SURFACE WATER

SHANA L. HORTON
Senior Counsel
Kelly Hart & Hallman LLP

State Bar of Texas
WATER RIGHTS 101
February 20, 2013
San Antonio

CHAPTER 2

SHANA L. HORTON

Kelly Hart & Hallman LLP
shana.horton@kellyhart.com
512-495-6458

EDUCATION

The University of Texas School of Law, JD, (2003)

The University of Texas, BA in Plan II Honors (2000)

EXPERIENCE

Kelly Hart & Hallman LLP, Senior Counsel (Sept. 2011-present)

Texas Commission on Environmental Quality, Staff Attorney, Environmental Law Division (Jan. 2007—August 2011); Litigation Division (Nov. 2005—Dec. 2006)

Texas House of Representatives, Assistant Committee Clerk and Committee Counsel, Law Enforcement Committee, 78th and 79th Legislative Sessions (2003 and 2005)

Akins & Nowlin, LLP, Associate Attorney (October, 2003 – October, 2004)

Texas Court of Criminal Appeals, Judicial Intern (July – August, 2001)

Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, PC, Summer Associate (May – July, 2001)

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

- Chair, Austin Bar Association Environmental Law Section (Chair Elect, 2011; Membership Chair and CLE Coordinator, 2010 and 2009; Membership Chair, 2008; Events Chair, 2007)
- Texas Water Conservation Association Water Laws Committee (2012-2013)
- The Changing Face of Water Rights CLE Planning Committee (2012, 2013 programs)
- Austin Young Lawyers Association (2003-present)

PUBLICATIONS

- Co-author, *State and Federal Governmental Entities With Water Resource Jurisdiction,* Essentials of Texas Water Resources, Texas Bar Books, Mary K. Sahs, Ed., 2011 (2nd Ed.)
- *Litigation and Administrative Action Update,* TRWA / TWCA Water Law Seminar, Water for the Future: Texas at the Crossroads, Jan. 2013
- *Surface Water Rights 101,* The Changing Face of Water Rights in Texas 2012, State Bar of Texas, Feb. 2012
- *Surface Water Rights 101,* The Changing Face of Water Rights in Texas 2011, State Bar of Texas, Feb. 2011

TABLE OF CONTENTS

SURFACE WATER LAW 101[1]

I. INTRODUCTION

The purpose of this paper is to introduce you to the law relating to the right to use surface water in Texas. A foundation in the history and development of Texas water law is essential to understanding the fundamental ideas that underlie the current system of laws, so a significant portion of this paper is devoted to laying that foundation. Then, this paper will expound upon ownership and use of the water and beds of rivers and streams and using water without a permit under a riparian right or the permit exemption for domestic and livestock use. Next, several key legal concepts will be briefly explained. Finally, the paper provides an overview of the current process involved in obtaining a surface water right. But first, the title of this paper begs the question:

A. What is Surface Water?

All water can generally (and a little simplistically) be categorized as surface water or groundwater. This paper is not about groundwater; that will be covered in another paper in these materials. Surface water is categorized in Texas water law into one of two general types: diffuse surface water and water in a watercourse. *See* City of San Marcos v. Texas Comm'n on Envtl. Quality, 128 S.W.3d 264, 271-272 (Tex. App. – Austin 2004), *pet. denied*. Except for a brief description, this paper is not about diffuse surface water, either. This paper is about surface water in a watercourse, specifically "state water." So the salient issue when it comes to state permitting and regulation is not "What is surface water?" but rather, "What is state water?"

1. What is State Water and Why Does It Matter?

Tex. Water Code § 11.021 defines state water:

> (a) 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, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.
>
> (b) Water imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state is the property of the state.

The streams, canyons, depressions and similar natural features enumerated in § 11.021 are known as "watercourses." To determine whether surface water is state water and is thus owned and regulated by the state, one must determine whether it is in one of the watercourses listed in the statutory definition. Because of this, the characterization of what qualifies as a watercourse is important.

A "watercourse" is defined in Title 30, Texas Administrative Code (30 TAC) § 291.7(61) as "a definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter, with some degree of regularity, depending on the characteristics of the sources)."

The courts have described watercourses as having:

> (1) a defined bed and banks,
> (2) a current of water, and
> (3) a permanent source of supply.

Domel v. City of Georgetown, 6 S.W.3d 349, at 353 (*quoting* Hoefs v. Short, 114 Tex. 501, 273 S.W. 785 (1925)). However, the lengthy discussions in *Hoefs v. Short* and subsequent cases indicate that the courts have taken great latitude when considering the three factors listed above. For example, the required "permanent" source of water supply can be rainfall. *Hoefs* at 787. Also, a watercourse does not have to be a constantly flowing stream. Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 605–08, 297 S.W. 225, 227–28 (1927).

If water meets the definition of state water, it is subject to state regulation under the Texas Water Code and the rules of the Texas Commission on Environmental Quality (TCEQ or Commission). The TCEQ is the state agency with general jurisdiction over "water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights." TEX. WATER CODE § 5.013. A "water right" is defined in the Water Code as "a right acquired under the laws of this state to impound, divert, or use *state water*." TEX. WATER CODE § 11.002(5) (emphasis added). Further, Texas Water Code Section 11.121 provides that "except for appropriations which are exempt from permitting, no person may appropriate any *state water* or begin construction of any work designed for the

[1]There are many excellent papers providing an overview of surface water rights in Texas and I encourage you to read all of them. In drafting this paper, I drew from and relied upon papers written by many of my respected colleagues, including Robin Smith, Tom Bohl, Glenn Jarvis, Karey Nalle Oddo, Doug Caroom and Susan Maxwell. I wish to recognize and thank all of them for their invaluable work.

storage, taking, or diversion of water without first obtaining a permit from the TCEQ to make the appropriation." (emphasis added).

