WATER RIGHTS ISSUES

TEXAS WATER RIGHTS LAW: EAST MEETS WEST

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Introduction

Water rights law determines the extent to which an individual can use the water which runs across, underlies, or moves through the atmosphere above his property. The resultant largely invisible institutional structure is perhaps the most significant obstacle to improved water resources management and conservation. An inherent problem in all jurisdictions is that the law has traditionally divided water moving through the interconnected phases of the hydrologic cycle into separate legal classes, applying different rules of law to the ownership and use of each class, despite the fact that it can often be demonstrated that water use in each legal class has significant impacts on opportunities for water use and management, as well as on recognized water rights, in other phases of the hydrologic cycle.

In the United States, two major water rights doctrines, the riparian and the prior appropriation systems, are applied to surface water in streams. Riparian water rights are largely unregulated and unquantified and are tied to riparian land ownership. Conversely, the prior appropriation system is administered by a state agency and appropriative rights are specifically quantified as to purpose, quantity, place, and occasionally time of water use. As settlement progressed westward across the United States, most states adopted the common law of England as the rule of law, and with it acquired the riparian system already in use in the eastern states. It soon became apparent that this system was not well suited to the hydrologic conditions in the more arid West, and it was either replaced by prior appropriation or the latter doctrine was superimposed on the pre-existing riparian system. It has proven especially difficult to correlate dissimilar riparian and appropriative water rights where the two systems exist concurrently.

In general, the differences between the common law riparian and prior appropriation systems also apply to groundwater. Three common-law variations have developed, the strict common law rule (absolute ownership), and two less stringent variations, the doctrines of reasonable use and of correlative rights. The prior appropriation system may also be applied to groundwater. Other legal classes of water of significance are diffused surface water, surface runoff before it reaches a streamcourse, and atmospheric moisture. As a rule, diffused surface water can be intercepted and used by the owner of land on whose property it accumulates, often with little regulation. Because weather modification is relatively new and its results so uncertain, any public and/or private rights to atmospheric moisture remain poorly defined, though weather modification activities are regulated to varying degrees by all states. The trend for all legal classes of water is away from poorly-defined common law water rights toward increasingly strict statutory and administrative definition and regulation.

From the author's perspective as a geographer-lawyer, this paper: 1) provides a brief overview of the Texas law of water rights, a relatively unique blend of eastern and western legal principles, and 2) discusses some of the water management issues which are directly attributable to the

complex legal system which has evolved.

The Texas Law of Water Rights

The most voluminous segment of Texas water law pertains to surface water in rivers and streams. Texas, a dual-doctrine state, recognized first the riparian doctrine and later superimposed on it the prior appropriation system. Texas riparian law is a complex blend of Hispanic civil law and English common law principles. Not until the mid- 1960s was it determined that only limited riparian rights pertain to most of the extensive early Spanish and Mexican land grants and to pre-1840 grants from the Republic of Texas. More comprehensive riparian rights attach to lands granted by the Republic and state between 1840, when the English common law was adopted, and the Appropriation Acts of 1889-1895, an era when a great deal of public land passed into private hands. Texas courts modified the riparian doctrine to give riparian landowners the right to divert streamflow for irrigation and other largely consumptive purposes. Since the Appropriation Acts, most surface water in Texas has been owned by the state and can be managed in the general public interest, and a statutory procedure has existed through which individuals can procure water rights permits. First, this was accomplished through a very informal procedure called "certified filing," whereby landowners merely filed a sworn statement with the County Clerk describing their water diversion. Since 1913, a more strictly administered procedure involves making application to a state agency, now the Texas Water Commission, for a permit to appropriate water. A virtually complete water rights adjudication, begun in 1969, will now merge all unrecorded surface water rights, consisting largely of riparian claims, into the permit system. Henceforth, all permits, including adjudicated riparian rights, will be subject to cancellation for nonuse.

One of the most poorly-defined areas of Texas surface water law concerns the right of public access. There is no express statutory authority giving the general public the right to use state-owned waters, but there is extensive, and often conflicting, case law recognizing such a right on navigable streams. It is also well established that the public may not gain access by crossing private property. Texas is unique in having a statutory definition of navigable streams, defined as those averaging 30 feet or more in width from the mouth upstream. Definition of public and private rights is complicated by the fact that Texas land grants, sometimes with slightly different property rights, have emanated from Spain, Mexico, the Republic of Texas, and the state.

