



WATER RIGHTS AND REGULATION

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- Environmental Law
- Natural Resources Law
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 - City of Bryan
 - City of Frisco
 - City of Tyler
 - City of Leander
 - Denton County WCID #10
 - La Ventana Ranch Owners Association
 - Your client?



Discussing Water Rights, A Western Pastime

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Source: duckboy.com/postcards/discussing-water-rights-a-western-pastime.html

TEXAS WATER LAW GLOSSARY

TEXAS WATER LAW GLOSSARY

Disclaimer

This glossary was originally prepared by Timothy L. Brown and Robert R. Flores for the State Bar of Texas Changing Face of Water Rights course in 2015. The authors and State Bar have graciously given their permission for its use at the 2018 Legal Issues for Texas Civil Engineers seminar.

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TEXAS WATER LAW GLOSSARY

ALJ: Administrative Law Judge.

abandoned water right: a water right that is not put to beneficial use for a number of years. Generally, if it is willfully abandoned during three successive years, the water may become subject to appropriation. TEXAS WATER CODE §§11.030, 11.146, 11.171 to 11.186. See "cancellation" and "forfeited water right." Mere nonuse will not result in loss of rights unless there is a willful intention to abandon. *Lower Neuses River Water Supply Dist. v. Cartwright*, 274 S.W.2d (Civ. App. 1954). Ten years' nonuse can be *prima facie* evidence of willful abandonment. *Texas Water Rights Comm'n. v. Wright*, 464 S.W.2d 642 (Tex. 1971).

abandoned well: a well that is no longer used. Under the circumstances, abandoned wells must be filled with cement or concrete grout to prevent pollution of ground water bodies, vegetation or agricultural soils and crops. TEXAS WATER CODE §28.012; and applicable rules of groundwater districts.

acre-foot: the volume of water needed to cover 1 acre to a depth of 1-foot. It equals 325,851 U.S. gallons.

adequacy of supply: the sum of the water supply legally and physically available after comparing supply with demand, often during a drought of record.

adjudication: a formal proceeding to determine the legal and quantitative rights to the use of a particular body of water, including a stream or watercourse or segment, and thus if such rights have been perfected, vested, and not impaired.

Adjudication Act, Water Rights, 1967: the legislatively established procedures for the comprehensive adjudication of surface water rights. It provides that administrative adjudications become final only after court approval. Successful claimants receive a certificate of adjudication defining the scope of their water rights. The adjudication process has been completed for the entire state. The Act also limited vested riparian rights, previously protected by the Legislature, to the maximum demonstrated beneficial use during a 5-year period prior to the effective date of the Act. In effect, riparian rights are transformed from a right to make an unquantified reasonable use of water of the normal flow into a right to make a beneficial use of a specified quantity of water. Administrative implementation of the Act authorizes the assignment of time priorities to proven riparian rights. The priority date is established as the date of first beneficial use of state water (when it is perfected) within the claim area. The certificate of adjudication or the sewer permits that are based on the original certificates are the basic evidence of and measure of water rights, regardless of their origin, riparian or otherwise. Domestic, and livestock uses are exempted from the Adjudication Act regardless of the amount used. TEXAS WATER CODE §§11.301 - 11.341.

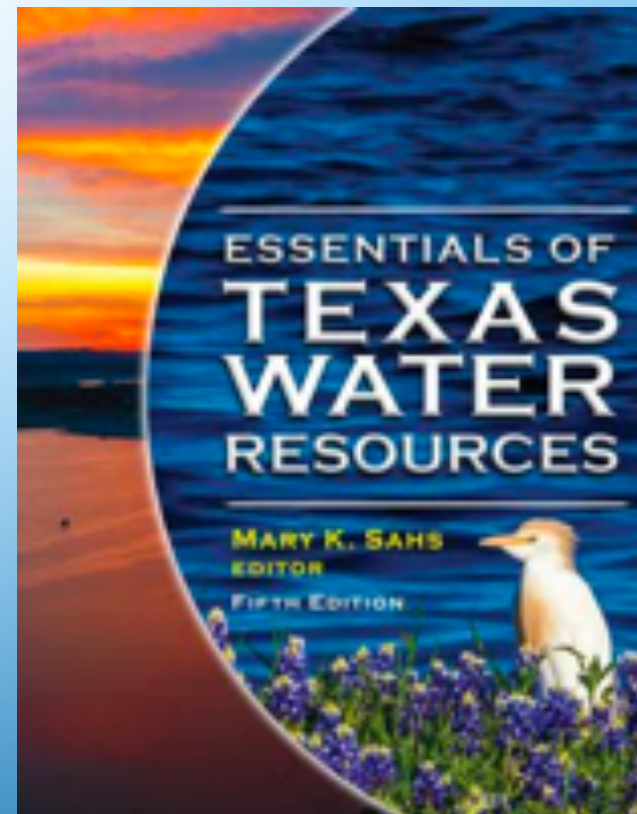
adopted regional water plan: a plan that a regional water planning group has formally adopted in accordance with its bylaws. Before an initial plan is prepared, it goes through a review and public hearing process during which the regional water planning group must summarize and address all written comments. The plan is then submitted to the TWDB for approval and inclusion into a state water plan. The TWDB approves the plan only if it finds that the regional water plan meets the requirements contained in the Texas Water Code, Chapter 16, Provisions Generally Applicable to Water Development. TEXAS WATER CODE §16.051 et seq.; 31 TEX. ADMIN. CODE §357.10(19). Adopted plans are a resource for identifying areas and entities with either a need or a surplus of water (to potentially market); additionally, they may influence the funding and permitting of projects and help develop water policies for the State.

