

FUNDAMENTALS OF SURFACE WATER LAW
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“The Changing Face of Water Rights in Texas”

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I. INTRODUCTION

This article is intended to provide an overview of the current state of Texas surface water law. Reference will be made to pertinent provisions of Senate Bill 1 (SB 1) enacted by the 75th Legislature in 1997,¹ to Senate Bill 2 (SB 2) enacted by the 77th Legislative in 2001,² and Legislative actions in 2003³ which made clarifications and made changes in Texas surface water law.

To understand surface water law in the current time, it is necessary to review the evolution of surface water law in Texas, which has been a combination of judicial recognition of common law concepts coupled with legislative enactments regulating and expressing the exercise of these rights. Historically, Texas water law has taken two separate courses based upon whether water was surface water in streams or located under the surface of the land. Surface water in streams is the property of the State, but the right to use it is a property right obtained through a legal process, V.T.C.A., Water Code §11.040, 11.043.⁴

On the other hand, the “rule of capture” has been applied with respect to water under the surface. This rule entitles the surface owner of the land to pump unlimited quantities of water from his land regardless of the impact the pumping has on his neighbors’ ability to obtain water on adjoining lands over an underground aquifer. But, I suggest to you that these laws, and the context in which they interplay, may interact more in the future than in the past.

II. SURFACE WATER LAWS – BACKGROUND

A. Development of the Appropriation Doctrine

Surface water, as opposed to groundwater, was the first to receive legislative attention with respect to obtaining a right to use it. In the late 1800s the legislature, recognizing that there was a greater need for surface water than the supply of water in our streams, imported the *appropriation doctrine* used in the western United States to Texas. The appropriation system provides a process to obtain a legally recognized right to use water. This was done to encourage

¹ Act of June 2, 1997, 75th Leg., R.S. ch. 1010, 1997 Tex. Gen. Laws 3610 (codified in various sections of TEX. WATER CODE ANN., TEX. GOV’T CODE ANN., TEX. AGRIC. CODE ANN., TEX. TAX CODE ANN., and TEX. HEALTH & SAFETY CODE ANN.).

² Act of June 15, 2001, 77th Leg. , R.S. Ch. 966, 2001 Tex. Gen. Laws 1880.

³ I refer to SB 1 and SB 2 in this article so as to give a historical understanding of surface water law in the State, and to trace and emphasize the changes made by these Legislative changes as they relate to current time.

⁴ All statutory references are hereafter to the Texas Water Code, V.T.C.A., Water Code, unless otherwise noted.

irrigation in the arid western portions of the State. It provides a certainty of the legal right to use water from a stream which was necessary, as an incentive for investment in agricultural and water projects, and now the certainty required for management of the water resource. An essential element of this system is “first in time is the first in right,” *i.e.*, the priority system, which gives an enforcement concept to the rights, see §11.207.

Patterned after the mining laws in the western states, the *Irrigation Act of 1889*⁵ provided a statutory scheme in the arid or semi-arid part of Texas (generally, west of the 50th median), where one would stake a claim to water by filing with the county clerk a sworn written *Declaration of Intent to Appropriate Water* of a stream stating the acreage and location of land being irrigated and intended to be irrigated. The *Irrigation Act of 1895*⁶ applied the appropriation system State-wide (whether arid or not), and attempted to add some basic principles about quantifying water rights which impacts current law.

Later, in *The Irrigation Act 1913*⁷ the legislature modified this law by adopting a permitting system. This law provided a method of establishing a state inventory (record) and quantification of all appropriative surface water rights in the State. The Board of Water Engineers was established as the agency to oversee surface water rights in the State (the predecessor to the current Texas Commission on Environmental Quality “TCEQ”).⁸ Since 1913, rights to surface waters can only be obtained by obtaining a permit from the State. The *Irrigation Act of 1913* was repealed and replaced by the 1917 Irrigation Act⁹ which slightly modified the 1913 Act, but added a water rights adjudication process which was subsequently declared unconstitutional in *Board of Water Engineers v. McKnight*, 111 Tex. 81, 229 S.W. 301 (1921) on the basis that water rights being property rights could only be adjudicated by the courts and not by an administrative agency. This was a significant decision for two basic reasons: on the positive side, it recognized that a water right is a property right, but on the negative side, it set back proper water management for many decades by the delay in adjudicating water rights.

All during this period, the courts and the legislature continued to recognize and protect common law vested riparian rights to those owning land adjacent to a stream to take water from the stream for irrigation, industrial domestic and livestock uses. This was the law until the late 1960s.

⁵ 1889 TEX. GEN. LAWS. 100.

⁶ Ch. 21, TEX. GEN. LAWS 21.

⁷ Ch. 171, TEX. GEN. LAWS 358.

⁸ Through the years, this agency has changed its name from the Board of Water Engineers to the Texas Water Commission, Texas Water Rights Commission, Texas Natural Resource Commission to the now, TCEQ, which has transformed it from a “water rights” agency to an environmental agency.

⁹ Ch. 88, TEX. GEN. LAWS 211.

The years 1913 and 1917 were significant surface water law years in Texas because under public pressure to develop the water resources of the state in 1917, the people of Texas approved a water conservation constitutional amendment¹⁰ enabling the legislature to create governmental entities whose purpose was to “conserve” water by “developing” water resources in the State. The term “conservation” at that time, meant the development of water resources through regional governmental water districts, dams, reservoir projects, and practices to “conserve” the water in our streams for use before it was “lost” to the Gulf of Mexico. The law of these “water entities,” *i.e.*, water districts and river authorities, is beyond the scope of this article, but is a significant circumstance in State policy in managing our water resources.

