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Primer on Texas Water Law

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Primer on Water Law 2015

“When the well is dry, we know the worth of water.”

— [Benjamin Franklin](#)

The purpose of this presentation is to give a brief overview of Texas water law “for the non-lawyer.” The discussion will focus on the basic differences between surface water and groundwater, some background on water rights and how our system came to be, and basic details on how our system of water rights is regulated. Interwoven in this presentation will be some mention about the recent revisions to Texas water law brought about by recent legislation and the recent Texas Supreme Court case of *Edwards Aquifer Authority v. Day*.

Texas water is categorized one of two ways for regulatory purposes: (1) as groundwater; or (2) as State (surface) water. The two differing concepts of how these are characterized and regulated could not be more diametrically opposed. To follow this dichotomy, the paper will discuss surface water and groundwater separately.

I. SURFACE WATER.

A. Elements of Surface Water

(1) Surface Water defined. What is surface water? Rather than just a straightforward definition of “surface water”, the definition appears to come from making it synonymous with the term “state water,” meaning water that is property of the state. The state legislature has given us section 11.021 of the Texas Water Code, which asserts state ownership over what would appear to be any type of surface water. Texas Water Code § 11.021(a) provides:

The water of the ordinary flow, underflow, and tides of every flowing river,
natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the

storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

In addition, it is important to note that the features stated in section 11.021 are frequently known as “watercourses.” Once water reaches a “watercourse” it becomes legally significant because it becomes property of the state. Therefore, the definition of “watercourse” is important. The courts have described what constitutes a “watercourse.” A watercourse is defined as having: (1) a defined bed and banks, (2) a current of water, and (3) a permanent source of supply. *Domel v. City of Georgetown*, 6 S.W. 3d 349, 353 (Tex. App. – Austin 1999, pet denied). Whether water is within the confines of a watercourse is crucial to the determination of whether it is state water or not. Generally, the concept is that when water reaches a watercourse, it is state water. Until then it is called “diffuse water.”

(2) Diffuse Water. As stated above, water on the surface of the land that has not yet reached a bed or channel (i.e. entered a watercourse) is diffused surface water. Generally, this will be rainwater or snowmelt runoff. Diffused surface waters are the property of the landowner until they enter a watercourse and become state water.

(3) Underflow. Tex. Water Code § 11.021(a) provides that the “underflow” of streams is state water. Under Texas law, the “underflow” refers to water found within the bed and banks of a river. Although this water is found within the ground, it is regarded as “state water” and is subject to prior appropriation. According to title 30 of the Texas Administrative Code, the underflow of a river refers to: [w]ater in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(4) SB 1 Exception. Texas Water Code § 11.042(b) provides an exception that allows someone with groundwater to discharge it into a state watercourse and obtain a bed and banks permit from the TCEQ to authorize indirect reuse.

B. The Surface Water Prior Appropriation System

(1) So now that we know that surface water is basically State water, how does anyone get to use the water? Today, surface water rights in Texas are generally governed by what is called the

“prior appropriation system.” The phrase, “first in time is first in right” is an often used way to describe this system. To determine how to ascertain who had what rights, in 1967, the Legislature adopted the Water Rights Adjudication Act, and instigated an “adjudication process.” The adjudication process was a way for the State to quantify and reconcile the various sorts of water rights that have been previously used in Texas (civil law water rights, riparian water rights, and other assorted complicated schemes).

(2) The adjudication process is summarized as follows:

1. The TCEQ required all persons claiming a right to use water in a given river segment to file their claims with the Commission and prove the nature and extent of their previous use.

2. Following evidentiary hearings and an opportunity to dispute the Commission’s preliminary conclusions, the Commission defined all water rights in a certain segment. For each right that the Commission recognized, their order stated the nature of the use authorized, quantity of water, priority of use, authorized diversion point, diversion rate, and other conditions of the water right.

3. Following an opportunity for all parties dissatisfied with the Commission’s ruling to litigate the issues, the Commission then automatically filed its administrative determination with a district court for final action by the judiciary.