advanced conservation: for water planning purposes, it describes significant reductions in future per capita water demand above the expected scenario by implementing additional measures. The expected

ESSENTIALS OF TEXAS WATER RESOURCES

Topics include:

- Surface Water and Groundwater Modeling
- Interstate Compacts
- Surface and Groundwater Transactions
- Water Planning
- Financing Water Projects
- Gov't Acquisition of Water Rights by Involuntary Means
- Flood Management
- Reservoirs
- Water Utilities
- Water Districts
- Wholesale Water Suppliers
- Water Rights and the Endangered Species Act
- Water Quality Regulations
- Dredge and Fill Permits
- AND SO MUCH MORE!



INTRODUCTION

- **SURFACE WATER**

- BELONGS TO THE STATE

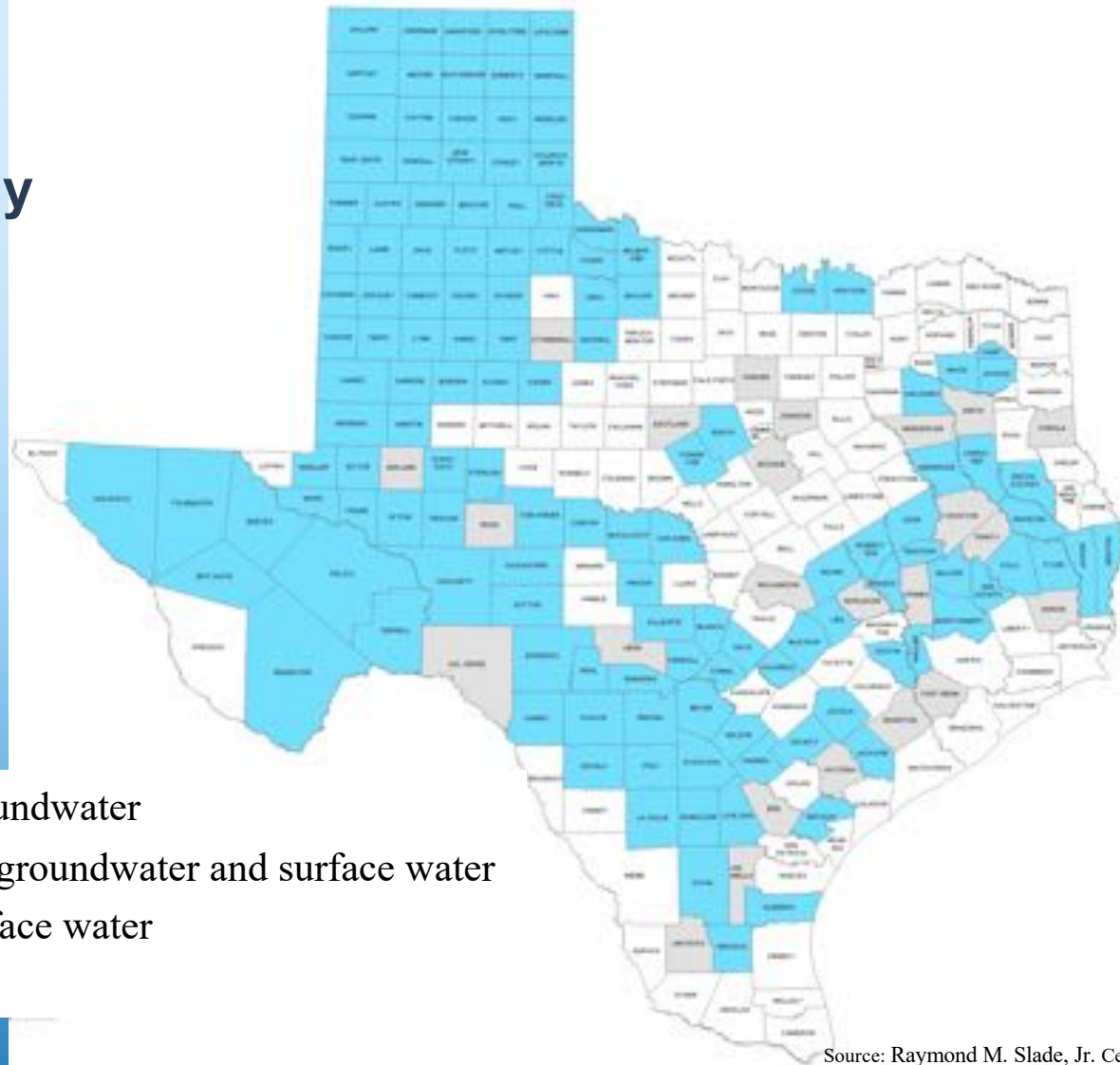
- PERMITS TO USE SURFACE WATERS ARE GRANTED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY




- **GROUNDWATER**

- INDIVIDUAL PROPERTY RIGHT

- STATE LAW EMPOWERS MANAGEMENT VIA GROUNDWATER CONSERVATION DISTRICTS

Comparison of groundwater and surface water use by county



-  > 55% groundwater
-  45 to 55% groundwater and surface water
-  > 55% surface water