This remained the surface water law policy of the State until 1985, when the term “conservation” in this context was changed to mean conserving water by using it “efficiently” so that there will be sufficient water to meet the needs of agriculture, and the anticipated growth in population in the State coupled with a concern for the environment with less emphasis on the development of the water resources through construction of dams and reservoir projects. This change has impacted current law as will be discussed below.

As a result of the drought in the 1950s, litigation arose to adjudicate water rights, *i.e.*, to quantify and identify those holding surface water rights in the Lower Rio Grande. It will be recalled that an administrative adjudication process, provided for in the 1917 Act, was declared unconstitutional in the *McKnight* case. This left adjudication to the courts.

The pressure to adjudicate existing legal rights arose in the lower segment of the Rio Grande (downstream from Falcon Dam near Zapata, Texas) in the 1950s when water in the Rio Grande stopped flowing at Brownsville. This litigation involved thousands of parties adverse to one another, and presented complex procedural and substantive water law issues. This court adjudication case took over 20 years to complete, which culminated in a final judicial decree adjudicating the water rights in this reach of the Rio Grande in 1971. This litigation experience, coupled with the recognition of the need to identify and quantify water rights statewide, led to a legislative attempt to provide for an adjudication process in the rest of the State, by the passage of the *Water Rights Adjudication Act* in 1967.¹¹ This statute provided a constitutional scheme to adjudicate and quantify surface water rights over the entire State. Since 1967, all surface water rights have been adjudicated and water right owners have been identified and their rights quantified over all of the State except for the Upper Rio Grande in El Paso area which is currently under adjudication.

More than 40 years later, in 1997, following another statewide drought in 1996, was another significant surface water law year in Texas, when the Legislative passed SB 1. SB 1 reflected the current approach on how the State will address its surface water needs in the future by (1) promoting water conservation practices and (2) encouraging a reallocation of the available

¹⁰ TEX. CONST. ART. XVI §59.

¹¹ TEX. WATER CODE ANN. Subchapter G §11.301, *et. seq.*

water supply, within a basin and between basins, by use of voluntary consensual water transfers. It also recognized the *hydrologic* connection between surface water and groundwater. The Legislature later addressed aspects of SB 1 in 1999, only in a limited manner because full implementation of many of the provisions of SB 1 had not been completed. The Legislature later addressed some aspects of SB1 in the 77th session of the Legislature in 2001 when it passed SB 2.

At this point, we move forward in time to the current time, but I would suggest that a more detailed historical review of the development of seminal surface water laws in the pre-SB 1 period leads to a deeper understanding of surface water law in the State.

However, such a review is beyond the scope of this article. The reader is referred to such sources as: Baade, *The Historical Background of Texas Water Law - A Tribute to Jack Pope*, 18 ST. MARY'S L. JOUR. 2 (1986); *State v Valmont Plantations*, 346 S.W.2d 853, (Tex.Civ.App.-San Antonio (1961), aff'd, 163 Tex. 381, 355 S.W.2d 502 (1962), Blalock, *Excerpts from the Opinion of the Trial Court*, Proceedings, Water Law Conference, University of Texas Law School 16 (1959); *State v. Hidalgo County W.C.I.D. No. 18*, 443 S.W.2d 728 (Tex.Civ.App. 1969, writ ref'd n.r.e.). SB 1 and SB 2 also significantly addressed many groundwater law issues, and instituted a regional water planning process, and addressed other water law issues which are beyond the scope of this article, but will be discussed with respect to particular issues which relate to this general overview of current Texas surface water law.

B. Riparian Rights

The development of the appropriative doctrine coupled with then existing common law of water rights created a dual system of surface water rights prior to the implementation of the *Water Rights Adjudication Act of 1967*. That is, the appropriative water rights system created by the early legislative acts and riparian rights recognized by the courts created this dual system. In difference to riparian rights were traditionally protected by the legislature, even while the legislature adopted the appropriative system of surface water rights. A riparian water right was a right to use water recognized at common law. The riparian right entitled the owner of property adjacent to a watercourse to take water from the stream and make reasonable use of it, but retained other requirements sometimes overlooked in court decisions of the time. The riparian right is similar conceptually in many respects to the rule of capture applied by the courts to groundwater. In spite of this recognized common law right, the legislature in the *Irrigation Act of 1913*,¹² limited riparian rights to rights attached to land patented by the State between January 20, 1840, when Texas statutorily adopted the common law, and July 1, 1895, when the legislature imported the appropriative water law concept to Texas in the *Irrigation Act of 1895*. In other words, state patents issued after July 1, 1895, do not carry with them a grant of riparian water rights, except for domestic and livestock use. Yet, the riparian had other conditions.

¹² *Supra*, footnote 5.

The key to a riparian right is “reasonableness.” Riparian rights were not quantified. A riparian property owner could use any amount of water that is reasonably necessary. Although a riparian may use the water for any reasonable purpose, a riparian could not unreasonably interfere with the uses of other riparian water users. If necessary and reasonable, a riparian landowner may impound water pursuant to his riparian rights.

A riparian landowner could sell the water for use off-site of the riparian property, provided that the off-site use did not prejudice other riparian water users. Riparian rights could, by express conveyance, be separated from the riparian land. *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733 (1905).

