **3. Cancel Unused Water Rights.**

7 The TCEQ could also initiate cancellation of unused water rights, in whole or in part, for non-
8 use.⁸³ The TCEQ is required to actively and continually evaluate outstanding permits and
9 certified filings and directed to carry out measures to cancel wholly or partially the certified
10 filings and permits that are subject to cancellation.⁸⁴ However, rarely has the TCEQ ever
11 initiated cancellation of water rights. There could be numerous paper rights under which
12 significant amounts of unused water are reserved and protected thereunder. If this unused, and
13 apparently unneeded, water was freed up through cancellation, it would then be subject to
14 reservation for instream uses or beneficial inflows or to appropriation by others. However,
15 unless and until cancellation occurs, a paper water rights holder retains all rights thereunder and
16 the water tied up by that owner is deemed unavailable for appropriation by others.⁸⁵ I am not
17 aware of any systematic review by TCEQ to identify unused water rights for the purposes of
18 instituting cancellation.

19 **4. Evaluate Certain Other Areas in order to Manage and Protect Water Rights** 20 **and Uses During Shortages.**

21 To focus on significant instances where some flexibility may very well exist so as to enable the
22 TCEQ to better manage and protect water rights and uses during shortages, three possible action
23 areas should be evaluated: impoundments, surplus water return flows and domestic and livestock
24 uses.

25 **a. Impoundments**

26 As to impoundments, many times reservoirs impound much more water than reasonably needed
27 to meet current demands of the users of the reservoir's stored water. Reservoirs are indeed
28 constructed, and accompanying water rights issued, based on long-term projections of water
29 needs. Thus, some amount of water may be stored in a reservoir in times of drought that is not
30 currently needed by that reservoir's users, but which, if released, could help satisfy other water
31 rights holders' needs or help protect environmental flows.

32 As previously stated, it is clear that the TCEQ, through the Watermaster, can currently require an
33 upstream impoundment to pass inflows into the reservoir to the extent necessary to honor
34 downstream senior water rights, demands for domestic and livestock purposes, minimum
35 streamflow requirements, minimum release requirements, and other conditions.⁸⁶ Under this
36 broad, general authority, it is my opinion that the TCEQ may adjust reservoir release provisions

⁸³ Texas Water Code Secs. 11.030, 11.146 and 11.171 et. seq.

⁸⁴ Texas Water Code Sec. 12.012.

⁸⁵ *Lower Colorado River Authority v. Texas Department of Water Resources*, 689 S.W.2d 873 (Tex. 1984).

⁸⁶ 30 Texas Administrative Code Chapter 304, Sec. 304.21(c).

1 to require the release of all inflows coming into a reservoir. Exercising such authority in times of
2 water shortages and other emergencies would meet the statutory mandate of minimizing impacts
3 of such actions on water rights holders, since the reservoir water right holder would still retain all
4 water impounded and release only inflows, if any. Where a reservoir is impounding water in
5 amounts significantly greater than required to meet the current needs of its users, as a practical
6 matter, there should be no impact on the reservoir water rights holder if such an emergency
7 action is taken by the TCEQ. Here, the TCEQ has met its responsibility to ensure that the
8 beneficial use of state water is maximized while ensuring that the impact on water rights holders
9 is minimized.

10 For example, if there were a large rainfall upstream of a reservoir that was below permitted
11 capacity, the water would be impounded until the permitted capacity was reached. However,
12 under these circumstances, it is my opinion that the TCEQ may currently take action and issue an
13 order during a drought requiring such inflows to pass through.

14 However, as stated above, the Legislature, in adopting the new authority for the TCEQ to
15 suspend or adjust water rights, expressly prohibited the TCEQ from requiring the release of
16 water that, at the time the order is issued, is lawfully stored in a reservoir under water rights
17 associated with that reservoir. Thus, under this state law the TCEQ is likely limited to adjusting
18 inflow release requirements, as described above, and would be unable to order releases of stored
19 water.