Source: Raymond M. Slade, Jr. Certified Professional Hydrologist

1870

TEXAS WATER LAW TIMELINE

1919

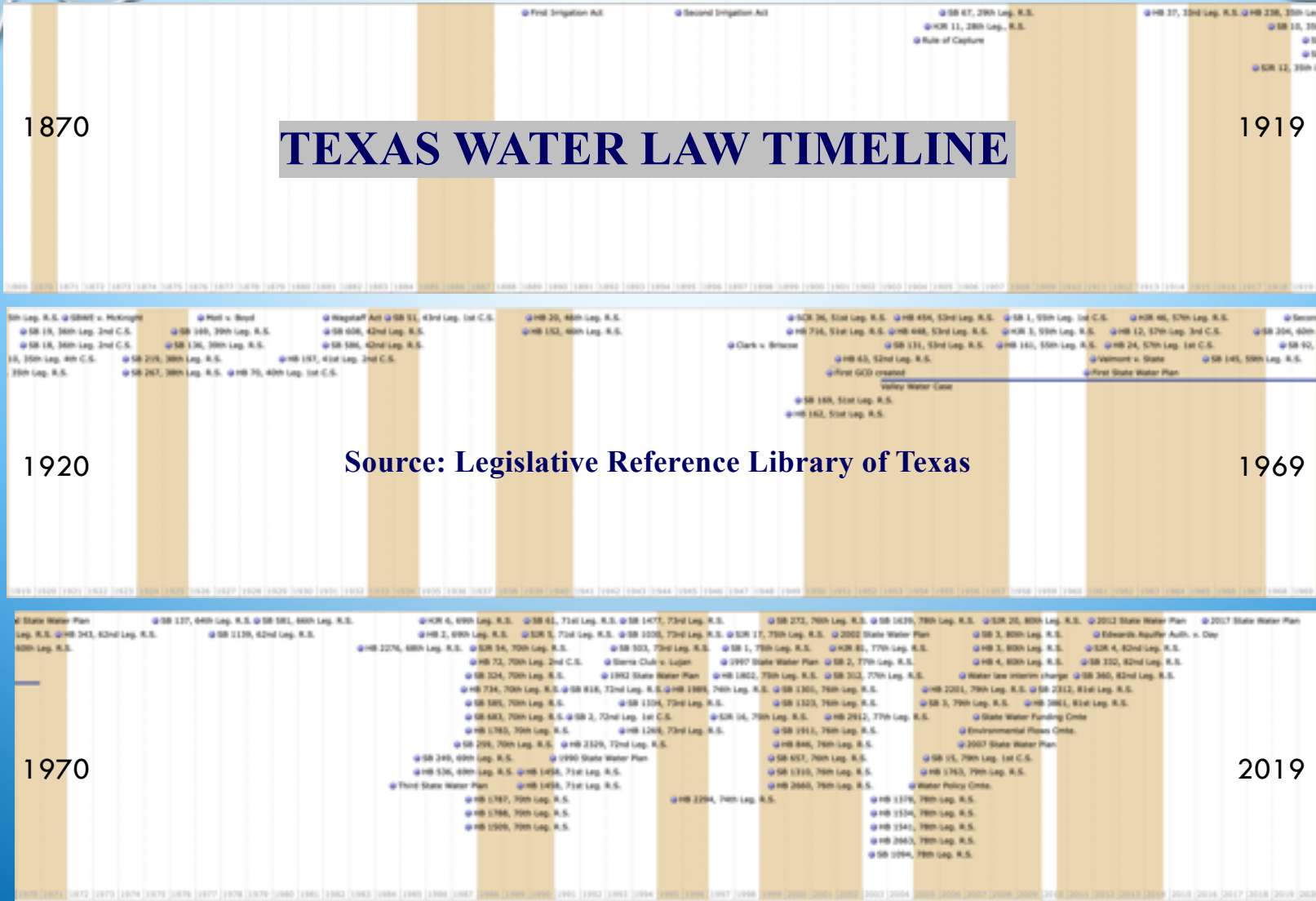
1920

Source: Legislative Reference Library of Texas

1969

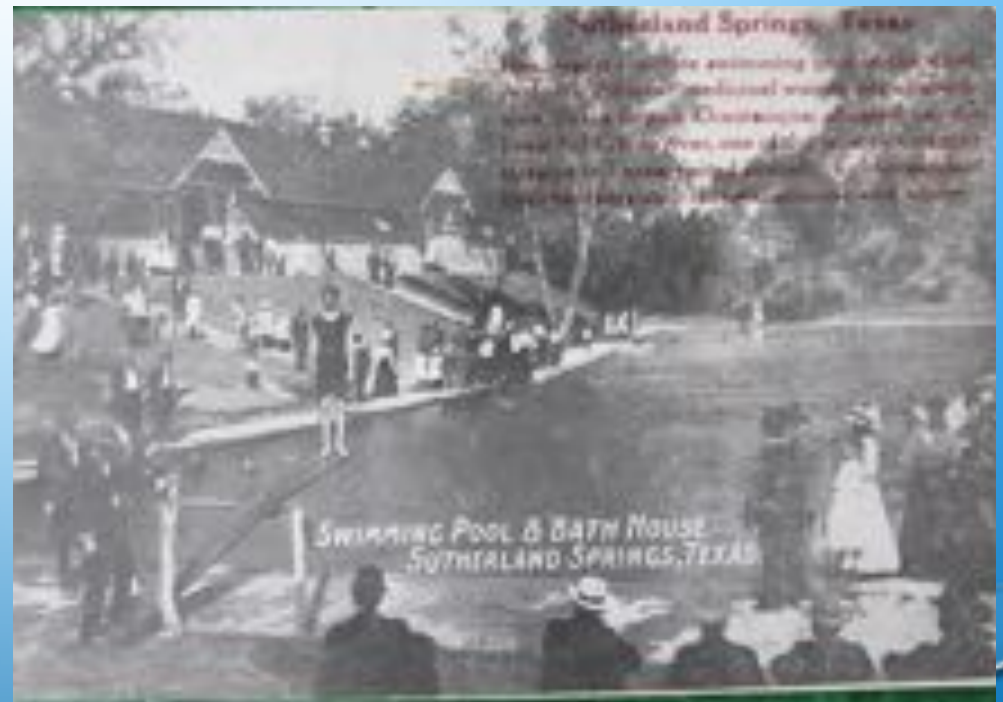
1970

2019



GROUNDWATER

- Definitions
 - Percolating in an aquifer
- Exceptions
 - Does not include underflow
- Who owns it?
 - Rule of Capture
 - Severing the bundle of sticks



Source: www.youhavewatermail.blogspot.com

GROUNDWATER

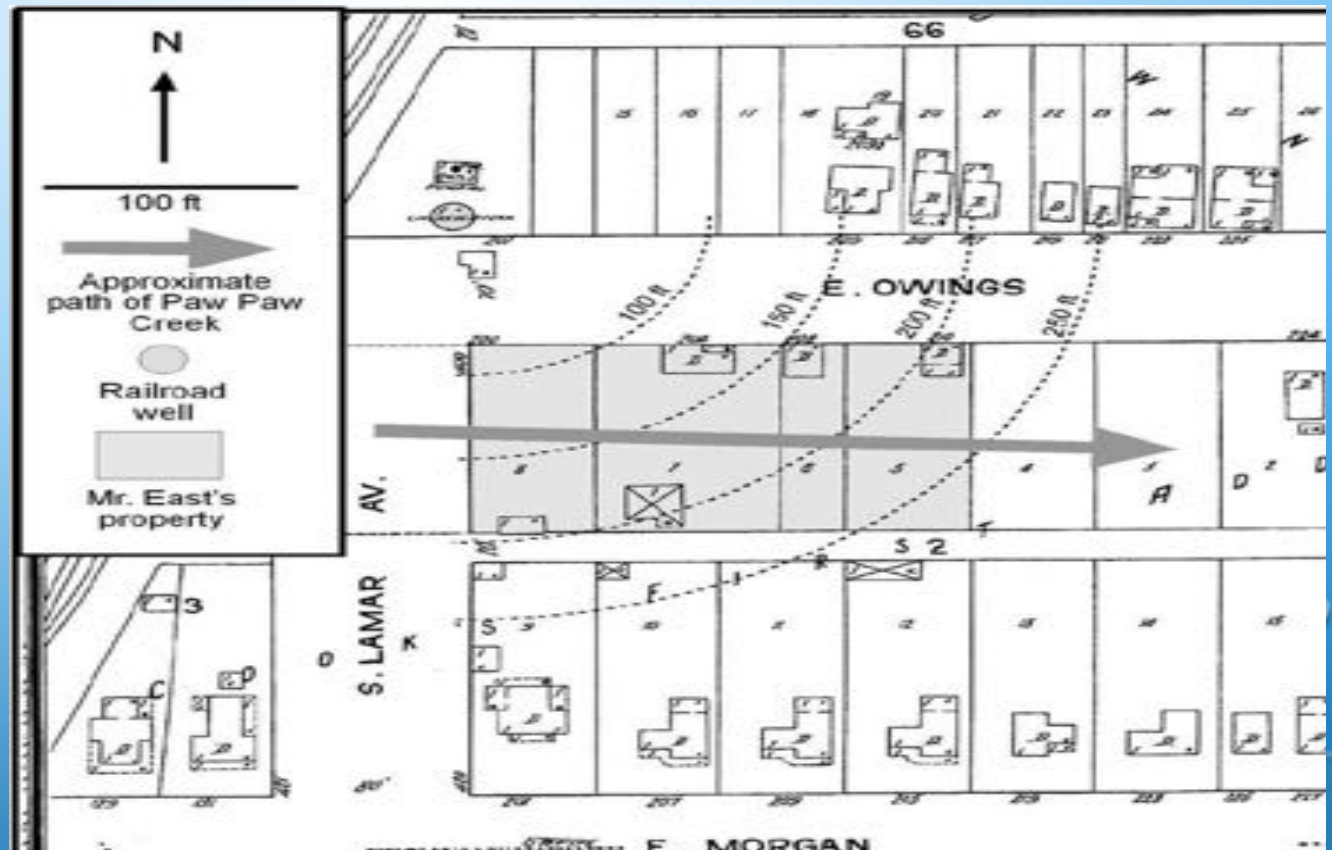
- Common law exceptions to ownership
 - Malicious use
 - Willful/wanton waste
 - Negligent drilling/pumping causing subsidence

IMPORTANT GROUNDWATER CASES

- Houston & Texas Central Railway Co. v. East (1904)
- Cantwell v. Zinser (1948)
- Pecos County WCID No. 1 v. Williams (1954)
- City of Corpus Christi v. City of Pleasanton (1955)
- South Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1 (2001)
- City of Del Rio v. Clayton Sam Colt Hamilton Trust (2008)
- Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1 (2008)
- Edwards Aquifer Auth. v. Day (2012)
- Bragg v. Edwards Aquifer Authority (2013)
- Coyote Lake Ranch, LLC v. City of Lubbock (2016)