Significantly, however, is that riparian rights attached only to the *normal* flow of the stream, as opposed to the *storm and flood* flow. *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926). This is significant because much of the available surface water is due to storm and flood flows which was later captured by the building of reservoirs. Riparian rights were also required to be riparian, that is within the watershed, and not severed. But, riparian rights were superior to appropriative water rights. *Matagorda Canal Co. v. Markham Irrigation Co.*, 154 S.W. 1176 (Tex.Civ.App.-Galveston 1913, no writ). Unlike appropriative water rights, riparian rights were not lost through non-use. *Fleming v. Davis*, 37 Tex. 173 (1872).

Implementation of the 1967 *Water Rights Adjudication Act*,¹³ merged riparian and appropriative water rights for most practical purposes. On most rivers that have been adjudicated, the distinction between riparian rights, other than for domestic and livestock uses, and appropriative rights have essentially been removed; and riparian rights have been converted into appropriative rights.

III. WATER RIGHTS ADJUDICATION ACT OF 1967

The legislature established procedures for comprehensive adjudications of surface water rights in passing the Adjudication Act of 1967.¹⁴ Adjudication of water rights was contained in the *Irrigation Act of 1917* which authorized the then Board of Water Engineers to adjudicate existing claims of water rights, riparian as well as appropriative rights. This provision, however, was invalidated as an unconstitutional delegation of judicial power to the legislative or executive power in *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301 (1921). This was a devastating blow to efforts to clarify and stabilize water rights. Forty-six years passed before this gap in the State’s water laws was filled.

The Adjudication Act avoided the separation of powers fate of the earlier legislation by providing that administrative adjudications would become final only after court approval.

¹³ TEX. WATER CODE ANN. Chapter 11.

¹⁴ *Supra*, footnote 8.

Successful claimants would receive a certificate of adjudication, which defines the scope and limit of their rights. The adjudication process has been completed for all stream segments except in the Upper Rio Grande segment in the El Paso area which is currently under adjudication. This created a vested perfected water right, however, it later developed that adjudicated rights were not all perfected. This has led to further uncertainties.

The Adjudication Act did much more than establish a procedure for adjudication of claims. It also limited vested riparian rights, except for domestic and livestock uses, to the maximum demonstrated beneficial use during a five-year period prior to the effective date of the Adjudication Act.

The Supreme Court of Texas held that this legislative limitation of the significant common law riparian right to make prospective uses of water was not an unconstitutional taking. The court reasoned that no one has a right to waste state waters and that non-use constitutes *waste*, *In Re Adjudication of the Water Rights of the Upper Guadalupe River Basin*, 642 S.W.2d 438 (1982). Riparian rights were, thus, transformed from a right to make an unquantified reasonable use of water into a right to make a beneficial use of a specified quantity of water at specified locations - *a characteristic of appropriative rights and a concept which may be considered in the groundwater arena*. Also, the legal concept of non-use as being a “waste” of water, and not a “beneficial use” has become a difficult concept to deal with in a growing state where projects must be planned and built based upon the future need for water for long term planning purposes.

The transformation of a “riparian right” to an appropriative right was made complete by administrative construction of the Adjudication Act as authorizing assignment of time priorities to proven riparian rights, see §11.001. The then Texas Water Commission, a predecessor to the TCEQ, declared that this was essential to a workable scheme. E.g., *Final Determination Before the Texas Water Commission in the Matter of the Middle Colorado River Segment of the Colorado River Basin* (1981). The priority date was established as the date of the first “beneficial use” of state water within a claim area for other than domestic or livestock purposes.

All other claims of water rights, except those under permits or certified filings, were treated in the same manner as riparian rights. Among such were claims under Spanish and Mexican grants and claims under the Acts of 1889 and 1895 for which there were no certified filings, which are exceptions to the general surface water laws requirements. But, domestic and livestock use, was left to be dealt with in the future.

The *certificate of adjudication* authorized by the Adjudication Act has become the basic evidence of and measure of water rights, regardless of their origin, riparian or otherwise. This certificate is, of course, subject to the Court’s judgment, and may be limited by valid future regulation. Currently, rights to the remaining unappropriated surface water in the State can only be obtained by permits issued by the TCEQ as discussed below.

Domestic and livestock uses were exempt from the Adjudication Act – regardless of the amount used. Certain other uses, such as the right to construct a dam and reservoir and use the water impounded for domestic and livestock purposes are also exempt from the permit requirement. See §11.142. SB 2 later extended this exemption to wildlife management uses.

Thus, now most all previous existing surface water rights have been defined and quantified. Two watermaster operations (Rio Grande and South Texas - Nueces, San Antonio and Guadalupe Rivers) exist to enforce these water rights and another is pending on the Concho River. The issue of proper enforcement is still problematical.

IV. TODAY - APPROPRIATION OF WATER RIGHTS

A. General

Despite this onerous history of quantification of surface water rights, the surface water law today is a recognition that surface water in streams in Texas is owned by the State subject to appropriation through a statutory appropriation administrative process, except for domestic and domestic livestock uses and the right to build and maintain a dam and reservoir with a capacity of less than 200 acre feet for domestic and livestock use and wild life management purposes.

§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, flood water, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.”

Although §11.021(a) appears to assert State ownership over every sort of surface water, such a reading was overbroad until the Adjudication process is completed in each river basin. The courts and the adjudication process recognized that surface water rights are property rights, but are capable of alienation by the sovereign. The sovereign’s original grant of land in many cases carried a right *to use* water. The nature and extent of the right depended upon which sovereign (Spain, Mexico, Republic of Texas, or State of Texas) made the grant. To the extent that a prior sovereign has granted rights to water, §11.021(a) was held incapable of constitutionally withdrawing the grant. But, this issue seems to have been resolved in the adjudication process, and does not seem to be an issue in the current adjudication case in the El Paso area, Upper Rio Grande, case.

