

LEGAL UPDATES

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## Texas Court Strikes Down Statute and Preserves Houston's Water Rights

On June 30, 2021, Texas's Third District Court of Appeals upheld a lower court decision to protect the City of Houston's interest in an unbuilt water reservoir by striking down a state law, declaring it unconstitutionally retroactive based on its impairment of Houston's water rights. Striking down the state law restores Houston's right to develop the unbuilt reservoir to supply water to the city in the future.

In *Brazos River Authority et al. v. City of Houston*, Houston obtained a 70% interest in water rights for the reservoir on Allens Creek, with the Brazos River Authority (BRA) as its partner with the remaining 30% interest. The city maintained long-term plans for developing the water project but suffered several major setbacks that held up the project for years. The Texas State Legislature eventually passed HB 2846 in 2019 to remove the city's interest in the water project and transfer all rights to the BRA.

The State Legislature enacted HB 2846 to speed up development of the reservoir by transferring full interest to the BRA. However, the court found the Legislature could not provide any reason why the BRA could complete the project faster, considering the numerous repeated setbacks plaguing the project. Dissenting Justice Melissa Goodwin said the Legislature's action should carry a presumed constitutionality and require Houston to demonstrate the need to strike down the law, which she says Houston failed to do. Houston's proof of its vested water rights in the reservoir became questionable because it received permits for the project's development decades earlier but failed to move forward on construction.

In its decision, the court relied on the three-factor test established in a 2010 Texas Supreme Court decision, *Robinson v. Crown Cork & Seal Co.*, to review whether a statute violates the state's constitutional prohibition on retroactive laws under the following factors: (1) the extent of the public interest served by

the statute; (2) the nature of the prior right violated by the statute; and (3) the severity of the violation. Ultimately, the court split on the issue, with the majority determining the Legislature lacked justification to retroactively apply the state statute to Houston's interest in the unbuilt reservoir, because the Legislature failed to demonstrate an overriding public interest in violating the water rights of the city in the unbuilt reservoir.

Houston officials lauded the court's decision as a victory for all Texas cities, claiming the Legislature's bill punished the foresight to seek out potential water sources and would endanger the city's water supplies.

The Brazos River Authority announced plans to appeal this decision to the Texas Supreme Court.

### **What this means to you**

This court's decision restores the City of Houston's interest in the Allens Creek reservoir project and affirms the state prohibition against retroactive statutes. The court's application of the factor test established by the Texas Supreme Court also provides insight into the courts' decision-making process on issues involving the constitutionality of retroactive statutes.

### **Contact us**

If you have any questions about this opinion or its potential impact, feel free to reach out to Kate David, Sandy Hellums-Gomez, Robert Eckels, Mike Stafford, Logan Leal or your Husch Blackwell attorney for more information. Summer Associate Justin Cias, Texas A&M School of Law Class of 2022, provided invaluable assistance with this article.