THE *EAST* CASE

- Facts
- Holding
- Significance:
The Rule of Capture



THE *EAST* CASE

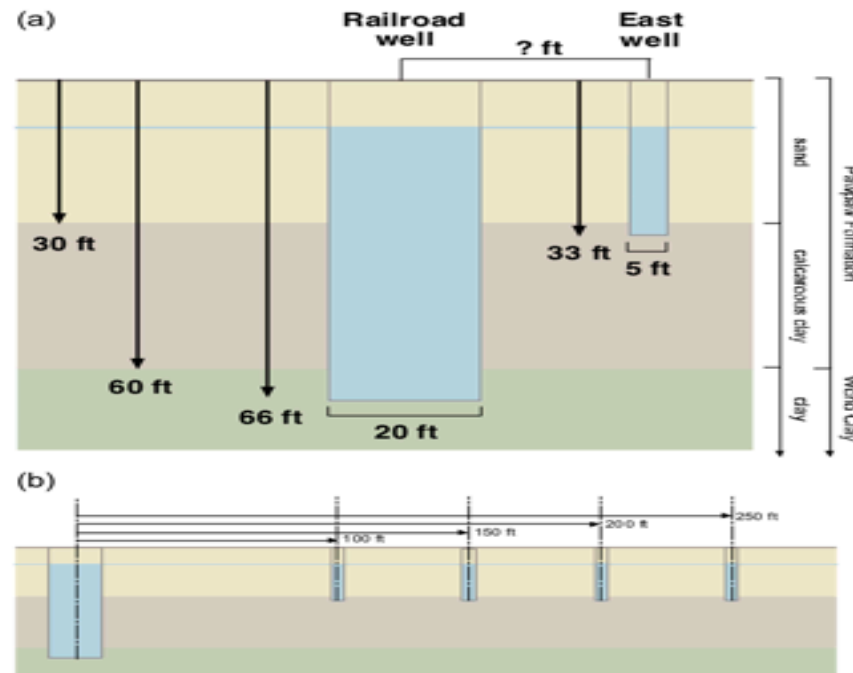


Figure 7: Schematics showing (a) the relative dimensions of the Railroad and East wells and the probable subsurface geology in the area and (b) the same with the East well at likely distances from the Railroad well.

Source: *Groundwater is No Longer Secret and Occult - A Historical and Hydrogeologic Analysis of the East Case.*

THE *EAST* CASE

Cuius est solum, eius est usque ad coelum et ad inferos



Chapter 5

Groundwater is No Longer Secret and Occult – A Historical and Hydrogeologic Analysis of the East case

Robert E. Mace^a, Cynthia Ridgeway^a, and John M. Sharp, Jr.^b

^aTexas Water Development Board

^bThe University of Texas at Austin

Introduction

In 1901, Denison, Texas was a bustling railroad town that served as a retail and shipping center for North Texas and a stopping point for more than 10 railways crossing and intersecting Texas¹ (Figure 1). Twenty-nine years earlier, the Missouri, Kansas and Texas Railroad, affectionately referred to as the K-T or KATY, laid out the town and named it after its vice president, Mr. George Denison.² The town quickly grew from 3,000 residents in 1873 to more than 10,000 in 1900.³

Running a railroad required water: water for passengers at the station, water for maintaining machine shops, and water for the steam boilers that propelled the locomotives down the tracks. In July of 1901, the Houston and Texas Central Railroad Company sent some of its staff to Denison in search for water for its facilities.^{4,5} They started their search near Owings Street and Lamar Avenue and investigated wells that had already been dug in the nearby neighborhood, including a well on property owned by Mr. W. A. East.⁶ These household wells were about 5 feet in diameter and 33 ft deep. The railroad men, apparently satisfied with the groundwater-producing abilities in the area, dug a well near the intersection of Owings Street and Lamar Avenue that was 20 ft in diameter and 66 feet deep. Once the well was completed in August of 1901, the railroad installed a steam pump and began producing 25,000 gallons a day.

Sometime after the railroad started pumping its well,⁷ wells in the nearby neighborhood started to go dry. This resulted in Mr. East and several of his neighbors⁸ filing suit against the railroad, claiming that production from the railroad's well dried up their wells. Mr. East claimed to be damaged in the sum of \$1,100 (about \$23,000 in 2002 dollars) plus court costs. In December of 1902, the District Court of Grayson County ruled against Mr. East and his neighbors and stated in its conclusion of law that "...no cause of action is shown in behalf of plaintiffs in any sum whatsoever, because I do not believe that any correlative rights exist between the parties as to underground, percolating waters, which do not run in any defined channel." Mr. East then filed for a new trial, claiming that the court erred because "...said finding was contrary to the law and contrary to the

CANTWELL v. ZINSER (1948)



Environmental scientist Nathan Bendik explains the flora found near Spicewood Spring. Michael Barnes/American-Statesman

'Q. These rocks on Jim's property are full of water according to your theory? A. Yes; no one knows about springs, where the direction is.

'Q. You don't contend there is one big stream of water up there? A. Anyone *579 that looks in there can see where the water has channeled its way.