4. Once the final judgment and decree was issued by the Commission, the Commission memorialized its findings by issuing a certificate of adjudication to each water right holder subject to the decree.

The last of the general stream adjudications for Texas, for the Upper Rio Grande stream segment, was completed in 2007. A person seeking a new water right must obtain authorization through the TCEQ permitting process.

(3) What all this means: Now, to use the water that is State water, you must have one of these adjudicated rights (also known as permits), or buy water from someone who does.

(4) Exception. The use of water for domestic and livestock purposes is generally exempt from state water rights administration. Without obtaining a permit, a person may construct on his

or her own property a dam or reservoir up to 200 acre-feet in capacity for domestic and livestock purposes. A person, other than a commercial enterprise, may temporarily store more than 200 acre-feet in such a reservoir without a permit if the person can demonstrate that he or she has not stored in the dam or reservoir more than 200 acre-feet on average in any 12-month period.

(5) Beneficial Use and Abandonment. To perfect a water right, you have to put it to beneficial use and keep using it for beneficial use. Tex. Water Code § 11.024. What constitutes “beneficial use” under § 11.024 is broad. It contains a list of several types of uses that are recognized as “beneficial,” including domestic and municipal, agricultural and industrial, mining, hydroelectric, navigation, recreational. Section 11.024 also recognizes that there are “other beneficial uses.” Note, if there are ten years of non-use your right can be considered as abandoned and you can lose that right.

C. Hot topics: Environmental Flows, Enforcement, and the Watermaster program

(1) Environmental flows. In order to maintain the biological soundness of the state’s rivers, lakes, bays and estuaries (and most likely in response to the EPA’s lawsuit involving the whooping crane), the State has enacted Section 11.0235 of the Texas Water Code. Section 11.0235 requires the TCEQ to consider the effects of an application on bays and estuaries and in-stream uses. “Environmental flows” is the term that refers to both in-stream flows and fresh water inflows into bays and estuaries. If a proposed project is to be located within 200 river miles of the coast, the TCEQ must impose special conditions on the permit if necessary to preserve freshwater inflows to bays and estuaries. Prospectively, any new or amended water right that increases the amount of water authorized must include a provision allowing the TCEQ to adjust conditions in the water right to provide for protection of in-stream flows or freshwater flows in compliance with applicable flow standards. In addition, section 11.152 requires TCEQ to consider the impacts on fish and wildlife habitats for any proposed project taking 5,000 acre-feet of water.

(2) Current Enforcement. Currently, willful violators of permit terms or water rights laws are subject to a maximum civil penalty of \$5,000 for each day of each violation in suits that the Attorney General brings on TCEQ’s behalf in the district courts. *See* Tex. Water Code § 11.082. The Attorney General, on referral from the TCEQ, may also seek injunctive relief in Court for

violations of TCEQ rules and orders, including those relating to water rights. Tex. Water Code §§ 7.002, 7.032, 7.101 and 7.105; Tex. Govt. Code § 2001.141. Additionally, the TCEQ may assess administrative penalties for violations of permit terms and conditions or water rights laws under Tex. Water Code § 11.0842. Designated TCEQ personnel may also issue field citations for violations. This is somewhat like a traffic ticket, which the alleged violator may pay or contest in an administrative permit hearing. Tex. Water Code § 11.0843.

(3) The Watermaster program. Water rights in certain river basins may be subject to regulation by a “watermaster.” A “watermaster” is someone who can investigate water use and cause diversion works to be cut off in certain situations. *See, e.g.*, Tex. Water Code § 11.326, *et seq.* Generally speaking, a watermaster divides the water of the streams (or other sources of supply) within the watermaster area, based on the adjudicated water rights, and regulates controlling works and diversion works in times of shortage in order to protect existing water rights and to prevent waste and any diversion, storage, or use in excess of adjudicated rights.