2. Diffuse Surface Water

Diffuse surface water is the other category of surface water. Generally speaking, it is water on the surface of the land that has not yet entered a watercourse. Usually, this water consists of rainfall runoff, although water that remains in upland areas after a flood recedes may also qualify as diffuse surface water.

Diffuse surface water is "water which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow." City of Princeton v. Abbott, 792 S.W.2d 161, 163 (Tex. App.– Dallas 1990, *writ denied*) (*quoting* Stoner v. City of Dallas, 392 S.W.2d 910, 912 (Tex.Civ.App.– Dallas 1965, *writ ref'd., n.r.e.*)). Diffuse surface water belongs to the owner of the land on which it gathers as long as it remains on that land and prior to its passage into a natural watercourse. Domel v. City of Georgetown, 6 S.W.3d 349, at 353 (*citing* Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221, 228 (1936)). Current TCEQ rules relating to spreader dams, i.e., structures designed to spread rainwater over a large area of pasture, reflect this principle. *See* 30 TAC § 297.23.

Although diffuse surface water is included in the category of surface water, in practice, the term "surface water" is generally used in reference to state water alone. The laws and regulations discussed in this paper govern not diffuse surface water, but state water.

B. What is NOT Surface Water?

Groundwater is not surface water. Groundwater is subject to a separate and very different regulatory scheme that is discussed in detail elsewhere in these materials.

Most groundwater — called "percolating groundwater" — is subject to the rule of capture. Water in the ground that is "percolating, oozing, or filtrating through the earth" is percolating groundwater. *See East* at 280. Under the rule of capture, at common law, the surface landowner may reduce to possession all the percolating groundwater that he can and use it as he wishes. Houston & Tex. Central Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 281 (1904); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292–295, 276 S.W. 2d 798, 799–803 (1955); Sipriano v. Great Spring Waters of America, Inc., 1 S.W. 3d 75 (Tex. 1999). However, the rule of capture is not absolute and groundwater withdrawals are increasingly subject to regulation. Where groundwater use is regulated, the regulation is implemented locally by groundwater conservation districts. *See* TEX. WATER CODE § 36.001, et seq.

In contrast to percolating groundwater, the "underflow," or subterranean flow, of streams is state water. *See* TEX. WATER CODE § 11.021(a). There is not much guidance in case law as to what constitutes underflow, so it is generally easier to determine what does not constitute underflow. A determination of what does not constitute underflow is strongly affected by the presumption in Texas law that all underground water is presumed to be percolating groundwater. *See* Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273, 278 (1927); *See also,* Pecos Co. Water Contr. & Impr. Dist. No. 1 v. Williams, 271 S.W.2d 503, 506 (Tex. Civ. App. – El Paso 1954, *writ ref'd., n.r.e.*).

In a case involving water from springs on private property converted to private use, the San Antonio Court of Civil Appeals also recognized the groundwater presumption. The Court held that the water in question was percolating groundwater, noting that there was no proof that a subterranean stream existed, that the flow of the spring had value to riparians, or that the spring added perceptibly to the flow of a stream. Bartley v. Sone, 527 SW2d 754 (Tex.Civ.App. – San Antonio 1975, writ ref'd. n.r.e.). In *Denis v. Kickapoo Land Co.*, the Austin Court of Appeals went further. Denis v. Kickapoo Land Co., 771 S.W. 2d 235 (Tex. App. – Austin 1989, writ denied). The Court noted that the Texas Supreme Court in *East* and other cases had consistently applied the English rule, which holds that the landowner has absolute ownership of groundwater under his land. Based on the Texas Supreme Court's application of the English rule, the Austin Court of Appeals held that even if water from a spring adds perceptibly to the flow of a stream, if it is captured before it enters, then it is percolating groundwater and the property of the landowner. *See Denis* at 238–39.

Are there subterranean streams that might also be governed by surface water law? No Texas court has declared one to exist. Reported case law does mention defined underground streams and suggests that water in defined subterranean channels would not be subject to the laws pertaining to percolating groundwater. *See* Cantwell v. Zinser, 208 S.W.2d 577, 579 (Tex. Civ. App. – Austin 1948, no writ); *Williams* at 506; *Denis* at 236-37. However, one of TCEQ's predecessor agencies declared that the Edwards Aquifer was an underground river, but its conclusions were rejected by a state district court in Austin. In its statement of legislative policy, the Edwards Aquifer Act confirms the holding of the district court, at least as to the Edwards. Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, § 1.01.

II. LEGAL FOUNDATIONS

Now that you know which water we are talking about, it is time to go back to the beginning. Through the years, Texas has imported various and sometimes incompatible principles of water law from the Spanish, Mexicans, and English, as well as our neighboring states in the Western United States. The first water rights in Texas were derived from the Spanish and Mexican sovereigns that governed Texas from roughly 1600 through Texas Independence in 1836.

