OVERVIEW OF TEXAS WATER LAW

Tiffany Dowell Lashmet
Texas A&M Agrilife Extension
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SURFACE AND GROUNDWATER IN TEXAS
Categories of Water

- Water law depends on category.

- **Groundwater** (2 categories)
  - *Percolating (aquifers)*
  - *Subterranean rivers (none in TX)*

- **Surface water** (2 categories)
  - *Surface water in a defined water course*
  - *Diffused surface water*
Groundwater Law Basics

■ Who owns groundwater in Texas?
  - Landowners own water beneath their property.

■ Governed by the Rule of Capture.
  - Landowner has the right to pump as much water as he wants, even if it drains his neighbor’s well (subject to limitations on next slide).
  - East and Day cases
  - “Law of the biggest pump”
Limits on Rule of Capture

- There are two categories of exceptions to the Rule of Capture:

  - Common Law Exceptions
    - Maliciously take for sole purpose of injuring neighbor
    - Wanton and willful waste
    - Negligently drilling/pumping that causes subsidence
    - Pumping from contaminated well
    - Trespassing in order to drill.

  - Groundwater Conservation Districts
    - “Preferred method of groundwater management”
    - Enact rules/regulations related to groundwater.
Groundwater Conservation Districts

- **Must** require a permit for the drilling and operating of any well or altering the size of a well or pump.
  - *Impact on existing users,*
  - *Beneficial use,*
  - *Waste/conservation plan,* and
  - *Consistent with GCD plan*

- **Must** require drillers logs be kept and filed.

- **May** require records and reports of drilling and production.

- **May** regulate spacing of wells and production of groundwater.

- **May** impose export fees for groundwater to be taken out of the district.
Groundwater Conservation Districts (cont.)

- Currently 98 GCDs, 4 pending confirmation.

- Cover all (or portions of) 174 counties.

- 85% of Texas groundwater.
Exempt Wells

- No permit necessary for certain types of wells:
  - Domestic use or providing water for livestock or poultry if:
    - Located on 10 acres or more; and
    - Not capable of producing more than 25,000 gallons/day
  - Used to supply water for a rig actively engaged in drilling or exploration operations for oil & gas if located on the same lease
  - Water used for some mining activities.

- These exemptions are a baseline—a local GCD can allow more exemptions.
Bragg v. Edwards Aquifer Authority

- Pecan farmer in Medina County seeks permits to irrigate long-standing pecan orchards.

- EAA denies permits.

- Farmer files suit for regulatory taking.
  - Penn Central factors:
    - Nature of the right infringed upon
    - Investment backed expectations
    - State’s interest in regulating
Bragg v. Edwards Aquifer Authority (cont’d)

- Trial court & San Antonio Court of Appeals side with farmer.
- TX Supreme Court refuses to hear the case.
- On remand, jury awards $2.5 million, EAA pays.
- Left with first takings verdict in TX for groundwater.
Lubbock v. Coyote Lake Ranch

- Ranch sells groundwater rights to Lubbock in 1953.

- In 2012, Lubbock shows up ready to start drilling wells.

- Current ranch owner argues accommodation doctrine.

- Mineral owner has right to use as much of the surface as is reasonably necessary to produce oil and gas, but must accommodate existing surface uses if landowner proves:
  - Substantially impact on existing surface use
  - Mineral can be produced another way
  - Surface use cannot be conducted in another way.
Lubbock v. Coyote Lake Ranch (cont’d)

- Trial court issued injunction; Amarillo Court of Appeals reversed—said no A.D. for groundwater.

- Texas Supreme Court issued huge water law ruling.
  - *Groundwater estate is dominant when severed.*
  - *Accommodation doctrine applies to groundwater owners.*

- Impact on other surface owners—groundwater owner now has the right to use as much of the surface as reasonably necessary to produce groundwater.

- Case back at trial court. Will the landowners meet burden of proof so accommodation doctrine applies?
  - *Substantially impact on existing surface use*
  - *Mineral can be produced another way*
  - *Surface use cannot be conducted in another way.*
Surface Water Basics

- **Who owns surface water?**
  
  - *Surface water in a “defined watercourse”*
  - Defined bed and banks
  - Current of water
  - Permanent source and supply
  - Owned by the state of TX

- *Diffused surface water*
  - Runoff from rain/snow before it gets into a watercourse
  - May be captured by landowner while on his property.
Surface Water Law Basics (cont’d)

- Must obtain a permit from TCEQ to use state-owned water.

- Governed by prior appropriation
  - *First in time, first in right.*
  - *Senior rights superior to junior rights.*

- Emergency exceptions do exist if necessary to protect public health, safety and welfare.
Exempt Diversions

- No permit necessary for certain types of diversions on non-navigable streams:

  - **Domestic or livestock purposes:** Can build a tank or reservoir if less than 200 acre-feet capacity and for a non-commercial purpose.
  - **Commercial or non-commercial wildlife management, including fishing, but not fish farming:** Can build a tank or reservoir if less than 200 acre-feet capacity.
  - **Surface coal mining operations:** May maintain a reservoir if used solely for sediment control or compliance with laws regarding fire/dust suppression.
  - **Drilling and producing petroleum:** May divert from the Gulf, bays and arms, so long as not more than 1 acre foot/day.
“Navigable Streams”

- Classification matters for two reasons.
  - Exempt diversions allowed only on non-navigable streams.
  - Beds of navigable streams are owned by the state, meaning public can use the stream even if flowing across private land and the landowner may not fence or dam.

- Navigability tests
  - Navigable in fact: Can serve as “common highway for trade and travel.”
  - Navigable in law: Does streambed maintain average width of 30 feet from the mouth up?
Texas Farm Bureau v. TCEQ

■ Facts
  - *Dow Chemical is 1942 water holder on Brazos River.*
  - *Makes priority call in 2012.*
  - *TCEQ grants call, but exceptions for municipalities and power generators.*
  - *Suspended rights:  841 rights; 117,227 AF/yr*
  - *Exempted rights:  19; 1.8 million AF/yr*
Texas Farm Bureau v. TCEQ

- Farmers argue this violates prior appropriation, not following “first in time, first in right.”
- TCEQ argues they have power under emergency exception.
- Appellate Court sides with farmers—TCEQ can suspend, but they have to comply with prior appropriation.

- Texas Water Code Section 11.053:
  - “During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, in accordance with the priority of water rights “as between appropriators, first in time is the first in right.”:
    - (1) temporarily suspend the right of any person who holds a water right to use the water; and
    - (2) temporarily adjust the diversions of water by water rights holders.”
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Thank you!

Tiffany Dowell Lashmet
Texas A&M Agrilife Extension

tdowell@tamu.edu
806-677-5668
Blog: agrilife.org/texasaglaw
Podcast: aglaw.libsyn.com
Twitter: @TiffDowell