A watermaster may be appointed in one of two ways. The TCEQ may on its own initiative divide the state into water divisions for the purpose of administering adjudicated water rights. The Commission’s executive director then appoints and supervises a watermaster and advisory committee for each division. Alternatively, upon petition by 25 water right holders or on its own motion, the Commission may create a watermaster position. To do so, the TCEQ must conduct a hearing to determine whether a watermaster should be established for an identified river basin or segment thereof. Currently, there are watermaster programs for South Texas, the Rio Grande (below Amistad), and the Concho River.

Note, in April 2014, based on a petition by water right holders and following a contested case hearing, the Commission directed its Executive Director to appoint a watermaster for the Lower Brazos River Basin to encompass Possum Kingdom Lake and all water rights below that point in the basin. A committee to select the Brazos watermaster is in place and they should be selecting the person to fill the role by the summer of 2015. The watermaster will protect existing water rights and to prevent waste and any diversion, storage, or use in excess of adjudicated rights. This will be crucial for the Ft. Bend, Brazoria and Galveston County areas that get their water from the Brazos.

II. GROUNDWATER.

A. Elements of Groundwater. Groundwater is basically water occurring under the surface of the land. By definition in Texas Water Code § 36.001, “Groundwater” means water percolating

below the surface of the earth. The term “groundwater” can include percolating water or artesian water, but not the underflow of a surface water river or stream or the underground flow of water in confined channels. Groundwater is presumed to be percolating, unless proven otherwise. *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.). Groundwater in Texas is specifically excluded from the definition of state water and is subject to the rule of capture, as may be regulated and modified by the various groundwater conservation districts across the state.

B. Exceptions.

Certain categories of underground water, however, are legally distinct from “groundwater,” in terms of the ownership interest and/or the applicable regulatory jurisdiction. Each of these distinct categories of underground water is summarized below:

(1) Underground Streams in Defined Channels

There is a critical distinction between percolating groundwater and flowing groundwater (subterranean streams). The landowner’s rights with respect to groundwater flowing in a well-defined and known subterranean stream are the same as would apply for a surface watercourse. The subsurface watercourse, however, must have all the characteristics of a surface watercourse. These characteristics are beds, banks that form a channel, and a current of water. This determination is made on a case-by-case basis, and to date no subterranean streams have been found in Texas.

(2) Artesian Water

According to the Texas Water Code § 11.201, artesian water is groundwater confined under pressure by an impermeable geologic layer, capable of flowing “above the first impervious stratum below the surface of the ground” when properly cased in a well. Texas courts have applied the principles applicable to percolating groundwater to artesian water. The only significant distinction is the existence of statutory provisions prohibiting the waste of artesian water and requiring the approval of the Texas Commission on Environmental Quality (TCEQ) in certain circumstances for withdrawal.

C. The Rule of Capture

(1) The Rule. In 1904 the Texas Supreme Court, in the case of *Houston & Texas Central Railway Co. v. East*, adopted the English common law rule that the owner of the land may pump unlimited quantities of water from under his land, regardless of the impact that action might have upon his neighbor's ability to obtain water on his own land. This right is referred to as the "right to capture." Colloquially, this is called "the law of the biggest pump."

(2) Exceptions. Several limitations exist at common law on the landowner's right to capture and use percolating water. First, the landowner cannot capture and use percolating water maliciously with the purpose of injuring a neighbor. Similarly, a landowner cannot use it in a manner that amounts to wanton and willful waste of the resource. Third, since 1978 an action for damages will lie for the negligent pumping of groundwater that causes subsidence of neighboring land. See *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978). Chapter 36 of the Texas Water Code now incorporates these common law exceptions and defenses under the rule of capture reflected in Texas case law.

D. Groundwater Districts. Although subject to the rule of capture, predictably, groundwater has become subject to reasonable regulation under the police power to protect the public health and welfare. This regulatory authority of the State has resulted in the creation of local or regional districts, known as underground water or groundwater conservation districts (usually known as groundwater districts).

