



WRC WORKING GROUP

DEPARTMENT OF NATURAL RESOURCES



STATEMENT OF ISSUE

- In January 2018, the WRC passed a resolution to convene a working group to further study the possibility, implications, and mechanisms for the out-of-state sale of publicly owned surface waters in Louisiana and provide recommendations to key decision-makers to help them determine whether to pursue the sale of surface water, and if pursued, how the process could work.
- Narrowed focus - Toledo Bend Reservoir



WORKING GROUP

Name	Organization
Thomas Harris	LDNR
Paul Frey	Louisiana Landowners Association
Tyler Gray	LMOGA
Mark Davis	Tulane Water Law Institute
Kyle Balkum	LDWF
Jim Harper	Louisiana Farm Bureau
Gary Snellgrove	LDNR – Office of Conservation
Harry Vorhoff	Attorney General's Office
Warren Founds	Sabine River Authority - Louisiana



SCOPE OF WORK

- Primary and secondary research
- Working group meetings
 - » February
 - » June
 - » September
 - » November
- Individual work and research
- Report drafting and feedback





KEY QUESTIONS TO ANSWER

- Process
- Legal
- Impacts
(Agricultural/
Wildlife/Envir
onmental)
- Benefits



EXTERNAL RESEARCH SUBMITTED

- Water Facts for Toledo Bend Reservoir
- Current Status of Interstate Water Supply Diversion from the Lower Mississippi River
- Louisiana's Place in the Emerging Water Economy
- Protecting State Waters Within the Commerce Clause
- Survey of Law from Other States

STUDY FINDINGS

- Legal limitations and requirements
- Procedural requirements
- Minimum water level and downstream releases requirements
- Benefits of potential sale
- Term
- Precedential value
- Documentation Supporting Decision



LEGAL LIMITATIONS AND REQUIREMENTS

- Louisiana law on sale/transfer of surface water is sparse and untested
- Surface water is a public thing subject to public use
- Riparian framework of Louisiana surface water law
- SRA-Louisiana specifically authorized to sell Toledo Bend water



LEGAL LIMITATIONS AND REQUIREMENTS

- Sale/transfer to non-riparians subject to conditions
 - » Beneficial purposes of water transfer – what is the public value?
 - » Consistent with SRA-Louisiana’s public purpose and legal authorities
 - » Coordinate with State natural resource agencies
 - » Impacts on existing water users and potential future development in Louisiana
 - » Consider alternatives for revenue
- Public Trust Mandate
 - » Environmental Impacts vs social and economic benefits
- Interstate Commerce and Sabine River Compact
- Continuing Legal Uncertainty



PROCEDURAL REQUIREMENTS

- Under Louisiana law, the SRA - Louisiana will have to approve any agreement for the sale, utilization, distribution, or consumption of water by a majority vote of its commission
- Written concurrence of the Governor of Louisiana, the Senate Committee on Natural Resources, the House Committee on Natural Resources and Environment, the Water Resources Commission, and at least two-thirds of the governing authorities of the parishes within the territorial jurisdiction of the SRA



FAIR MARKET VALUE

- AG Opinions 08-0176, 09-0028, & 09-0066: Per La. Const. Art. VII, § 14, surface water is a thing of value owned by State that must be purchased for “fair market value” if it is to be used for anything other than a public purpose
- Fair market value for the sale of such water should include the economic development, employment, and increased tax revenues created by the activities associated with the sale of running surface water
- At a minimum, SRA – Louisiana staff should compare any proposed price rate with existing and historical rates for untreated Toledo Bend surface water as well as any other comparable water sale prices. Additionally, consideration of other economic and non-economic benefits from the sale of water may be considered when determining the value of the Toledo Bend surface water



MINIMUM WATER LEVEL AND DOWNSTREAM RELEASES REQUIREMENTS

- Ensuring any proposed sale would not impact releases from the reservoir to meet the downstream obligations of both authorities ensuring environmental, ecological, navigation, or societal benefits
- Any proposed sale agreement should clearly state that SRA of Louisiana (alone or in conjunction with SRA of Texas) have the authority to limit or even cease water withdrawals when water levels in the reservoir are in danger of going below a level that would cause significant environmental impacts or perhaps when significant impacts to other users is threatened
- Any agreement should consider and mitigate potential impacts to recreational use of the reservoir. SRA of Louisiana should attempt to document potential negative impacts, if any, to recreational uses and those business associated with recreational uses from the proposed withdrawals



BENEFITS OF POTENTIAL SALE

- A large water sale could replace the power sales revenue for SRA of Louisiana. The goal would be to
 - » 1) attract a large water sale to be shared by both the Louisiana and Texas SRA's
 - » 2) still maintain a water reserve for future use, and
 - » 3) not compromise the other recreational and economic attributes of the Toledo Bend Reservoir to the states
- Failure to find a new funding source, could lead to decreased resources for SRA of Louisiana and potentially lead to decreased maintenance of the reservoir
- Louisiana's failure to agree to such a sale would not necessarily prevent the Texas SRA from entering into an agreement on its own someday in the future



TERM

- A water sales agreement should include a reasonable term
- Agreements that are too long have the potential to become outdated and have consequences completely unforeseeable at the time the agreements are entered into
- Agreements that are too short have the potential to be unworkable or to be so unattractive that interest to enter into such a sales agreement will not exist
- The term of such an agreement has the very real potential to affect the price a private party is willing to pay for surface water due to the investments that would be required to construct necessary infrastructure
- The term and renewal structure of any future out-of-state water sale agreement would need to be developed based on existing operating conditions of Toledo Bend and resulting effects of the proposed sale that best accommodates **all** parties concerned



PRECEDENTIAL VALUE

- The prospect of the out-of-state sales of surface water from Toledo Bend is unique within Louisiana – it is subject to an interstate compact, it is a reservoir that is currently operated pursuant to a FERC license, and it provides the boundary between Texas and Louisiana
- It is of paramount importance that a strong statement setting forth the factors that make a specific out-of-state surface water sale proposal distinct from future out-of-state sales proposals be included in any decision approving an out-of-state sale. This can be accomplished by SRA of Louisiana through the drafting of a comprehensive reasons for decision that considers the many factors addressed in the report and the study group meetings



SUMMARY

- Sale must meet several legal requirements
- Sale is constitutionally required to be for “fair market value”
- The benefits of sale outweigh any potential negative impacts to the environment
- A reasonable term limit be placed on any sales agreement or a schedule for review and renewal be put in place
- A clearly stated provision allowing of SRA of Louisiana to limit, condition, and even stop withdrawals under the agreement should certain water level limits be reached or other public interests mandate
- Documentation supporting any potential out-of-state surface water sale from Toledo Bend is highly encouraged