The Legislature in 1977 amended this important statute by providing that water that is imported into the state from outside the state is also state water, §11.021(b). I note this because of its possible consequence in the future.

B. Obtaining Appropriative Water Rights

1. General

Since 1913, and, for sure, after 1917, one must obtain a permit to obtain a surface water right, §§11.022 -11.024. Now, if one wants a new water right or wants to enlarge upon an existing surface water right, a permit must be obtained. I note, here, that like riparian rights, the appropriative right is usufructuary, *i.e.*, a right *to use* the water, not *ownership* of the corpus (the water itself). Unlike the prior riparian system with its vague criteria of “reasonableness,” the appropriative system provides for precisely defined water rights. The use of water is authorized, under the appropriative system in an amount specified, for a particular purpose, to be diverted¹⁵ from the watercourse at a definite location and used on a particular tract of land. The doctrine of *priority* or “first in time, first in right” applies to the allocation of water between appropriators during times of shortage on a watercourse.

Beneficial use is a key concept to the appropriation doctrine. The appropriation, now a permit or certificate of adjudication, authorizing use of water under the appropriative system is a right to make a beneficial use of water. To the extent the appropriator actually puts the water to beneficial use, the appropriation is then *perfected* and becomes a *vested property right*. Even a vested appropriative right, however, may be lost through nonuse over an extended period of time by cancellation¹⁶ by the TCEQ because it does not include a right of nonuse, *Texas Water Commission v. Wright*, 464 S.W.2d 642 (1971).

2. Permit Requirements

A person desiring to appropriate surface water must obtain a permit under §§11.124 -11.136. A permit application must be filed, and after payment of fees, notice and hearing, the applicant must show that (a) unappropriated water is available in the source of supply, (b) the proposed appropriation contemplates application of water to a beneficial use, (c) the proposed appropriation does not impair existing water rights, (d) the proposed appropriation is not detrimental to the public welfare, (e) reasonable diligence will be used to avoid waste and achieve conservation, and (f) addresses a need identified in the State Water Plan and Regional Water Plan unless the TCEQ waives this requirement. The TCEQ will also consider the impact the permit may have on groundwater, instream flows, water quality and fish and wildlife habitats. Each of the required findings and considerations presents a potential source of dispute in a contested hearing.

¹⁵ The term “diverted” has become important in a recent case, *San Marcos* case, which will be discussed in another segment of this seminar.

¹⁶ Water rights cancellation statutes, currently codified in §§11.171 - 11.186, were originally adopted in 1957, revised in 1991 and then by SB 1 and SB 2. They provide for total or partial cancellation after 10 years of non-use, but are now more like the “Wagstaff Act” an anachronism.

On November 5, 1985, the voters approved a constitutional amendment¹⁷ that incorporated water conservation plans as a requirement in the permitting process, and SB 1 and SB 2 required drought contingency plans in certain cases, and significantly - additional environmental considerations.

In the definition of “conservation,” the legislature incorporated the need to efficiently use our water resources and reduce the consumption of water. Section 11.002(8) allows the TCEQ to require the formulation and submission of a water conservation plan, and require evidence that reasonable diligence will be used to avoid waste and achieve water conservation pursuant to §11.002(8); and requires the TCEQ to assess the effects, if any, of the issuance of the permit on the bays and estuaries of Texas, upon instream flow requirements, water quality and give notice of permit applications to the Texas Parks and Wildlife Department, who is entitled to participate in any such proceeding §§11.147 - 11.149.

a. The Beneficial Use Requirement

The “beneficial use” requirement is normally easily satisfied by a prospective appropriator. An irrigator, industry, or municipality having definite plans to put the water to use after obtaining the permit normally qualifies. The only real inquiry in such instances is whether the volume of water requested is excessive in light of the use intended.

SB 1, by amendment to §11.023(e), allows for multiple use of water by specific volumes. In other words, water may be used for more than one use, for example, irrigation and/or municipal use.

In the case of reservoir projects, particularly those reservoirs constructed in advance of current need, the issue is somewhat more complex. Commitments from future water supply customers can typically satisfy the beneficial use requirement. Otherwise, the applicant may introduce projections of municipal and industrial growth in the reservoir’s service area that show a projected water need capable of using the water supply. Very little case law construing the beneficial use requirements in this respect exists.¹⁸ In most instances it will be a fact issue, with the TCEQ determination reviewed under the substantial evidence rule. SB 1 added additional guidelines and definitions of beneficial use.

b. The Availability of Water Requirement

The “availability of unappropriated water” requirement is a frequent source of controversy in contested permit applications. One aspect of the controversy centers around the legal definition of “unappropriated water,” *i.e.*, what is the standard used to measure it.

¹⁷ TEX. CONST. ART. III §49, discussed above.

¹⁸ There have been several applications filed with the TCEQ in recent years seeking instream use or environmental flows permits, most notably the application filed by the San Marcos River Foundation. The latter application was denied; however, in the meantime the 78th Legislature passed legislation establishing a moratorium on issuance of such permits and provided for an Environmental Flow Commission to study instream flow issues.