20 **b. Surplus Water Return Flows**

21 Another instance where some flexibility may exist to enable the TCEQ to better manage and
22 protect water rights and uses during shortages is the matter of surplus water return flows. The
23 law is clear that appropriators must return any unused, surplus water back to the watercourse
24 from which it was taken if the water can be returned by gravity flow and it is reasonably
25 practicable to do so. Here, during times of water shortage, the TCEQ could currently order all
26 unused, surplus water be returned to the watercourse from which it was appropriated, and could
27 deny all requests for indirect re-use and all bed and banks permits. Exercise of this existing
28 authority could be a useful tool to help ensure stream flow levels that have been historically
29 relied on by downstream water users and for environmental flows. Once water diverted under a
30 water right has been returned to a watercourse, it is considered surplus water and therefore
31 subject to reservation for instream uses or beneficial inflows or to appropriation by others. Here
32 again, the TCEQ would be carrying out its responsibility to ensure that the beneficial use of state
33 water is maximized while ensuring that the impact on water rights holders is minimized.

34 **c. Exempt Uses**

35 Finally, some flexibility enabling the TCEQ to better manage and protect water rights and uses
36 during shortages exists in the instance of water uses exempt from permitting, such as domestic
37 and livestock uses and other uses specified in Water Code Section 11.142. In this regard, TCEQ
38 watermasters have the authority to: order that persons with reservoirs exempt from permitting
39 allow inflows to pass through such reservoirs for the protection of downstream domestic and
40 livestock users; limit or prohibit diversions to the extent necessary to honor downstream senior
41 water rights, demands for domestic and livestock purposes, minimum streamflow requirements,

1 minimum release requirements, and other conditions; or take any other action necessary to
2 ensure that downstream senior water rights, demands for domestic and livestock purposes,
3 minimum streamflow requirements, minimum release requirements, and other conditions, are
4 administered in accordance with applicable laws.⁸⁷

5 These exempt uses could represent significant amounts of water, almost all of which is
6 unaccounted for by the TCEQ. Because no permit is required for these exempt uses, no
7 reporting or accounting of the amounts of water diverted and/or impounded is likewise required.
8 Accordingly, the TCEQ has no inventory of all the direct diversions by domestic and livestock
9 users or all exempt impoundments in the state, and thus does not know how much water is
10 actually involved under these exempted uses. Even though all these exempt uses are restricted to
11 a maximum of 200 acre-feet of storage, the total amount impounded in any given river basin in
12 all those 200 acre-foot impoundments is unknown, but possibly significant. Importantly, a
13 domestic and livestock user is not restricted at all in the amount of water that can be diverted and
14 used [other than impoundment] so long as all requirements for “domestic and livestock” use are
15 met. Here again, the total amount of all such direct diversions in any given river basin is
16 likewise unknown, and likewise possibly significant.

17 TCEQ has existing authority to undertake a thorough survey of exempt users, including numbers,
18 locations, and amounts and rates of water diverted. To my knowledge it has not done so. In my
19 opinion, TCEQ also has existing authority to require reporting by these exempt users.

20 If these exempt uses were subject to some management in times of water shortage, additional
21 water could likely become available in a watercourse for instream uses or beneficial inflows or
22 for appropriation by others for other beneficial uses. However, management of these exempt
23 uses is not something the TCEQ has exercised, even in times of water shortage or other
24 emergencies. Thus, the exercise of such authority is untested and has not been adjudicated in the
25 courts.

26 **III. CONCLUSION**

27 In my opinion, if an HCP is ordered as a form of relief, the TCEQ has a number of options,
28 detailed above, available under its existing legal authority for managing state-owned surface
29 water during times of water shortage.

⁸⁷ 30 Texas Administrative Code Chapter 304, Sec. 304.21(c).