(1) Creation. These districts may be created on a local option basis (upon petition pursuant to provisions of Chapter 36 of the Texas Water Code) or directly through the Texas Legislature. Currently, there is a proliferation of groundwater conservation districts (GCDs) and subsidence districts. As of April 2014, there are two subsidence districts and 99 GCDs throughout Texas. Two-thirds of Texas counties are fully or partially within a GCD or a subsidence district, and more than 85% of the groundwater produced in Texas is within one of these districts. One elementary fact about finding out whether and what regulations affect you as far as groundwater is concerned is to ascertain whether your property is within a GCD or a subsidence district and, if so, what the applicable rules of that district are.

(2) Powers. Powers of the GCDs and subsidence districts are not uniform, because many are created directly by the Legislature. However, chapter 36 of the Texas Water Code

provides the current codification of general law applicable to all GCDs. Pursuant to chapter 36, each GCD can enact their own rules. This authority, in and of itself, can cause the rules of a GCD to be different from those of other GCDs. The regulatory authority of a GCD is extremely broad, and a GCD may implement that authority in two ways: rulemaking and permitting. As per Texas Water Code § 36.101, a GCD has the authority to make and enforce rules, “including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater.” Most GCDs appear to have adopted some form of regulation over well spacing, groundwater production, or both.

(3) Subsidence districts. As stated above, groundwater regulation may occur not only through the creation of GCDs, but also through the creation of special law districts that may be expressly not governed by the provisions of Chapter 36. The prime example of this is the Harris-Galveston Coastal Subsidence District (Subsidence District). The HGCSO was created in response to significant subsidence in the Houston-Galveston area resulting from the pumping of groundwater. To reduce the drawdown of the water table and the reduction of artesian pressure, the HGCSO is authorized to regulate the spacing of wells and the production of groundwater from those wells. Before a well may be drilled or operated within the boundaries of the HGCSO, the owner or operator of the well must obtain a permit from the district. The Subsidence District utilizes a combination of mandatory planning and substantial permit fees to create strong financial incentives for water users to increase their reliance on surface water and decrease groundwater use. The enabling legislation creating the HGCSO has been challenged and upheld as constitutional by the Texas Supreme Court. Other similar districts created by special legislation are the Fort Bend Subsidence District and West Fort Bend Water Authority.

(4) Desired Future Conditions. Section 36.108 of the Texas Water Code requires groundwater conservation districts (GCDs) to implement joint planning and adopt “desired future conditions” (DFCs) for aquifers in groundwater management areas. This means that all groundwater districts in a certain aquifer area must plan and meet to determine desired future conditions for their defined aquifer level. Texas Water Code requires GCDs to issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable desired future condition (DFC) developed under Section 36.108 of the Texas Water

Code. GCDs must manage total groundwater production on a long-term basis to achieve their applicable DFCs, and must consider the amount of modeled available groundwater, estimates of production from exempt wells, production authorized under existing permits, estimated actual production from permitted wells, and yearly precipitation and production patterns.

(5) The case of *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (2012). In 2012, the Texas Supreme Court issued an important case that will affect groundwater regulation. In the facts of the case, landowners had applied for permit to withdraw 700 acre-feet of water annually from an aquifer for irrigation. The Edwards Aquifer Authority denied their application. The landowners protested, and an administrative law judge (ALJ) concluded that landowners should be granted a permit, but for only 14 acre-feet of water. The landowners appealed and also sued the Edwards Aquifer Authority for a taking of property without just compensation. The Texas Supreme Court held that land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation, as guaranteed by Article I, Section 17 of the Texas Constitution.

(6) The “Problem.” Districts by statute are to manage production in their groundwater management areas to achieve their desired future conditions. However, the *Day* case says landowners have a right to their water and regulation that takes their interest without adequate compensation may result in an unconstitutional “takings.” The groundwater districts and courts will now be grappling with issues surrounding this case.

CONCLUSION

While Texas water law has developed (and flip-flopped) over the past century or two, it appears to still be developing and changing. As with all legal issues, please check with legal counsel for the latest and greatest involving your water law issue.