The Texas Supreme Court addressed the question of what constituted unappropriated water under §§11.134(b)(2) and (3) in *Lower Colo. River Auth. v. Texas Dep't of Water Resources*, 689 S.W.2d 873 (Tex. 1984), the *Stacy Dam decision*. The Supreme Court held that unappropriated water meant the amount of water remaining after taking into account complete satisfaction of all existing uncanceled permits and filings valued at their recorded “paper” levels later referred to as the “four corners” approach.

Given the legal definition of unappropriated water, factual questions of whether it is available, and how frequently it is available, still remain. An aspect of the mixed fact and law determination is noteworthy. On virtually any river in the State, flows of unappropriated water are periodically available. Even though the normal flow of the river may be fully appropriated, water may still be available during times of abundance or flood. No statutory criteria exists to determine how frequently water must be available to support a finding that unappropriated water is available for appropriation. In the case of direct diversions from the stream, without water storage facilities, the TCEQ has previously utilized the at least seventy-five percent standard, if seventy-five percent of the water requested should be available seventy-five percent of the time, then water is available for issuing a new permit.

SB 1 addressed this issue by requiring the development and standardization of water availability computer models on rivers in the State, except the Rio Grande. By further legislative action, a water availability model for the Rio Grande was mandated. It has also now been completed. These water availability models (“WAMs”) have now been completed on all rivers in the State. The Legislature required the TCEQ to advise water rights holders in a watershed, where WAMs are available, of the availability of water during a drought of record.¹⁹ This has now been accomplished on all rivers in the State.

The construction of reservoirs to store water during times of excess flood flow is a means of making water available for appropriation that otherwise might not be available with sufficient regularity to support a new appropriation. This is an example of *developed water*. In the past, the TCEQ has typically limited the volume of use authorized from a reservoir to its “firm yield.” Firm yield is the amount of water, based upon a simulation utilizing historic streamflow records, that the reservoir could produce annually during the worst drought reflected by historical streamflow records. In performing these simulations, hydrologists assume full exercise of upstream senior water rights under the *Stacy decision*, and allow for the passage of sufficient water to satisfy all downstream senior water rights. No specific legal requirement exists that the TCEQ limit the authorized use from the reservoir to its firm yield. The development of WAMs has enhanced the TCEQ’s ability to determine this issue, and one might expect new regulations in the future especially with respect to the treatment of environmental flows and return flows, but this is influx at this point.

¹⁹ Act of June 18, 1999, Senate Bill No. 657, 76th Leg. R.S. Ch. 1222, 1999 Tex. Gen. Laws 4254.

c. Impairment of Existing Water Rights

As part of its hydrologic analysis, the TCEQ examines the impact of the proposed appropriation on existing downstream water rights. If the proposed appropriation would impair water availability for existing downstream rights, the TCEQ may include restrictions on the diversion and use of water in the new permit.

d. Public Welfare

The portion of §11.134 that requires the appropriation not be detrimental to the public welfare is obviously very broad and vague. Pursuant to current TCEQ rules, this protection of the public welfare can include consideration of environmental, social, and economic impacts of the proposed appropriation.

e. Conservation Plan and Reuse

Most applications for new, or amended water rights, must include a water conservation plan, which demonstrates that reasonable diligence will be used to avoid waste and achieve conservation of water. Water conservation is defined “. . . as the employment of practices, techniques, and technologies that reduce consumption, loss or waste, maintain or improve efficiency, increase recycling and reuse, or prevent pollution.” All existing water right holders of 10,000 acre feet or more must file a water conservation plan. Drought plans are also required of some users. The Legislature in 2003 dealt intensively with water conservation by forming a task force to recommend best management practices.

The TCEQ may provide for special conditions dealing with reuse of water and return flows.

f. Other Requirements

Section 11.147 requires the TCEQ to consider the impact of the proposed appropriation on the bays and estuaries of the State of Texas. For permits within an area that is 200 river miles of the Gulf Coast the TCEQ, to the extent practical, shall include conditions considered necessary to maintain beneficial inflows to affected bays and estuaries. This requirement is based upon statutory requirements implemented on September 1, 1985, which are codified in §§ 11.1491 and 11.152. These provisions initially required the TCEQ and the Parks and Wildlife Department to assess the effects on fish and wildlife habitats in cases where an application seeks to appropriate more than 5,000 acre-feet of water per year. Mitigation of adverse impacts that the appropriation may have, may be required, but the evaluation should also consider any net habitat benefits from the project. Sections 11.1491 and 11.152 further provide for an offset of any mitigation actions required pursuant to federal laws and require the consideration of the water quality impact of a proposed appropriation. SB 2 added significant considerations dealing with impact on groundwater, water quality and fish and wildlife habitats, and the Legislature in 2003 provided for an environmental flow commission to recommend policies dealing with protection of minimum flows necessary to protect the environment in the future. These are current issues under development and are clearly challenges for lawyers representing permit or amendment applicants at this time.

3. Interbasin Transfers

Section 11.085 requires special conditions for permits to transfer water from one watershed, or river basin, to another. Interbasin transfers should be distinguished with “intrabasin transfers” which are water transfers within the same watershed. A similar provision on interbasin transfers, applicable to the Texas Water Development Board (TWDB), is found in Section 49d of Article III of the Texas Constitution. It, and related statutory provisions, impose a limitation on TWDB projects, and prohibit interbasin transfers of water that is projected to be needed in a basin of origin within the next 50 years. These provisions were considered in the SB 1 amendments to §11.085. Before SB 1, the court case, *San Antonio v. Texas Water Comm’n*, 407 S.W.2d 752 (Tex. 1966), was the leading case involving the application of §11.085. It required the TCEQ to balance future benefits and detriments of the two competing basins prior to authorizing the transfer. Current §11.085, as amended by SB 1, has added considerable more “guidelines” to the TCEQ in considering interbasin transfers. Most notable is the “junior water rights” provisions, which are quite controversial, and were considered by the Legislature in the 1999, 2001, and 2003 sessions, but no changes were made. Significantly, SB 1 added exceptions to §11.085 pertaining to cases where governmental jurisdictions and county boundaries overlapped with watershed boundaries. A discussion of the complex issues of interbasin transfers is beyond the scope of this article.