A. Spanish and Mexican Land Grants

Surface water law in Texas emerged from the body of laws relating to land grants and land ownership under the succession of governments that controlled Texas. Under these laws, land titles granted by Spain or Mexico to property owners required specific authorization to use surface water for irrigation. *See* State v. Valmont Plantations, 346 S.W. 2d 853, 878 (Tex. Civ. App. – San Antonio 1961, *aff'd.* Valmont Plantations v. State, 163 Tex. 381, 355 S.W. 2d 502 (1962)). Thus, the right to use water from the natural flow of the watercourse for anything more than domestic and livestock reasons must have been expressly given in the land grant.

In 1848, the Mexican-American War ended with the signing of the Treaty of Guadalupe Hidalgo. As part of this treaty, Mexico relinquished all claims to Texas and recognized the Rio Grande as the southern boundary with the United States (see Article V). The treaty also provided that Texas would continue to recognize existing property rights after Independence. At that time, over 26 million acres—the vast majority of real property in Texas—was covered by Spanish and Mexican land grants. *See* A.A. White and Will Wilson, *The Flow and Underflow of Motl v. Boyd*, 9 SW LJ at 5, citing Rep. Comm's of Gen Land Office (1930-1932). These land grants did not recognize what the English called "riparian rights," a landowner's right to use water in an adjoining stream to irrigate his land. *See Valmont* at 869.

B. Adoption of the English Riparian System

In 1840, the Republic of Texas adopted the English common law, and with it, the riparian system of water rights. Tex. Rev. Civ. Stat. art. 1—Rep. Tex. Laws 3 [1840], n. 28 ("[T]he proprietor of land improving the same might lawfully repel surface water and turn the flow back on other lands without liability"); Harbert Davenport, *Development of the Texas Laws of Waters*, Vol. 21 Tex. Rev. Civ. Stats. (1953) [superseded], pp. XIII–XXXIX, at XIII. The English doctrine of riparian rights generally recognized a landowner's right to take a reasonable amount of water from an adjacent watercourse and make reasonable use of it. *See* Watkins Land Co. v. Clements, 98 Tex. 578, 585, 86 S.W. 733, 738 (1905). Irrigation was considered a reasonable use.

The word "riparian" comes from a Latin word meaning "pertaining to the bank or shore of a river or lake." Riparian water rights were rights to use waters of a stream that arose "out of the ownership of land through or by which a stream of water flows." *Id.* at 735. Waters subject to riparian use included the normal ordinary flow and underflow of a watercourse, but not stormwater or floodwater. *See* Motl v. Boyd, 286 SW 458, 468 (Tex. 1926). Like appropriative rights under the system that governs Texas water rights today, riparian rights were usufructory rights, meaning there was no ownership of the corpus of the water, merely a right to use it. Texas Co. v. Burkett, 117 Tex. 16, 25, 296 S.W. 273, 276 (1927). The riparian right came with the property and continued even if the landowner did not use the water. *See* Fleming v. Davis, 37 Tex. 173, 201 (1872) ("Use does not create it; disuse cannot destroy or suspend it.") As you will see, this is one of the differences between earlier riparian rights and the appropriative rights that would follow.

Another characteristic of riparian rights is that they were correlative. That is, each riparian landowner had an equal right with his neighbors up and down the stream to take and use water. Parker v. El Paso Co. Water Impr. Dist. No. 1, 116 Tex. 631, 642–43, 297 S.W. 737, 742 (1927). However, use of water by riparian landowners was limited to use on riparian lands, and generally to irrigation and domestic and livestock use. Biggs v. Lee, 147 S.W. 709, 710-11 (Tex. Civ. App. – El Paso 1912, *error dism'd.*). In 1881, the Court held that a riparian could divert water for irrigation so long as his diversion did not deprive a downstream riparian of his rights to use the water for domestic and livestock use. *See* Baker v. Brown, 55 Tex. 377, 380-381 (1881). In 1889, the Court held that a riparian could divert water for irrigation even though a downstream riparian did not have enough water available for irrigation. *See* Mud Creek Irrigation Co. v. Vivian, 11 SW 1078, 1079 (Tex. 1889). Ultimately, the Texas Supreme Court articulated a more general rule, concluding that a riparian could use water for irrigation only if the use was reasonable, taking into account all facts and circumstances. *See* Watkins Land Co. v. Clements, 86, SW 733, 736 (Tex. 1905). By that time, the system of riparian rights was already being superseded by the doctrine of prior appropriation.

C. The Rise of the Appropriation Doctrine

It is often said that the story of Texas Water Rights is the story of Texas' droughts. In the 1880's, Texas experienced a drought that caused severe problems for agriculture in the arid regions of the state. The state was unable to allocate water to those places where water did not flow freely using the riparian

model. Realizing it had to adapt its water rights system, Texas looked to other arid states in the Western United States for guidance and imported the appropriation doctrine. *See In re* The Adjudication of the Water Rights of the Upper Guadalupe Segment, 642 SW 2d 438, 440 (Tex. 1982).

The appropriation system, which provides a process to obtain a legally recognized right to use state water, was adopted and refined with the Irrigation Acts of 1889, 1893 and 1895; the Burges-Glasscock Act in 1913 and Canales Act in 1917; and the court cases interpreting these laws. The appropriation doctrine remains the basis of the law of water rights in Texas today.

