

2019-20

LEGISLATOR'S GUIDE to the Issues

Groundwater Rights

The Issue

Groundwater has long provided a major part of the Texas water supply. Undeveloped groundwater can help meet growing demand for water in Texas. Texas has two distinct legal systems governing water: groundwater and surface water. Surface water is owned by the state, which grants water rights to use specific volumes of water for beneficial uses. The Texas Water Code recognizes surface water rights issued in perpetuity as private rights that can be bought and sold.

In contrast, under Texas common law and statute, landowners hold a vested private property right in the groundwater beneath their land. Both the Texas Legislature and courts have recently reaffirmed this principle. Passed in the 82nd Legislature, SB 332 stated that “a landowner owns the groundwater below the surface of the landowner’s land as real property.” HB 4112, which passed in the 84th Legislature, strengthened groundwater ownership rights by codifying common law. Still, further work is needed to clarify whether the Texas Water Development Board’s (TWDB) statutory authority to approve Desired Future Conditions (DFCs) set by Regional Groundwater Management Areas (GMAs) is consistent with the landowner’s right to groundwater in place.

In *Edwards Aquifer Authority v. Day*, the Supreme Court held that the rule of capture is not inconsistent with ownership of groundwater in place. Citing the opinion in *Day*, the Court of Appeals in *Edwards Aquifer Authority v. Bragg* rejected the Authority’s argument that its enabling legislation in 1993 gave the Braggs ownership over water and its permits, which they did not own before. Therefore, the Authority’s denial of water permits to the Braggs for beneficial use in their pecan orchards rose to the level of a taking.

The landowner’s property right in groundwater is often confused with the rule of capture. The rule of capture is corollary to the landowner’s ownership right; it does not define the groundwater rights but explains the means by which a landowner may exercise the property right.

Like fee title ownership of land, “absolute” ownership of groundwater is subject to reasonable regulation. Since 1949, local Groundwater Conservation Districts (GCDs) have been the main regulator of groundwater in Texas. In 1995, the powers of GCDs were expanded to include pumping limits on wells and tract size, and in 2001, SB 2 enlarged GCD authority including preservation of historic uses and creation of Groundwater Management Areas (GMAs) based on regionally shared aquifers. In 2005, HB 1763 significantly enlarged the scope of groundwater regulation through provisions about DFCs of an aquifer and Managed Available Groundwater (MAGs) determined and overseen by the TWDB. The regulatory authority created expands the state’s role in groundwater regulation and is being used to limit or deny groundwater permits at GCDs.

Although GCDs are recognized in law as the state’s “preferred method of groundwater regulation” (TWC 36:0015), the system does not always function optimally. GCDs sometimes lack the resources and scientific expertise to make informed permitting and regulatory decisions. District boundaries are often based more on politics than hydrology, resulting in actions in one GCD that affect landowners outside the district boundaries. GCDs are exempt from many of the conflict of interest rules applicable to other government officials and regulators. In some cases, GCDs have imposed moratoria on groundwater development.

With the *Day* decision, Texas courts have begun to recognize that excessive regulation of groundwater can amount to a taking of property for which compensation is owed under the Texas and U.S. Constitutions. Several features of the law governing GCDs make it difficult to mount a successful challenge to burdensome regulation. GCDs are not subject to the record keeping requirements of the state’s Administrative Procedures Act, which can complicate judicial review. And if a landowner’s challenge to GCD regulation fails in court, he must pay the GCD’s attorneys’ fees in addition to his own.

The 84th Legislature passed HB 200 that allows judicial appeal of DFCs made by GMAs. This legislation helps undo previously legislated water policy that obstructs effective, efficient, and appropriate use of water in Texas. Despite the obstacles presented by current groundwater law, challenges to GCD authority are increasing. One legislative session later, in 2017, SB 1009 passed to limit the list of items a GCD may require in a permit application in addition to what is already required by statute.

The Facts

- By 2070, water demand in Texas is projected to increase by 17%, while groundwater supplies are expected to decrease by 24% between 2020 and 2070.
- Texas has abundant groundwater resources: 9 major aquifers and 21 minor aquifers. Total groundwater supplies were approximately 8 million acre-feet in 2010.
- Total groundwater in Texas aquifers is estimated at 17.1 billion acre-feet.
- Texas has 100 local groundwater districts covering all or part of 177 counties.

Recommendations

- Remove legal impediments to the private development of new groundwater supplies and to proper functioning of water markets in Texas.
- Review the operations of Groundwater Conservation Districts and Groundwater Management Areas to see what progress has been made in securing proper groundwater regulation, and seek adjustments as needed.
- Reform the rules governing GCD record keeping and conflict of interest to promote greater uniformity of regulation.

continued

Resources

[2012 State Water Plan](#), Texas Water Development Board (Jan. 2012).

Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012).

Houston and Texas Centennial Railway Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

[Solving the Texas Water Puzzle: Market Based Allocation of Water](#) by Ronald A. Kaiser, Texas Public Policy Foundation (March 2005).

Draft 2017 State Water Plan, Texas Water Development Board (March 2016).

Edwards Aquifer Authority v. Bragg, 421 S.W.3d 118, 124,137-38 (Tex. App. — San Antonio, 2013, pet. denied).