4. Reuse

SB 1 addressed the right to the reuse of surface water prior to its return to the watercourse which has been referred as “direct reuse” §11.046. The asserted right to water which has been diverted and returned to a stream and to divert it further downstream and reuse it again, is referred to as “indirect reuse.” SB 1 added new language to §11.046 providing that the TCEQ may require the return of water to the stream after a single use, or specify the amount of water that can be reused by requiring a certain amount of return flows so as to protect downstream water rights and instream flows. Recirculated water used for cooling purposes, is not considered surplus water. *See* §2.07 of SB 1, now §11.046(d).

It is noted that some existing permits require return flows and restricts continued use or direct reuse of water. In the past downstream permits have been granted based, in some respects, upon the assumption of upstream return flows being returned to the watercourse. SB 1 addressed this possibility by requiring the TCEQ to standardize its method of determining water availability in a stream in new permit proceedings by improvements to the WAMs. Section 2.06 of SB 1 requires one who discharges privately owned groundwater to a stream and makes reuse of it downstream to obtain a “bed and banks” permit, *See* §11.042(b). One who returns previously used surface water to the stream is required to obtain a new permit.

5. “Bed and Banks” Permit

Section 11.042(a)(b) – the “bed and banks” permit provision – requires a permit if one wishes to discharge privately owned groundwater or developed water in a reservoir into a stream and use it further downstream. Section §11.042(c) requires a new permit and assessment of the impact on the stream in cases of indirect reuse of once diverted water returned to the stream.

Existing indirect reuse and groundwater retrieval projects previously granted by the TCEQ before September 1, 1997, were grandfathered from these provisions, §11.042(d).

V. EXCEPTIONS TO APPROPRIATION REQUIREMENT

A. Early Claims

As noted above, §11.021(a) declares all waters in stream are owned by the State, but as noted, constitutionally this would not attach to early land grants by earlier sovereigns which carried a right to use water, such as grants from Spain, Mexico, Republic of Texas or the State of Texas. The Irrigation Act of 1913, limited such rights to land patented by the State between January 20, 1840 to July 1, 1895. Riparian irrigation rights were held not to attach to Spanish land grants, *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App. - San Antonio 1961) *Opinion* adopted 163 Tex. 381, 355 S.W.2d 502 (1962).

The Adjudication Act limited vested riparian rights to highest use between 1962-1967, or in some cases 1963 to 1970, and covered claims under filings made under the Irrigation Act of 1889 and 1895, but not certified under the Irrigation Act of 1913 and this was held constitutional by the Texas Supreme Court. *In Re Adjudication of the Water Rights of the Guadalupe Segment of the Guadalupe River Basin*, 642 S.W. 2d 438 (Tex. 1982). Thus, this general exception was limited, and has now been quantified in all basins which have been adjudicated and resolved, except for domestic and livestock use rights.

B. Diffused Waters

Another exception pertains to *diffused surface waters* which are those waters which do not flow in a defined watercourse, but flows across the surface of land in a variant and unpatterned way. Generally, this is rain or snow runoff, although water left in upland areas after a flood recedes may also qualify as diffused surface water. Diffused surface waters are the property of the landowner, until they enter a natural water course. When these waters flow into a natural water course they become state water subject to appropriation.

Upon entry into a watercourse, diffused surface water is legally transformed from private property to public property. Consequently, the definition of a watercourse is significant. A watercourse is a channel, with a well-defined bed and banks, in which water flows as a stream and has a “permanent source of supply.” *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785 (1925).

A watercourse does not always have to have water in it to satisfy the “permanent source of supply” requirement. Barilla Creek, the watercourse in *Hoefs case* did not flow year round. The stream flowed when it rained, from one to 22 times per year, with seasonal regularity. Such a watercourse is referred to as a *torrential stream*. The determinative issue in determining the existence of a “permanent source of supply” is its ability to provide a water supply for agriculture and other beneficial uses.

A watercourse is evidenced by a channel and is more than a low area in a pasture or a typical west Texas draw. *Turner v. Big Lake Oil Co.*, 62 S.W.2d 491 (Tex.Civ.App.-El Paso 1933), *aff'd* 128 Tex. 155, 96 S.W.2d 221 (1936). A well-defined bed and banks is required. The channel, however, must be made by the flowing of water over an extended period of time. *International-Great N. R.R. Co. v. Reagan*, 121 Tex. 233, 49 S.W.2d 414 (1932).

Navigable streams are watercourses. An early Texas statute dealing with surveys of land grants defined a navigable stream as a stream maintaining an average width of thirty feet, from cut bank to cut bank. TEX. NAT. RES. CODE ANN. §21.001(3). The waters of navigable streams are held by the state in trust for the public and, therefore, subject to appropriation. *Mottl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926); *Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982).