1. 1889: The 1889 Irrigation Act was passed in an effort to facilitate creation of agricultural irrigation systems in the dry regions of west Texas. It provided that the unappropriated water in every river or natural stream "within the arid portions of the state of Texas" could be diverted for "irrigation, domestic, and other beneficial uses." *See* 1889 Irrigation Act, § 1. The concept of "first in time is first in right" also appeared with the1889 Irrigation Act, which provided that, "[a]s between appropriators, the one first in time is the one first in right to such quantity of the water only as is reasonably sufficient and necessary to irrigate the land." *See* 1889 Irrigation Act, § 4. In order to claim his right to surface water, a person had to file a "Declaration of Intent to Appropriate Water" with the county clerk in the county where the head gate of the proposed canal or ditch was to be located. *Id.*, § 5. The declaration had to describe how the water would be diverted and either state the acreage and location of the land irrigated or provide a map.

Importantly, while people were filing declarations with their County Clerks staking legal claims to use water for irrigation, riparian users continued using the water by virtue of their riparian rights, which were still valid. Thus, two systems allocated water from the same water sources on different bases.

2. 1893: The 1893 Irrigation Act amended the 1889 version to extend the time for filing and recording declarations and to give owners of irrigation works a lien on crops raised with the irrigation water provided under lease or rental contracts. *See* 1893 Irrigation Act, §§ 1 and 2.

3. 1895: The 1895 Irrigation Act refined the law laid out in earlier Irrigation Acts. First, it expanded the definition of waters of the state. Current statutory language appeared, including the description of state water contained in Water Code Section 11.021. *See* 1895 Irrigation Act, § 1. The 1895 Act also added the use of water in the waterworks of cities and towns to the types of uses contemplated. *Id.* at §§ 2–4. This is what we today refer to generally as municipal use. The 1895 Act continued to protect riparians with a provision specifically stating that water "shall not be diverted to the prejudice of the rights of the riparian owner without his consent." *Id.* at § 3. Finally, the 1895 Act added to the law an official cutoff for new riparian irrigation rights. Texas law, now codified at Tex. Water Code Section 11.001(b), was amended to provide that no riparian rights were to be recognized for land patented after July 1, 1895. Thus, from 1895 forward, any new water rights in Texas had to be acquired by appropriation.

4. 1913: The next major step in the transition to the prior appropriation system was the enactment in 1913 of the Burges–Glasscock Act. This legislation expanded the prior appropriation system from the "arid" portions of Texas to all parts of the state. Perhaps most importantly, the Burges-Glasscock Act created a permitting system for all new water rights in Texas that was to be administered by a three-member State Board of Water Engineers. In place of the county declaration system, it created a centralized system of water rights claims registration ("certified filings"). Both previously unrecorded claims and those filed with county clerks were to be refiled with the State Board of Water Engineers. If these filings were made and approved, one would have the right to take the amount of water from the waterway he beneficially used prior to January 13, 1913. *See* 1913 Tex. Gen. Laws 358. Section 15 of the Burges–Glasscock Act, similar to the current Water Code Section 11.121, provided that a permit would be required to appropriate water. Since 1913, one can only obtain surface water rights by permit from the state.

The Burges–Glasscock Act did expand the prior appropriation system greatly, but nevertheless, it repeated the assurances contained in the earlier Irrigation Acts that the ordinary flow and underflow of streams could not be diverted to the prejudice of riparian rights holders.

5. 1917: After more droughts in 1910 and 1917, the citizens of Texas adopted the "Conservation Amendment" to the Texas Constitution. See Tex. Const. art. XVI, § 59. The Conservation Amendment enabled the state to adopt laws for the conservation of water. Next, the Legislature passed the Canales Act, which repealed and then reenacted most of the major sections of the 1913 Burges–Glasscock Act, and added one significant change: it established a procedure for the State Board of Water Engineers to conduct adjudications of water rights across the state. This would have allowed each right recognized to be given a specific priority, and would have allowed the Board of Water Engineers to then regulate the distribution of

water according to those priorities. But the Texas Supreme Court found fault with the Act.

6. 1921: In Board of Water Engineers v. McKnight, the Texas Supreme Court struck down the new provisions of the Canales Act, holding that water rights, as property rights, could only be adjudicated by the courts and not by an administrative agency. The Court found that portion of the Canales Act violated the separation of powers provision in the Texas Constitution. Board of Water Engineers v. McKnight, 111 Tex. 82, 229 S.W. 301(1921). This holding was crucial for water rights in Texas because it finally declared water rights to be property rights.

The *McKnight* decision was a victory for riparian owners and a setback for appropriators and others who sought to consolidate Texas surface water rights under one unified system. However, the conflict inherent in the dual system of water rights remained unresolved. It surfaced again a few years after the *McKnight* decision in a case called *Motl v. Boyd*.

7. 1926: In *Motl v. Boyd*, the Texas Supreme Court upheld the Irrigation Acts of 1889–95 and the Burges–Glasscock Act, validating the prior appropriation system. 116 Tex. 82, 286 SW 458 (1926). In upholding the prior appropriation laws, the Supreme Court confirmed the Irrigation Acts' "horizontal partition" of stream water between the ordinary flow of the stream and the storm or floodwaters above the ordinary flow. The ordinary flow of a river or stream was apportioned to the riparians. It was defined as the "highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal and usual condition, uninfluenced by recent rainfall or surface run-off." *Motl* at 468–69; see also, Hutchins at 153–154. This left appropriators free to appropriate storm and floodwaters above the highest line of ordinary normal flow of navigable streams and other waters, so long as their appropriation did not violate riparian rights. This attempt to reconcile the two systems was cumbersome at best, but after *McKnight* and *Motl v. Boyd*, there would be no significant attempts to unify the two disparate systems for 30–40 years.