'Q. There might be a hundred rivulets coming into that channel towards you? A. Yes. I just contend this is one natural outlet for this Spicewood Spring. It first flowed naturally by gravity for years.

'Q. You think that this water coming into Jim's sump is in an oozing condition? A. Very slow, yes.

'Q. Would you call it percolating? A. Yes, and oozing.'

CANTWELL v. ZINSER (1948)

Waste of natural resources is against the public policy of this State. Many conservation laws have been enacted by our legislature which evidence such policy. They apply to privately owned as well as publicly owned resources. These laws need not be cited as they are generally known. We do call attention to Articles 7600–7602, inc., Vernon's Ann.Civ.St., which make a nuisance the waste of water from artesian wells.

- Facts
- Holding: *East* applies
- Significance: (1) Owner of land has right to use all percolating water that he can capture with the aid of wells on his land, even if percolating groundwater's natural course feeds spring on neighbor's land.
- BUT: (2) No wasteful use

GROUNDWATER MANAGEMENT

- 1949: Texas Underground Water Conservation Act
- Provided for creation of Groundwater Conservation Districts (GCDs)
- Local control, not statewide regulation
- Originally concentrated in Panhandle, West
- 1997 SB1: “Preferred method of groundwater management”



Artesian well being drilled at Adolphus Hotel, Dallas, Texas
Source: www.youhavewatermail.blogspot.com

Powers of a GCD (Generally)

- Register wells
- Regulate well spacing
- Regulate pumping
- Cannot regulate exempt uses
- Cannot prohibit export
 - But can levy export fees



Source: www.youhavewatermail.blogspot.com

Understanding Where GCD Power Comes From

- TWC Chapter 36
- GCD Enabling Legislation
- Amendments to Enabling Legislation
- GCD Rules
 - Often amended so be careful
 - Amendments can be political



Source: www.youhavewatermail.blogspot.com



THE *COMANCHE* *SPRINGS CASE*

Pecos County WCID No. 1 v. Williams (1954)

- Facts
- Holding: No evidence that Williams's use was wasteful (industrial and ag use)
- Significance: Surface water appropriation does not extend to groundwater

City of Corpus Christi v. City of Pleasanton (1955)

- Facts
- Holding: American Rule vs English Rule (surprise!)
- Significance: The use of groundwater at a distant location, even though most of the water may be lost in transit, is permissible.
- Waste?

TAKEAWAYS: WASTING GROUNDWATER

- Sec. 11.205. WASTING WATER FROM ARTESIAN WELL. Unless the water from an artesian well is used for a purpose and in a manner in which it may be lawfully used on the owner's land, it is waste and unlawful to willfully cause or knowingly permit the water to run off the owner's land or to percolate through the stratum above which the water is found.
- The hope is that beneficial use will prevent waste
- There is no bright line rule, and trying to prove waste is very difficult

THE *SOUTH PLAINS LAMESA* CASE (2001)

- Facts
- Holding
- Significance: GCDs lack authority to regulate pumping in a manner expressly granted by the Legislature

LEGISLATURE'S RESPONSE TO *SOUTH PLAINS LAMESA*

- Amended TWC Ch. 36 to explicitly provide:
 - A groundwater district may make and enforce rules limiting groundwater production based on tract size or well spacing, and limiting production in other ways
 - *See* TWC § 36.116 (spacing, preservation of historic or existing use, others)

THE *GUITAR HOLDING* CASE (2008)

- Facts
- Holding
- Significance: although GCDs are authorized to preserve historic or existing use, a district's discretion to protect existing wells and production must be tied both to the amount and the purpose of the prior use

THE *DAY* CASE (2012)

- Facts
- Holding
- Significance



photo by Kemp Smith

timeline

- 1993: Edwards Aquifer Authority (EAA) is created
- 1996: Day & McDaniel file for permit (700 AFY)
- -----: EAA supports 600 AFY
- -----: Day & McDaniel protest
- 2003: EAA makes a site visit and grants 0 AFY
- -----: Day & McDaniel protest; goes to an administrative law judge
- -----: Judge grants 14 AFY; EAA concurs
- 2004: Day & McDaniel file lawsuit
- 2006: District court favors EAA
- 2008: Appeals Court favors Day & McDaniel
- 2012: The Supremes rule for Day & McDaniel

THE *DAY* CASE

Source: Overview of Groundwater Management in Texas, Robert Mace, Ph.D, P.G.

SIGNIFICANCE OF THE *DAY* CASE

- Land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation
- Affirmed authority of EAA and GCDs to regulate groundwater production, but recognized that such regulation can, at least theoretically, result in a compensable takings claim under the Constitution
- To determine takings, look at *Penn Central* factors:
 - Bought a train station to use as a business high rise
 - Court said reasonable investment-backed expectations were less than that
 - None of these three factors is determinative; all three must be evaluated together:
 - Interference with investment-backed expectations
 - Economic impact on property
 - Character of governmental action

SEP 21 2004



THE BRAGG CASE (2013, 2014)

THE *COYOTE LAKE RANCH* CASE (2016)