Water which is provided by an outside source not ordinarily in the watercourse sometimes referred to as “developed water” is not public water. It is water augmenting the natural streamflow that has been made available through artificial means, such as imported surface water supply from another watershed or groundwater pumped to the surface, and deposited into a stream. In *Harrell v. F.H. Vahlsing, Inc.*, 248 S.W.2d 762 (Tex.Civ.App.-San Antonio 1952, writ ref’d n.r.e.), for example, irrigation return flow that remained in the canals of a water district was not public water. It had not been returned to a watercourse. It was legally reduced to possession and still under the control of the owner of an artificial conveyance system. It remained subject to sale or further use by the owner of the system, so long as he maintains control of the water. In *Guelker v. Hidalgo County WCID No. 6*, 269 S.W.2d 551, 555 (Tex.Civ.App.-San Antonio 1954, writ ref’d n.r.e.) the court ruled that the use of such water was not subject to regulation by the State.

Once the water has escaped the owner’s physical control and rejoins a watercourse, his rights to the water terminate. He does not own the *corpus* of the water, only the right of use. *South Texas Water Co. v. Bieri*, 247 S.W.2d 268 (Tex.Civ.App.-Galveston 1952, writ ref’d n.r.e.); See also §11.046(a), Texas Water Code.

SB 1 reinforced this rule by adding a definition of “surplus water” as water “. . . in excess of the initial or continued beneficial use of the appropriator,” §11.002(10), and required, in an amendment to §11.046, that surplus water be returned to the stream by gravity flow if reasonably practicable to do so.

C. Interference with Diffused Waters

Section 11.086 makes it unlawful to divert or impound the natural flow of diffused surface waters in such a manner so as to damage the property of another by the overflow of the water diverted or impounded. It provides a damaged party a remedy for such unlawful diversion and impounding, both at law, (*i.e.*, the recovery of damages) and in equity, usually in a form of an injunction.

Section 11.086 provides:

- (a) No person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded.
- (b) A person whose property is injured by an overflow of water caused by an unlawful diversion or impounding has remedies at law and in equity and may recover damages occasioned by the overflow.
- (c) The prohibition of Subsection (a) of this section does not in any way affect the construction and maintenance of levees and other improvements to control floods, overflows and freshets in rivers, creeks, and streams or the construction of canals for conveying water for irrigation or other purposes authorized by this code. However, this subsection does not authorize any person to construct a canal, lateral canal, or ditch that obstructs a river, creek bayou, gully, slough, ditch, or other well-defined natural drainage.
- (d) Where gullies or sloughs have cut away or intersected the banks of a river or creek to allow floodwaters from the river or creek to overflow the land nearby, the owner of the flooded land may fill the mouth of the gullies or sloughs up to the height of the adjoining banks of the river or creek without liability to other property owners.

This is a surface water issue, but actually involves drainage implications as opposed to the right to use the water itself.

It is also noted that the construction and maintenance of levees and other improvements to control floods and overflows in rivers and streams, irrigation canals or other authorized structures, is not covered by this law. It allows a person to fill the mouth of gullies or sloughs in cases where they have cut away or intersect the banks of a stream without incurring liability to other property owners, irrigation canals and other authorized structures. This includes activities on defined streams, irrigation canals or other authorized structures, as opposed to construction of structures on the land surface with certain exceptions, such as exempted reservoirs.

D. Other Permit Exceptions

Certain reservoir structures on the surface of land owned by a landowner are exempt. *SB 2* added, shown in italics, provided for an exemption of small reservoirs for certain purposes. It provides:

- (a) Without obtaining a permit, a person may construct on his own property a dam or reservoir with normal storage of not more than 200 acre-feet of water for

domestic and livestock purposes. *A person who temporarily stores more than 200 acre-feet of water in a dam or reservoir described by this subsection is not required to obtain a permit for the dam or reservoir if the person can demonstrate that the person has not stored in the dam or reservoir more than 200 acre-feet of water on average in any 12-month period. This exemption does not apply to a commercial operation.*

(b) Without obtaining a permit, a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for fish and wildlife purposes if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by Section 23.51, Tax. Code. This exemption does not apply to a commercial operation.

(c) Without obtaining a permit, a person who is drilling and producing petroleum and conducting operations associated with drilling and producing petroleum may take for those purposes state water from the Gulf of Mexico and adjacent bays and arms of the Gulf of Mexico in an amount not to exceed one acre-foot during each 24-hour period.

(d) Without obtaining a permit, a person may construct or maintain a reservoir for the sole purpose of sediment control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act (Article 5920-11, Vernon's Texas Civil Statutes).²⁰

The SB 2 amendments raised serious questions of interpretation and enforcement. How can it be determined that a reservoir has not stored more than 200 acre feet until after it has stored more than 200 acre feet? Who keeps the records? What is a "commercial operation"? Does it include a bed and breakfast operation for bird watchers? What is "domestic and livestock purposes"? These are issues of concern to the TCEQ, and can be a source of argument among water lawyers until the courts and/or the legislature provides more guidance.²¹

Other exceptions which have not received TCEQ or court attention is provided by §11.1421, dealing with mariculture activities, §11.1422 dealing with historic cemeteries, and water in of any arm, inlet, or bay of the Gulf of Mexico, §11.023(f).

But, probably the most significant exception is the domestic and livestock use exemption. This right was exempt from adjudication in the 1967 Adjudication Act. It remains an undefined

²⁰ Codified as § 11.143.

²¹ It was also complicated by the legislature passing a similar amendment in H.B. 247, which has a different wording. Act of June 17, 2001, 77th Leg. R.S. Ch. 1427, 2001 Tex. Gen. Laws 4810; the TCEQ has attempted reconciliation of these laws in its regulations.

and unquantified right except in TCEQ regulations.²² It is a water right that must be dealt with in the future.