D. 1967: The Adjudication Act Reconciles the Dual Systems

In the 1950's, Texas experienced what is generally accepted as the most severe drought in its recorded history. As had been the case before, Texas water law was forced to evolve to respond to drought. This drought, often referred to as the "drought of record," brought to a head the problems of competing water rights claims in the Lower Rio Grande Valley, where the Rio Grande River literally stopped flowing at Brownsville. The amount of water appropriated under surface water rights had exceeded the amount of supply. In 1956, a lawsuit ensued. Thousands of parties participated in an effort to determine who had surface water rights in the lower Rio Grande and in what quantities. State v. Hidalgo County Water Control & Improvement Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App.–Corpus Christi 1969, writ ref'd n.r.e.) ("Hidalgo County"). It was clear that Texas had to do something to prevent future crises like the one experienced in the Lower Rio Grande Valley.

To that end, while the Hidalgo County case was on appeal, the Texas Legislature enacted the Water Rights Adjudication Act of 1967. Act of April 6, 1967, 60th Leg., R.S., ch. 45, 1967 Tex. Gen. Laws 86, now codified at Tex. Water Code § 11.301, et seq. The Adjudication Act merged the doctrine of riparian rights and the doctrine of prior appropriation and for the first time, created "an orderly forum and procedure for the adjudication and administration of water rights." In re The Adjudication of Water Rights of the Brazos III Segment, 746 S.W. 2d 207, 209 (Tex. 1988). The Act provided a constitutional scheme to adjudicate and quantify surface water rights over the entire state. Under the provision now codified as Water Code Section 11.301, the Act required all claimants of water rights based on anything other than permits and certified filings (e.g., Spanish, Mexican, and riparian claims, as well as claims under the Irrigation Acts that had not been filed pursuant to the Canales Act) to make those claims to TCEQ's predecessor agency by September 1, 1969. These were known as "Section 303 claims." Claims had to be made on the basis of actual beneficial use of water for the period from 1963 through 1967.

On the petition of claimants or on its own motion, the Agency could commence an adjudication. The Section 303 claims were part of this adjudication, but anyone in the stream segment being adjudicated who held a permit or certified filing was notified and they had to file a claim as well ("Section 307 claims"). *See now*, TEX. WATER CODE § 11.307. The Agency made a preliminary determination of all claims. This was followed by an opportunity to file contests to the preliminary determination with the Agency. A final determination was eventually made by the Agency, and it was automatically filed in district court, where exceptions could be filed. *See now*, TEX. WATER CODE §§ 11.304–319. The scope of review in the district court was a sort of *de novo* review, whereby the court reviewed the facts as well as the law independently, but the scope of the inquiry was limited to issues raised at the Agency. *See now*, TEX. WATER CODE § 11.320. The requirement for approval by the district court addressed the separation of powers problem that had been presented in the 1917 legislation.

After the highest court reviewing the adjudication issued a final decree, the Agency was required to issue a "certificate of adjudication" to the claimant, evidencing his water right. *See now*, TEX. WATER CODE § 11.323. The Certificate of Adjudication is evidence of one's right to use the surface waters of Texas and the limits of that right, regardless of how that right originally manifested—by Spanish land grant, riparian rights, or appropriative rights. Essentially, riparian rights were converted to appropriative rights through this permitting process. Riparian rights were altered from the right to take as much water as was reasonable into the right to make a beneficial use of a specified amount of water at a specific location. *See* In re The Upper Guadalupe Segment, 642 S.W.2d at 444-46.

The Water Rights Adjudication Act was challenged, both on separation of powers grounds and on the basis that Section 303's requirement that a claimant demonstrate water use between 1963 and 1969 was an unconstitutional taking of riparian water rights. The Texas Supreme Court rejected both those claims and upheld the Act. *Id.* at 438.

Adjudications under the 1967 Act were commenced throughout Texas in the 1970s and continued through the early 1980s. Most cases proceeded through the courts in the 1980s. The last segment to be adjudicated by the TCEQ was the Rio Grande Basin in El Paso and Hudspeth Counties, in which a final agreed decree was issued by the El Paso County District Court in October, 2006. The Lower Rio Grande adjudication begun in the district court has been completed since the early 1970s. There are a handful of unresolved claims remaining in the Pecos River Basin today, pending in the district court in Reeves County. Except for those claims, claims for state water in all parts of Texas have been adjudicated. The result is a body of permits and certificates of adjudication containing similar provisions including time priorities, and placing all water rights on essentially the same footing.

E. 1997-present: Senate Bills 1, 2 and 3

In 1996, severe drought struck Texas again. Again, water laws would undergo significant change. Over the next several legislative sessions, the Texas Legislature would pass Senate Bills 1, 2 and 3, omnibus water bills tackling modern water law concerns. These laws are commonly referenced by practicing attorneys and you will learn more about their effects in other papers.

