



Groundwater Rights



The Issue

Groundwater has long provided a major portion of the Texas water supply. Scientific assessment of the undeveloped groundwater indicates groundwater resources can help meet growing demand for water in Texas.

Texas has two distinct legal systems governing water: groundwater and surface water. Surface water in Texas is owned by the state, which grants water rights to use specific volumes of water for beneficial uses. A surface water right in Texas is a “usufructuary” right, or a right to use. 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. This principle has recently been reaffirmed by both the Texas Legislature and courts. During the 82nd Legislative Session, Texas passed SB 332, which clearly stated that “a landowner owns the groundwater below the surface of the landowner’s land as real property.” A landowner’s ownership of groundwater in place was also vindicated by the Texas Supreme Court in *Edwards Aquifer Authority v. McDaniels*. The Court held that the rule of capture is not inconsistent with ownership of groundwater in place, noting that “the landowner is regarded as having absolute title in severalty to the oil and gas in place below his land. The only qualification is that it must be considered in connection with the law of capture and is subject to police regulation ... [This rule] correctly states the common law regarding the ownership of groundwater in place.”

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

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 Desired Future Conditions (DFCs) of an aquifer and Managed Available Groundwater (MAGs) determined and overseen by the Texas Water Development Board (TWDB). The regulatory authority created in HB 1763 expands the state’s role in groundwater regulation and is being used to limit or deny groundwater permits at GCDs.

Yet while 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, with the result that actions in one GCD can 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.

Beginning with the *McDaniel* decision, Texas courts have begun to recognize that excessive regulation of groundwater can amount to a taking of property for which compensation is owed. 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. Despite these disincentives, challenges to GCD regulations are increasing.

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The Facts

- By 2060, water demand in Texas is projected to increase by 22%, while available water supply is expected to decrease by 10%.
- 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 99 local groundwater districts covering all or part of 174 counties.

Recommendations

- Remove legal impediments to the private development of new groundwater supplies and to proper functioning 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.

Resources

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

Edwards Aquifer Authority v. McDaniel, 55 Tex. Sup. J. 343 (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 (Mar. 2005).