VI. CANCELLATION OF SURFACE WATER RIGHTS

Prior to 1957, appropriative rights could be canceled only when “. . . willfully abandoned for three successive years . . .,” §11.030. Willful abandonment is very difficult to establish. In 1957 the legislature passed a cancellation statute²³ which provides a procedure to cancel rights for non-use for 10 consecutive years. Retroactive application of this statute to existing rights was upheld in *Texas Water Commission v. Wright*, 464 S.W.2d 642 (1971). This law covered partial non-use as well as total non-use. Under §11.172 an appropriator may avoid cancellation by convincing the TCEQ that the appropriator has a “bona fide intention of putting the water or the unused portion of the water to an authorized beneficial use within a reasonable time after the hearing.”

SB 1 in §4.06 added further provisions making it more difficult to cancel rights. This could be a recognition of the conflict between the “use it or lose it” approach and the modern definition of *water conservation*. Section 11.002(9),(10) defines “conserved water” as a beneficial use of water which exempts it from cancellation. SB 2 added further limitations on cancellation protesting long term reservoir projects. However, cancellation continues to be a threat to water right holders who do not use their rights and encourages water marketing as the state’s preferred method of voluntary reallocation of water.

VII. THE WAGSTAFF ACT

The Wagstaff Act was passed in 1931. I will discuss it here because you may hear it referred to from time to time. The legislature then perceived that upstream municipal water supplies were threatened by major downstream senior appropriations for hydroelectric and

²² 30 Tex. Admin. Code § 297.1(18)(28) defines domestic use as “Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold” and livestock use as “The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and 71.001, respectively, of the Parks and Wildlife Code.” Section 297.21(a) provides that a person who owns land adjacent to a stream may directly divert and use water from the stream for domestic and livestock use without having to obtain a permit; §304.21(a),(d)(3) allows a watermaster to protect domestic and livestock uses in times of low flows.

²³ §11.171, *et. seq.*

irrigation purposes. It gave priority to municipal needs against permits issued after 1931. Through the years, the Wagstaff Act accomplished several significant modifications of the existing appropriative system, such as the list of priority uses in §11.024 that establishes a ranking of preferred water uses to be utilized in new permit issuance. Section 11.024 ranks water uses in the following order: domestic and municipal, industrial, irrigation, mining, hydroelectric, navigation, recreation and pleasure, and other beneficial uses.

The Wagstaff Act's most significant provision in the codified Texas Water Code was contained in §11.028. It provided that all appropriations, except on the Rio Grande, following the effective date of the Wagstaff Act, *i.e.*, May 17, 1931, for any purpose other than municipal and domestic uses were subject to subsequent “. . . further appropriation . . .” for municipal or domestic uses without condemnation or compensation. The Wagstaff Act further provided that municipalities and other governmental agencies can exercise the power of eminent domain to acquire water and/or property devoted to uses other than municipal and domestic purposes.

The Wagstaff Act appeared to provide a mechanism to make water available for municipal use on a watercourse (except the Rio Grande) that is otherwise fully appropriated. The implementation of these provisions in practice, however, was uncertain. No Texas court ever addressed these basic issues authoritatively.

The uncertainties created by the Wagstaff Act were removed by SB 1 by simply providing “Section 11.028, Water Code, is repealed.”

VIII. WATER PLANNING AND WATER TRANSFERS

A. Water Planning

A significant aspect of SB 1 was that it changed the State's water policy with respect to water planning from planning from the top down to a strategy of local planning from the bottom up. SB 1 required water planning by regional water planning groups made up of all segments of public interest. These regional water plans have now been submitted and approved by the Texas Water Development Board (TWDB), and the TWDB has approved a state water plan based upon local input.

Water planning and management has become another element of surface water law in respect to granting new permits and in amending existing permits.

B. Water Transfers

Another significant aspect of SB 1 was that it established that voluntary water right transfers were the preferred method of reallocation of water rights from one need to another. Several provisions of SB 1 encourage the voluntary transfer of water rights. This involves a process at the TCEQ where existing water rights are amended, based upon an underlying water rights sales transaction. SB 1 amended existing law by adding §11.122(b) which provides:

Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.

Now, clearly in an application to amend a water right in a water marketing context, the statute now directs that the TCEQ shall authorize the amendment if the change in the water right **“ . . . will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.”**

The intent of these provisions was to facilitate water transfers. Whether this occurs is yet to be seen. The issues involved in water rights transfers and amending existing water rights are beyond the scope of this article.

IX. CONCLUSION

The early surface water laws provided a basis for a water right, either as one granted by the State (or sovereign) or one based upon the riparian doctrine with the limited exceptions discussed above. The Adjudication Act of 1967 provided a means of quantifying and identifying existing rights and offered an enforcement vehicle through a watermaster, which has received limited acceptance over the state. SB 1 and SB 2 have added – some would say – more sophistication to our surface water laws by including considerations of water quality, impact on groundwater and the environment in the granting of future permits and in many respects when existing water rights are amended. Significantly, SB 1 did establish the important policy of voluntary reallocation of existing water rights through consensual water transfers rather than involuntary reallocation of water rights, and an emphasis on water management and regional planning.

The current state of surface water law offers a fertile field for water lawyers to use their legal expertise and imagination in sorting out the more refined issues that are present while the State strives to provide a system of surface water law that will provide water for the needs of a growing State.