1. Senate Bill 1, 75th Leg. Session (1997). In 1997, the Texas Legislature passed Senate Bill 1 (SB 1), a sweeping overhaul of water planning and development in Texas. SB 1 reflects the State's current approach to addressing future surface water needs by (1) promoting water conservation practices and (2) encouraging a reallocation of the available water supply by use of voluntary consensual water transfers, whether within the same river basin or between basins ("interbasin transfers"). SB 1 also recognized the hydrologic connection between surface water and groundwater. The bill required the Texas Water Development Board to develop a comprehensive state water plan to be amended every five years and launched a regional water planning process. As you will learn later, the state cannot issue any water right that conflicts with the regional water plan. SB 1 also had a major impact on groundwater law, establishing groundwater conservation districts as the preferred method of managing groundwater resources.

2. Senate Bill 2, 77th Leg. Session (2001). In 2001, Texas Legislature passed Senate Bill 2 (SB 2). SB 2 refined and built upon SB 1, creating the Texas Water Advisory Council, revising the authority of groundwater conservation districts, and creating water infrastructure and rural water assistance funds, among other things. With respect to surface water rights, SB 2 provided that in considering an application for appropriation of unappropriated surface water, TCEQ would have to consider assessments of in-stream uses, fish and wildlife habitat, water quality, and effects on groundwater.

3. Senate Bill 3, 80th Leg. Session (2007). Senate Bill 3, enacted in 2007, continued the legislature's focus on the development, management, and preservation of the water resources. Most significantly, SB 3 created to environmental flows process, an administrative process to determine the environmental flow needs in Texas' rivers, bays, and estuaries. Further, after establishing these environmental needs, the bill required TCEQ to adopt rules to provide environmental flow standards, including, as necessary, set-asides in basins where unappropriated water was available. This has obvious effects on the supply that would otherwise be available for seekers of surface water rights permits.

III. OWNERSHIP OF STATE WATER AND WATERCOURSES[2]

[2] For more on this topic, see Boyd Kennedy, If a River Runs Through it, What Law Applies?, 32 Texas Prosecutor 20, 22 (2002), available at http://www.tpwd.state.tx.us/publications/nonpwdpubs/water_issues/rivers/navigation/kennedy/kennedy_faq.phtml and Robert D. Sweeney, Jr., Riverbeds and Banks: Title and Regulatory Issues, State Bar of Texas Advanced Real Estate Law (2012).

A. Ownership and Use of Water

One of the most basic principles of Texas water law is that the State of Texas retains ownership of all state water and holds it in trust for the use of its citizens. TEX. WATER CODE § 11.235; Motl v. Boyd, 116 Tex. 82; 286 S.W. 458, 467 (1926). The rest of the statutory scheme flows from this tenet. Because of this, with certain exemptions, every person who wishes to use state water must first obtain a permit from the state.

As discussed in Section I, above, "state water" is the property of the State of Texas, and includes 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, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state, as well as water imported from outside of the state for use in the state and which is transported through the beds and banks of any navigable stream. TEX. WATER CODE §§ 11.021(a) and (b).

Though the state retains ownership, the right to use state water can be acquired by appropriation under Chapter 11 of the Water Code. TEX. WATER CODE § 11.022. Once that right is acquired, water may be taken or diverted from the watercourse. *Id.*

B. Ownership and Use of the Riverbed

Generally, the state also owns the beds of navigable waterways and holds them in trust for the public. TEX. PARKS & WILD. CODE § 1.011(c); Brainard v. State, 12 S.W.3d 6,15 (Tex. 1999); City of Austin v. Hall, 93 Tex. 591 (1900). According to the Texas Supreme Court, "[f]rom its earliest history, this state has announced its public policy that lands underlying navigable waters are held in trust by the state for the use and benefit of all the people." State v. Bradford, 50 S.W.2d 1065, 1070 (Tex. 1932). Thus, the public enjoys the right to use the beds of public streams in many ways. Conversely, there are no public rights in the beds of non-navigable streams.

To determine whether a stream is public, it must first be determined whether the watercourse is navigable. A stream may be "navigable in fact" or navigable by statute. There is no single test for what is "navigable in fact." One appellate court held that streams are navigable if, in their natural state, they "are useful to the public for a considerable portion of the year." Welder v. State, 196 S.W. 868, 873 (1917). In another case, the Texas Supreme Court stated that navigable streams are those streams that are "common highways of trade and travel." Selman v. Wolfe, 27 Tex. 68, 71 (1863).

The federal test for "navigability in fact" concerns whether a water body can be used as a highway for commerce; however, the federal law related to property rights in watercourses has almost no application in the State of Texas, except as to establishing federal jurisdictional boundaries. Under the "equal footing" doctrine, other states were granted the rights to their watercourses by the United States when they became states. United States v. Oregon, 295 U.S. 1 (1935). Texas, on the other hand, was its own nation prior to statehood, with its own established legal principles applicable to ownership and use of watercourses. These were retained when Texas became a state in 1845. Thus, Texas' own laws apply here rather than federal laws.

By statute, a navigable stream is defined as any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more. TEX. NAT. RES. CODE § 21.001(3); 30 TEX. ADMIN. CODE § 297.1(33). A version of this statute has been in effect since 1837. According to the Texas Supreme Court, this measurement is taken at the "gradient boundary" on each bank, which defines the boundaries of the streambed. Diversion Lake Club v. Heath, 86 S.W.2d 441 (Tex. 1935). The gradient boundary is defined as "a gradient of the flowing water in the stream, and is located midway between the lower level of the flowing water that just reaches the cut bank and the higher level of it that just does not overtop the cut bank." *Id.* The procedure for measuring the gradient boundary is complex and beyond the scope of this paper. For more on this topic, see Arthur A. Stiles, *The Gradient Boundary - The Line Between Texas and Oklahoma Along the Red River*, 30 Tex. Law Rev. 305 (1952).