Texas law divides groundwater into two classes: 1) water flowing in well-defined underground streams, to which surface water law might apply, and 2) percolating groundwater. There is a strong legal presumption that all groundwater is percolating, and in no case has the presence of an underground stream been proven. Texas law is very well settled about the ownership of percolating groundwater. The strict common law or "English" rule was established by the Texas Supreme Court in 1904. Under the absolute ownership rule, landowners can pump and use the water beneath their property despite the fact that it might deprive adjacent or more distant water users of underground or interconnected surface water of their accustomed supply. The rule has been elaborated somewhat by Texas courts, but it has not been modified to any significant degree, even though many other states have replaced it. About the only regulation of the landowner's absolute right to groundwater is exercised by local underground water conservation districts (UWCDs), formed under a 1949 general statute or by special legislation. Though general law and some special law districts have broad powers to regulate groundwater production, conservation is accomplished primarily through well-spacing rules and control of off-farm waste. Before 1985, only 12 UWCDs have been formed; thereafter, the pace of district formation increased and there are now over 30 established UWCDs, a partial result of 1985 legislation authorizing the Texas Water Commission to designate "critical groundwater areas" and push for UWCD creation.

With respect to diffused surface water, Texas follows the general rule of most states which allow the landowner to intercept and use this water on his property. A statute provides that landowners can build stock tanks or farm ponds, so long as the storage capacity does not exceed 200-acre feet, though this water can be used only for domestic and livestock purposes. A permit is required only if the reservoir exceeds that capacity is on a streamcourse or the water is to be used for other purposes. The property owner's right is superior to that of adjacent lower landowners and to any surface water rights on streams into which the water might eventually flow. Water accumulating in the thousands of small basins of interior drainage, the playa lakes, on the Texas High Plains is also regarded as diffused surface water.

Texas does not claim rights to clouds or atmospheric moisture as do a few states. However, in the only weather modification case to reach Texas appellate courts, there is some discussion of private rights, another situation that makes Texas law unique. This case has been interpreted as suggesting that Texas landowners have a right to precipitation that would naturally fall on the land, a situation analogous to water rights of a riparian landowner. Since passage of a 1967 Weather Modification Act, such activities are regulated by the Texas Water Commission. Subsequent amendments allow public hearing on projects if requested by area residents and for local elections on hail suppression projects, which remain the most controversial of all weather modification activities.

Though this discussion has focused on the fragmented and uncoordinated nature of Texas water rights law, one positive factor should be noted. It appears there are few legal obstacles to the sale or transfer of most kinds of water rights in Texas, unlike some states where water marketing is hampered by various legal constraints.

Texas Water Management Issues

As population and water demand increases in Texas and as the water supply becomes more fully utilized or even depleted, there are many unresolved issues which are directly attributable to Texas' peculiar, and sometimes unique, water law. State ownership and management in the public interest is clearly defined only for surface water in streams. Private water rights of varying certainty apply to groundwater, diffused surface water, and perhaps to atmospheric moisture. What follows is a brief discussion of some of the more critical water rights issues:

Legal View of the Hydrologic Cycle. As noted in the he introduction, this problem is not unique to Texas water law, but is a pervasive one in all states. Texas does, however, have many instances where water use from one phase of the cycle can seriously impact recognized water rights and opportunities for water use and management in other phases. As a general rule, no legal mechanism exists to protect diminished or extinguished water rights in other phases.

Conjunctive Management. Simply defined, this is the management of water in two or more phases of the hydrologic cycle as an integrated resource, and it is normally practiced only with interconnected ground and surface water. The unique Edwards Limestone aquifer of the Balcones Fault Zone in South Central Texas is unquestionably the state's most complex and controversial water problem area. A massive, natural transfer of water through the aquifer connects three major river basins. The aquifer is heavily pumped for irrigation in the west, where the Nueces River and its tributaries provide most of the recharge; it provides the municipal supply for 17 towns and cities with an urban population of 1.3 million, including the City of San Antonio, and large springs draining the aquifer provide significant baseflow for the Guadalupe and San Antonio Rivers in the East. Here, the interconnected surface and groundwater could benefit from conjunctive management. However, conjunctive management is impossible in Texas where water in streams is state-owned and managed, but where no such control exists over groundwater.