EXHIBIT LRS-1

LARRY R. SOWARD

80 Red River #321
Austin, Texas 78701

7550 Kirby Drive, No. 1042
Houston, Texas 77030

(512) 965-5762

SKILLS AND EXPERIENCE

- + Confident, experienced and successful in managing and improving all operations and affairs of major state agencies. Served as: Executive Director of agency with annual budget of approximately \$40 million and over 1,100 statewide personnel in a central headquarters and 17 field offices; Deputy Executive Director of agency with annual budget of approximately \$11 million and 250 personnel; Deputy Commissioner of agency with annual budget of approximately \$24 million and over 500 statewide personnel in a central headquarters and 18 regional/lab/field offices; Deputy Commissioner/Chief Clerk of agency with annual budget of approximately \$50 million and over 620 statewide personnel in a central headquarters and 10 field offices; Executive Assistant to the Lieutenant Governor of Texas; Commissioner, Texas Commission on Environmental Quality, the environmental agency of the State with the approximately 2,980 employees, 16 regional offices, and over \$500 million annual operating budget.
- + Over thirty years of administrative experience with comprehensive supervision and management knowledge and skills involving all aspects of a major state agency's responsibilities, operations and personnel.
- + Experienced in effectively representing major state agencies in all phases of legislative processes.
- + Experienced in successfully planning and implementing complete agency reorganizations, as well as organization and implementation of new programs. Led three state agencies through legislative Sunset Review processes.
- + Skilled in coordinating major state agency's programs with other associated State, Federal and local governmental agencies.
- + Extensive experience and skills in all aspects of a major state agency's strategic planning and budgeting processes, both at the legislative level and the intra-agency level.
- + Extensive skills in personnel management, motivation and development, including developing and implementing personnel policies and procedures, organizing departments and implementing employee training, improvement and incentive programs.
- + Strong ability in maintaining positive relations between agency and general public, interest groups and regulated communities.

- + Considerable knowledge and experience in managing intra-agency and interagency support services, including large data processing, graphic arts, records and supply centers with emphasis on full cost recovery of same.

EDUCATION

Graduated from the University of Texas School of Law in August, 1974.

Graduated from the University of Texas at Austin in December, 1971 with Bachelor of Arts Degree in Mathematics.

Graduated from R. L. Turner High School in Carrollton, Texas, in 1968.

LICENSES

Licensed to practice law in Texas since December, 1974. Inactive.

Licensed to practice law in the Federal District Courts for the Eastern, Western and Northern Districts of Texas. Inactive.

PROFESSIONAL EMPLOYMENT HISTORY

11/09 – Present INDEPENDENT CONSULTANT

Provides/provided consulting services to various clients on environmental, regulatory and legislative related matters. Services have included: peer review of permit applications; local government liaison support; assisting and/or advising on issues, strategies, and policies associated with: Texas air permitting and enforcement and related matters, Texas Sunset Review process relating to the TCEQ, Texas surface water rights and uses laws, regulations and policies; air quality issues and policy developments in the 82nd Texas Legislature. Services have also involved appearing with or on behalf of clients in meetings with TCEQ, EPA, legislators, Texas Sunset Commission staff and Sunset Commission members, environmental and public interest groups, local government officials and personnel, trade associations, industry representatives and/or other stakeholders; developing issue/policy papers, formal written comments and recommendations and testimony on issues of interest/concern to clients; and consulting and/or expert witness services, including performing investigation document review, studies and research, preparing written reports and testimony and/or affidavits; assisting in trial preparation and testifying as an expert witness in areas in which qualified.

10/03 – 8/09

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Commissioner

As one of the three full-time Commissioners appointed by the Governor to the Texas Commission on Environmental Quality, responsible for protecting the State's human and natural resources consistent with sustainable economic development. Along with the Executive Director of the agency, responsible for establishing overall agency direction and policy for the approximately 2,980 employees, 16 regional offices, and over \$500 million annual operating budget. As one of the three Commissioners, responsible for: implementing state and federal environmental regulatory laws by issuing permits and authorizations for the control of air pollution; the safe operation of water and wastewater facilities; and the treatment, storage, and disposal of hazardous, industrial, and municipal waste and low-level radioactive waste. Ensuring compliance with state and federal environmental laws and regulations by adopting enforcement orders, assessing administrative penalties and taking formal enforcement action against suspected violators. Approving plans for the cleanup and eventual reclamation of contaminated industrial and abandoned hazardous waste sites, and for the restoration of air and water quality. Setting water rates and allocating surface water rights. Planning for air quality, water quality, and waste management by adopting the State Implementation Plan for attainment of the National Ambient Air Quality Standards, adopting total maximum daily loads to improve water quality, and setting policy and adopting regulations for solid waste generation and management in Texas.

Also appointed by the Governor to serve on the Texas Energy Planning Council in 2004.