But what if the state says the watercourse adjacent to a landowner's property is navigable, and the landowner disagrees? This question was recently addressed by the Texas Supreme Court in *Texas Water Development Board v. The Sawyer Trust*. 354 S.W.3d 384 (Tex. 2011). The Sawyer Trust (the Trust) wanted to sell sand and gravel from the streambed of the Salt Fork of the Red River where it crosses the Trust's property in Donley County. The Trust sued the TPWD for a declaratory judgment that the stream is not navigable. The Supreme Court held the Trust's claims against the TPWD were barred by sovereign immunity, but remanded so that the Trust could pursue a claim against state officials under a theory that the officials were acting *ultra vires* in asserting ownership of the riverbed.

Boating, fishing, swimming, walking and wading are examples of public rights in navigable waterways. To maintain the navigability of watercourses, obstruction of a navigable watercourse is prohibited. TEX. PENAL CODE § 42.03; TEX. PARKS & WILDLIFE CODE § 90.008(a); TEX. WATER CODE § 11.096. Operating a motor vehicle in a navigable waterway is generally prohibited, but there are a number of exceptions. TEX. PARKS & WILDLIFE CODE § 90.002-.003. Though the public may have a right to use the

watercourse, members of the public may not cross private property in order to access the public waterway.

The State of Texas' ownership of the beds of navigable waterways also means that it owns the resources contained therein such as sand, gravel, and other minerals and sediments. Dredging and other construction activities that disturb submerged land, such as sand mining in a riverbed, are potentially subject to permitting by the Texas Parks and Wildlife Department (TPWD). *See generally*, TEX. PARKS & WILD. CODE, Ch. 86 and 31 TEX. ADMIN. CODE, Ch. 69, Subch. H. Under Section 86.002 of the Parks and Wildlife Code, "no person may disturb or take marl, sand, gravel, shell, or mudshell under the management and protection of the [TPWD] or operate in or disturb any oyster bed or fishing water for any purpose other than that necessary or incidental to navigation or dredging under state or federal authority without first having acquired … a permit authorizing the activity [from TPWD]." There are, however, several significant exceptions. In one case, the Texas Supreme Court held that a TPWD permit was not required when the dredging of the river was done for navigational purposes and had been approved by the United States Army Corps of Engineers (Corps), and thus was "necessary or incidental to navigation under … federal authority" under the exception in Tex. Parks and Wildlife Code § 86.002(a). Amdel Pipeline, Inc. v. State, 541 S.W.2d 821, 825 (Tex. 1976). Also, some activities may be permitted under a general permit rather than requiring an individual permit. TEX. PARKS & WILD. CODE § 86.007. For example, activities that require the disturbance or removal of less than 1,000 cubic yards of sedimentary material may be done under a general permit. 31 TEX. ADMIN. CODE §69.115(a)(3).

The Corps and EPA also regulate riverbed dredging in "waters of the United States" under Section 404 of the Clean Water Act. The Supreme Court has provided methods for determining whether a water body is a "water of the United States," which determines federal jurisdiction over such projects. *See* Rapanos v. United States, 547 U.S. 715 (2006). The Corps' and EPA's regulatory implementation of the Supreme Courts' tests are currently under review and the topic of many papers and courses of continuing education study; the nuances are beyond the scope of this overview. Generally, though, the definition is quite broad. A project that will result in the discharge of dredged material (i.e., material excavated from waters) or fill material (i.e., material placed in waters such that dry land replaces water or the water's bottom elevation changes) into a water of the United States, may require a Section 404 permit.

I began this section by stating that the state *generally* owns the land underlying a watercourse. There are, however, exceptions. The state has the authority to grant that land to another if it wishes. Land underlying a watercourse passes by grant or sale only when expressly provided for by the state, and there is a strong legal presumption against such a grant. Diversion Lake Club, 86 S.W.2d 441. In 1929, the state granted title to some riverbed property under the so-called "Small Bill." Tex. Rev. Civ. Stat. Ann. art. 5414a; *see also*, 31 TEX. ADMIN. CODE §7.3(b). Some early land grants showed survey lines crossing navigable streams, appearing to grant title to the private landowners. The Texas legislature passed the Small Bill to address these problematic surveys. Under the Small Bill, the state relinquished some property rights to the land underlying these streams. However, in considering whether the riverbed constituted the landowner's "own property" for purposes of the provision that a landowner can build a dam on his own property, a Texas appeals court determined that the Small Bill does not have the effect of relinquishing all of the state's rights to the riverbed. Garrison v. Bexar-Medina-Atascosa Counties WCID No. 1, 404 S.W.2d 376 (Tex. App. – Austin 1966). The court pointed to language in the Small Bill preserving certain rights to the State: "Provided that nothing in this Act contained shall impair the rights of the general public and the State in the waters of streams or the rights of riparian and appropriation owners in the waters of such streams…provided that this Act shall not in any way affect the State's title, right or interest in and to the sand and gravel, lying within the bed of any navigable stream within this State, as defined by Article 5302, Revised Statutes of 1925" (the thirty-foot rule). *Id.* at 379, citing Vernon's Ann. Civ. St. art. 5414a, s 2. Thus, the primary property right enjoyed by those private who own riverbeds under the Small Bill is the right to the mineral estate underlying the riverbed. In state-owned riverbeds, the mineral estate belongs to the Permanent School Fund. TEX. NAT. RES. CODE § 11.041(a)(1). The General Land Office leases riverbeds for oil and gas development. TEX. NAT. RES. CODE § 52.071.