Coordination of Riparian and Appropriative Surface Water Rights. This was a major problem facing state water agencies and water users from the 1890s until the 1980s, but has largely been resolved by surface water rights adjudication and the incorporation of thousands of riparian rights into the permit system. As a part of the adjudication process, it was expected that unused appropriative rights, or "paper rights," were to be reduced or cancelled, resulting in unclaimed water that could then be made available for appropriation. Loopholes in the cancellation statute hindered progress and following adjudication most streams are still fully or even over-appropriated. According to a recent court decision, no new permits can be granted on fully-appropriated streams until sufficient paper rights are cancelled or reduced.

Public Access Problems. As previously noted, the public right of access to state-owned water is poorly defined. Riparian landowners sometimes impose obstacles to public entry, use, passage, and egress from streams, and access points are limited. The dividing line between public and private property along streams is the elusive gradient boundary, which cannot be easily demarcated by the public or even by experts. A clear statutory enunciation of public access rights such as exists for coastal waters and beaches is needed, as well as a determination of which stream segments meet the statutory test of navigability and thus are open to public access.

Regulation of Groundwater. Though Texas courts have recognized that some aspects of the absolute ownership rule are" harsh and outmoded," they have so far declined to significantly modify it, relegating this task to the Legislature. Legislative change appears little more likely because legislators are especially sensitive to the political power inherent in unregulated private water rights. Comprehensive water legislation was passed in 1985, but the portion dealing with groundwater was described as "the lengthiest, but perhaps the least meaningful, part of the 1985 water package." Problems caused by excessive pumping, such as landsurface subsidence on the Texas coast or diminished spring and streamflow in the Edwards aquifer region, which impact largely urban populations, seem destined to eventually lead to area-specific emergency political solutions. The gradual depletion of the nonrenewable aquifers of West Texas has generated much less controversy and state-wide reform of groundwater law is generally opposed by area landowners who view local UWCDs as the management tool of choice.

Interception of Diffused Surface Water. Many Texas counties have several thousand private stock tanks and farm ponds, and because they can be constructed at will by landowners, and are even encouraged by some government agencies, their number is increasing. Most are quite small, having an average storage capacity of only 6.5 acre-feet, but they intercept a significant portion of the runoff from watersheds averaging 136 acres. Also, most are shallow and much of the water they store evaporates or is lost to seepage in nonproductive formations. It is well documented that they can have a very adverse impact on downstream water rights. In West Texas, during dry years they can intercept most or all of the surface runoff. A recommendation that the storage capacity of permit-exempt small impoundments be reduced from 200 to 10 acre-feet has not been acted on.

Rights to Atmospheric Moisture. For all its increasingly complex regulatory provisions, the 1967 Weather Modification Act does not mention, nor has it settled, the question of public and private rights to atmospheric moisture. This is not a particularly critical issue, however, because unanswered scientific questions concerning both the direct and indirect effects of most weather modification activities continue to hinder their widespread application.

Conclusions

This brief summation has dealt with the uniqueness of and problems related to Texas water rights law from an intrastate perspective only. Space limitations prevent discussion of obvious interstate

and international issues pertaining to rivers, groundwater, and weather modification, all of which impact water resources to varying degrees. Definitive, sweeping solutions of even intrastate problems face formidable obstacles because of: 1) the great hydrologic and climatic diversity of Texas, 2) the very complexity of the state's water law, and 3) perhaps most importantly, the political opposition of the holders of the enormous number of recognized, and often unregulated, private water rights. Collectively, these factors almost assure that whatever water law reforms are enacted or imposed will focus on very specific local problem areas, a piecemeal, rather than a comprehensive, approach. Failure to address some water problems in a timely fashion has prompted, to the consternation of state and local officials, the spectre of management intervention by federal agencies such as the U.S. Army Corps of Engineers, Fish and Wildlife Service, and Environmental Protection Agency.

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