SURFACE WATER



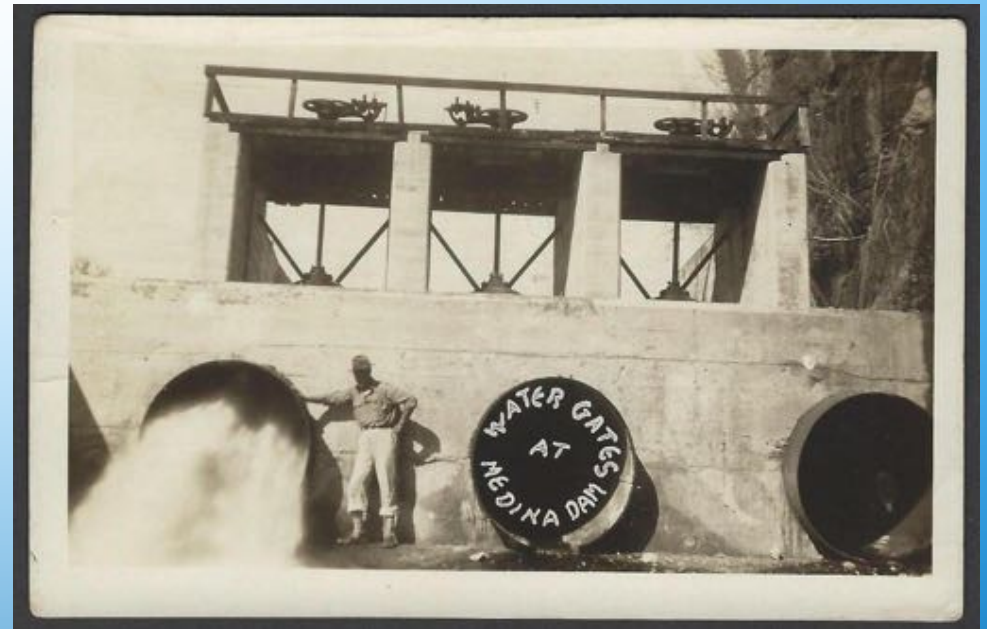
BARTON'S SPRING BATHING RESORT, AUSTIN, TEXAS.

118904

Source: www.youhavewatermail.blogspot.com

SURFACE WATER

- Definitions
- Who owns it?
 - Prior Appropriation Doctrine
 - Usufructuary right
- Exceptions
 - Diffused surface water
 - Developed water and water reuse
 - Exemptions for domestic and livestock



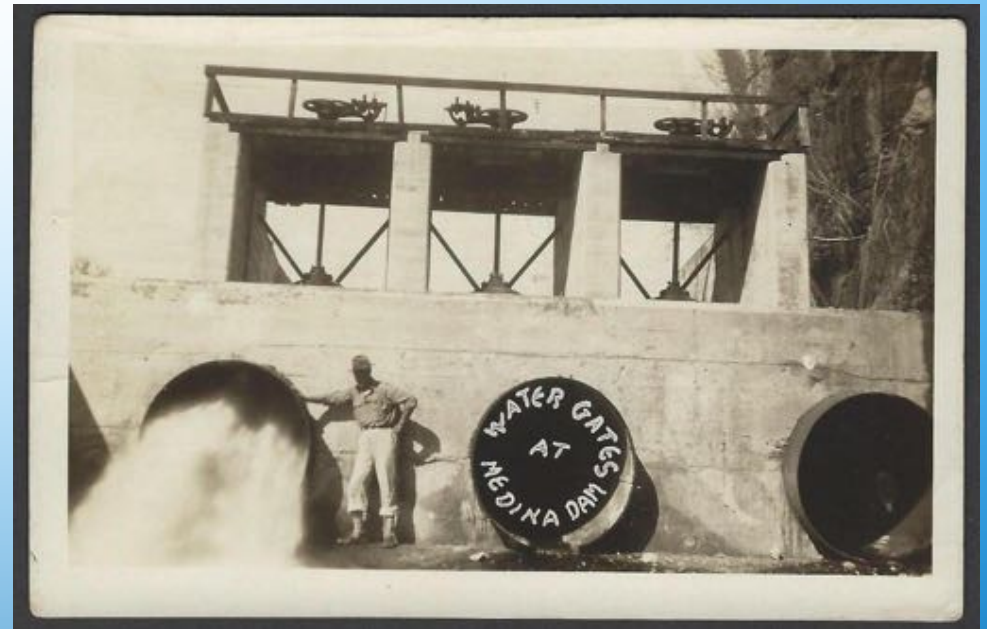
Source: www.youhavewatermail.blogspot.com

SURFACE WATER

Texas Water Code § 11.042(b): A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and **shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows**. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries.

SURFACE WATER

- Definitions
- Who owns it?
 - Prior Appropriation Doctrine
 - Usufructuary right
- Exceptions
 - Diffused surface water
 - Developed water and water reuse
 - Exemptions for domestic and livestock



Source: www.youhavewatermail.blogspot.com

SURFACE WATER MANAGEMENT

- Statewide regulation via TCEQ
 - Very different from groundwater management
- Riparian Rights
 - What are they?
 - What's their significance?

IMPORTANT SURFACE WATER CASES

- In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin (1982)
- City of Marshall v. City of Uncertain (2006)
- Texas Farm Bureau v. TCEQ (2015)

IN RE THE ADJUDICATION OF THE WATER
RIGHTS OF THE UPPER GUADALUPE SEGMENT
OF THE GUADALUPE RIVER BASIN



Water Vendor, Del Rio, Texas.

"I wish you forgot"

CITY OF MARSHALL V. CITY OF UNCERTAIN



Tex. Comm'n on Env'tl. Quality v. Tex. Farm Bureau (2015)



The background is a light blue gradient with several realistic water bubbles of various sizes scattered across it. The bubbles have highlights and shadows, giving them a three-dimensional appearance.