1/03 – 8/03

TEXAS LIEUTENANT GOVERNOR'S OFFICE

Executive Assistant

As Executive Assistant to the Lieutenant Governor, responsible for the direction and management of the administration, research, budget, constituent correspondence and inter-governmental affairs divisions of the Lieutenant Governor's Office. Represents the Lieutenant Governor on the Texas Bond Review Board and the Council on Competitive Government. Liaison to the State Preservation Board in behalf of the Lieutenant Governor. As part of transition of administrations, thoroughly scrutinized Office's operations and organization to help develop and implement appropriate organizational and procedural aspects; assisted in the recruitment and hiring of staff; assisted Lieutenant Governor in the appointment of Senate committees. Provides advice and counsel to Lieutenant Governor on administrative, legislative, policy and political issues.

1/99 – 12/02

TEXAS GENERAL LAND OFFICE / VETERANS' LAND BOARD

Deputy Land Commissioner/Chief Clerk

As the chief operations officer of the agency, responsible for the direction and management of the overall day-to-day operations of the GLO/VLB. Served in all official capacities of the Commissioner when and as designated by him and in his absence; served on Commissioner's behalf in his absence on the Veterans' Land Board and the School Land Board. Provided advice and counsel to Commissioner on all administrative, regulatory and policy issues; represented agency before the Legislature, Governor's Office, other state, federal, and local governmental agencies, as well as business, industry and civic organizations; assisted in the coordination of the agency's involvement in legislative session; planned and implemented major agency reorganization, including sizeable reduction in employee workforce; prepared operating budgets and legislative appropriation request; oversaw the financial management and administrative operations of the agency to ensure the most effective and efficient expenditure of taxpayer dollars while providing outstanding customer service. As part of transition of administrations, thoroughly scrutinized agency operations to find improper or inappropriate procedures and practices and eliminate such. Developed and implemented appropriate organizational and procedural changes to reduce government regulation, to privatize functions and programs where appropriate and to reduce personnel numbers where feasible.

11/92 – 12/98

TEXAS DEPARTMENT OF AGRICULTURE

Special Counsel, Associate Deputy Commissioner, Deputy Commissioner

Appointed Deputy Commissioner in August, 1995. As the chief executive officer of the agency, responsible for the direction and management of the overall day-to-day operations of TDA. Served in all official capacities of the Commissioner when and as designated by him and in his absence; served on Commissioner's behalf on the Texas Agricultural Finance Authority and Agriculture Resources Protection Authority boards, as well as other TDA and/or industry-related committees and task forces. Provided advice and counsel to Commissioner on all administrative, regulatory and policy issues; represented agency before the Legislature, Governor's Office, other state, federal, and local governmental agencies, as well as business, industry and civic organizations; coordinated agency's involvement in legislative sessions and Sunset Review process; developed agency goals and strategic plans; prepared operating budgets and legislative appropriation requests; oversaw the financial management and administrative operations of the agency to ensure the most effective and efficient expenditure of taxpayer dollars while providing outstanding

customer service. Developed and implemented appropriate organizational and procedural changes to reduce government regulation, to privatize functions and programs where appropriate and to reduce personnel numbers where feasible.

As Associate Deputy Commissioner, assisted the Deputy Commissioner in advising and assisting the Commissioner on policy matters in all areas of the department's jurisdiction. Also responsible for coordinating and managing the department's Administrative Services, Communications, and Legal Affairs divisions, including: developing policy recommendations to Commissioner and Deputy Commissioner and formulating staff procedures to implement policy as established by Commissioner; providing advice to Commissioner and Deputy Commissioner on administrative and regulatory issues; performing liaison activities with the Legislature, Governor's Office, and other state, federal, and local governmental agencies; coordinating agency's involvement in legislative sessions and Sunset Review process; developing agency goals and strategic plans; preparing operating budgets and legislative appropriation requests; overseeing the financial management and operations of the agency; overseeing the administrative support and automated data processing operations of the agency; assuming management and leadership responsibilities for projects and programs as assigned by Commissioner or Deputy Commissioner; assuming responsibility for the general operations and activities of the agency in the programs of assigned responsibility and in other agency programs jointly with the other Associate Deputy Commissioner.