SECURING A WATER RIGHT: THINGS TO CONSIDER

- Availability of unappropriated water
- Beneficial Use
 - Exactly what is required to be shown here?
- No impairment of existing water rights
- Public welfare

The background is a light blue gradient with several realistic water droplets of various sizes scattered across the surface. The droplets have highlights and shadows, giving them a three-dimensional appearance.

SECURING A WATER RIGHT: THINGS TO CONSIDER

- Conservation ordinances and drought contingency plans
- Environmental flow requirements
- Interbasin transfers
- Local or state-wide politics

The background is a light blue gradient with several realistic water bubbles of various sizes scattered across it. The bubbles have highlights and shadows, giving them a three-dimensional appearance.

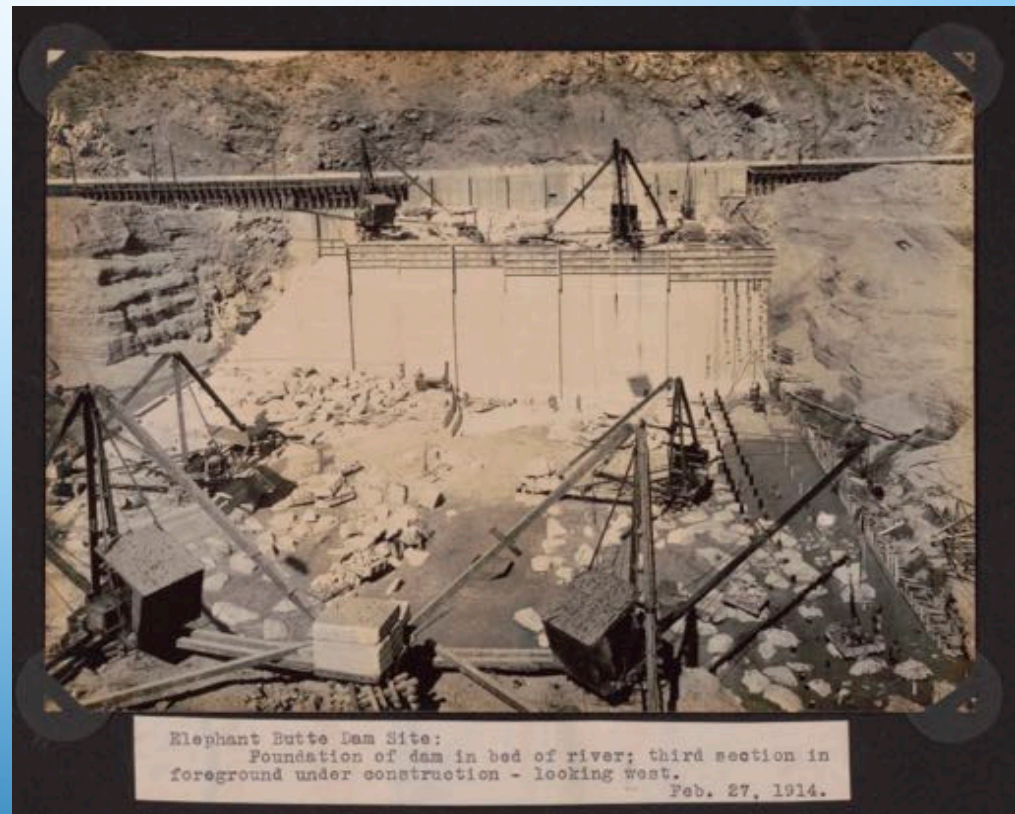
WATER LAW ON THE HORIZON: THINGS TO LOOK FOR IN THE FUTURE

- Technological innovations
 - Aquifer storage and recovery
 - Desalination of brackish groundwater
- Indirect reuse
- Regulatory takings
- Water marketing

The background is a blue gradient, transitioning from a lighter blue at the top to a darker blue at the bottom. Several realistic water droplets of various sizes are scattered across the background, with some in the top-left and bottom-right corners.

OTHER RECENT MAJOR WATER LAW DISPUTES

Texas v. New Mexico, No. 141, Original (U.S. filed Jan. 8, 2013)



U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct.
1807 (U.S. 2016)



WOTUS Update



WOTUS Update



Acting Administrator Andrew Wheeler and Mr. Rickey "R.D." James, Assistant Secretary of the Army for Civil Works, sign the new proposed WOTUS definition rule, surrounded by various cabinet members and Members of Congress

LEGAL ISSUES FOR ENGINEERS TO CONSIDER

Case Study/Hypothetical Discussion

- What could happen if I accidentally type the wrong word on an application for a Groundwater Permit?

LEGAL ISSUES FOR ENGINEERS TO CONSIDER

Case Study/Hypothetical Discussion

“This well was
completed prior to
the adoption of this
regulation.”

“This well was
commenced prior to
the adoption of this
regulation.”

LEGAL ISSUES FOR ENGINEERS TO CONSIDER

Case Study/Hypothetical Discussion

- “Existing Well” means a groundwater well within the District’s boundaries, for which drilling or significant development of the well commenced before the effective date of these Rules.

The background is a light blue gradient with several realistic water bubbles of various sizes scattered across the top and bottom edges. The bubbles have highlights and shadows, giving them a three-dimensional appearance.

SUGGESTIONS FOR ENGINEERS

- Talk to your client's lawyer!

QUESTIONS?

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