As Special Counsel, responsible for advising and assisting the Commissioner of Agriculture on all matters relating to regulatory policies and state and federal legislative and regulatory issues. Primary responsibility for water, air and other environmental issues as they relate to agriculture in Texas.

11/90 - 11/92

PUBLIC UTILITY COMMISSION

Deputy Executive Director

Responsible for assisting Executive Director in coordinating and managing all daily administrative activities of the PUC, including: developing policy recommendations to Commissioners and formulating staff procedures to implement policy as established by Commissioners; providing advice to Commissioners on administrative and regulatory issues; performing liaison activities with the Legislature, Governor's Office, and other state, federal, and local governmental agencies; coordinating agency's involvement in legislative sessions and Sunset Review process; developing agency goals and strategic plans; preparing operating budgets and legislative appropriation requests; supervising the

financial management and operations of the agency; providing general guidance for administrative support and automated data processing matters; assuming management and leadership responsibilities for projects and programs as assigned by Commissioners or Executive Director; assuming responsibility for the general operations and activities of the agency in the absence of the Executive Director.

1/88 - 11/90

ENVIRONMENTAL LAW PRACTICE

As solo practitioner and as partner in small law firm, practiced environmental/water law, representing clients before State, Federal and local governmental agencies. Partner generally responsible for management of firm's inventory, accounting, billing and records.

8/75 - 12/87

TEXAS WATER COMMISSION

Executive Director, General Counsel/Chief Hearings Examiner, Assistant Chief Hearings Examiner, Hearings Examiner

Started at entry level hearings examiner position with Texas Water Quality Board (predecessor agency) conducting adjudicative public hearings in all areas of agency's regulatory responsibilities. Promoted in October, 1977 to Assistant Chief Hearings Examiner, managing agency's water quality and hazardous/solid waste adjudicative public hearings programs. Promoted in January, 1983, to Chief Hearings Examiner/General Counsel, managing agency's entire adjudicative public hearings program in all areas of regulatory responsibilities and providing legal advice and counsel to the 3 full-time Commissioners.

Appointed Executive Director in September, 1985. Responsible for managing and supervising over 1,100 employees statewide and an annual budget of over \$40 million.

Planned and implemented complete agency reorganization to provide necessary structure for effective and efficient response to all State and Federal mandates: eliminated inefficient levels of administration to provide more responsive Executive Office; implemented programmatic versus functional divisions, combining all aspects of each program into a single division, improving lines of authority, communications and decision-making; instituted "Board of Directors" management approach to achieve team effort; changed agency to progressive rather than reactive mode with greater emphasis on enforcement; elevated and maintained field operations to major program level.

Instilled self-confidence in the staff in their ability to do their job and do it well through "can do, will do" philosophy; sought and maintained high quality staff; encouraged innovative ideas in ways to do more work more

effectively and efficiently; provided employee incentives through aggressive merit raise and promotion policy and employee recognition programs.

Built public, legislative and regulated community confidence in redirected agency through demonstrated accountability: presented effective and efficient legislative packages; sought and obtained major new revenue sources to fund expanded workloads and reduce dependency on general revenue; increased staff communication with regulated community; adopted cooperative but firm stance on enforcement and improved permit processing procedures.

Achieved higher percentage of compliant facilities and/or facilities under enforcement or corrective action plans; developed long-range goals and plans; implemented effective monitoring techniques for measuring agency performance; achieved greater agency responsiveness through close supervision by total management team.

REFERENCES AND ADDITIONAL DATA AVAILABLE ON REQUEST

EXHIBIT LRS-2

List of Documents Considered

1. Plaintiff's Original Complaint for Declaratory and Injunctive Relief
2. State Official Defendants' Rule 12(b) Motion and Memorandum in Support
3. The Texas Law of Water Rights, by Wells A. Hutchins (1961)
4. Texas Water Code, Chapters 1, 5 11 and 12
5. Texas Administrative Code, Title 30, Chapters 210, 288, 295, 297, 298, 299, 303 and 304
6. Texas Commission on Environmental Quality website relating to water rights:
http://www.tceq.texas.gov/permitting/water_rights.html/
7. "*Rights to Surface Water in Texas*," Texas Commission on Environmental Quality Publication GI-228 (Rev. 3/09)