IV. USING WATER WITHOUT A PERMIT: THE RIPARIAN RIGHT AND DOMESTIC AND LIVESTOCK EXEMPTION[3]

A. The Riparian Right

As explained previously, the term "riparian" water right describes the right to use waters of a stream that arising "out of the ownership of land through or by

[3] For more detailed discussions on this topic, see David Klein & Robin Smith, Exploring the Scope of Landowner Water Rights for Domestic and Livestock Purposes, 7 TEX. TECH. ADMIN. L.J. 119, 138-140 (Spring 2006) and Lyn Clancy, Texas Law Regarding Riparian and Exempt Uses of Surface Water, Changing Face of Water Rights 2012. This portion of the paper is adapted and draws from the latter.

which a stream of water flows." Watkins Land Co. v. Clements, 98 Tex. 578, 585, 86 S.W. 733, 735 (1905). Riparian rights is one area where the historical foundations of Texas water law, discussed earlier, are still at work. Some land adjacent to a watercourse may still carry the riparian right to use surface water.

To determine whether his or her property carries with it a riparian right to use water, a landowner must first determine the date of the original land grant from the sovereign to private ownership. If the property was granted by the sovereign before 1840, then by virtue of its being adjacent to a natural watercourse, it carries with it an implicit right to use the waters for domestic and livestock purposes. *See In re* Adjudication of Water Rights in Medina River Watershed of San Antonio River Basin, 670 S.W.2d 250, 254 (Tex. 1984). However, the landowner cannot use this water for irrigation purposes based upon this grant. The landowner must obtain a permit from the state in order to irrigate. *In re* Adjudication of Water Rights of Brazos III Segment of Brazos River Basin, 746 S.W.2d 207, 209 (Tex. 1988). Even if the property is comprised of pre-1840 Spanish and Mexican land grants that expressly provided for a grant of irrigation rights, the state required that these rights be claimed and converted to paper permits during the water rights adjudication process. *Id.*

Land may also carry riparian rights if it was patented between January 20, 1840 and July 1, 1895. During that time, Texas was operating under the English common law of riparian rights. Thus, under common law, lands granted by the Republic or State of Texas carried with them rights to use the stream of water as it passed by the land. *See, e.g.*, Fleming v. Davis, 37 Tex. 173, 174 (1872).

In 1895, the State of Texas adopted the appropriative system of water rights. Thus, if the land in question was first conveyed to private hands by the sovereign after July 1, 1895, there can be no common law claim that riparian rights are attached to the land. *See* Irrigation Act of April 9, 1913, 33 Leg., R.S. ch. 171, 1913 Tex. Gen. Laws 358 (confirming that no riparian rights were granted after 1895); *see also* WELLS A. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 116 (1961).

The common law riparian right is generally considered a vested property right. *See* Mud Creek Irrigation Agric. & Mfg. Co. v. Vivian, 74 Tex. 170, 173-74 (1889). The riparian domestic and livestock user has only a usufructory right of use. *See* Zavala County WID No. 3 v. Rogers, 145 S.W.2d 919, 923-24 (Tex. Civ. App.—El Paso 1940, no writ); *see also* Barakis v. Am. Cyanamid Co., 161 F.Supp. 25, 28 (N.D. Tex. 1958). The user has no ownership in the corpus of the water. *See* Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 128-129 (1935). The riparian domestic and livestock right is one of reasonable use for beneficial purpose. HUTCHINS, *supra*, at 359-360. Also, the riparian right is only to the use of the normal flow in the stream, not to storm water, floodwater, or authorized releases from storage for downstream use. *See* Motl v. Boyd, 116 Tex. 82, 122 (1926); 30 TEX. ADMIN. CODE § §297.21(a); *see also* Humphreys-Mexia v. Arsenaux, 297 S.W. 225 (Tex. 1927), regarding diversions from a reservoir.

Originally, the common law riparian right included the right to use water for domestic, livestock and irrigation purposes. *See In re* Adjudication of Water Rights of Brazos III Segment of Brazos River Basin, 746, S.W.2d at 209 (citing Motl, 116 Tex. at 107-108); Biggs v. Lee, 147 S.W. 709, 710-11 (Tex. Civ. App.—El Paso 1912, writ dism'd w.o.j.). However, the 1967 Water Rights Adjudication Act allowed the court to terminate riparian irrigation rights. *See In re* Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438,442 (Tex. 1982). Case law is unclear on what constitutes "domestic" and "livestock" use, but the TCEQ has adopted the following definitions:

> Domestic use--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.

30 TEX. ADMIN. CODE § 297.1(18).

> Livestock use--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.

30 TEX. ADMIN. CODE § 297.1(28).

Riparian use is thus limited to use by a single family or household and cannot support a commercial operation. Lawn watering is included in the TCEQ definition of domestic use. A riparian landowner can probably also water a hayfield or orchard if the hay is

used to feed a family cow or horse or the fruit is consumed by the landowners. Essentially, the use must be for the owner's benefit and not the benefit of third parties.

Ordinarily, water diverted under a riparian right cannot be used on non-riparian land or land outside the watershed of the stream. Further, if the landowner subdivides the property, the water cannot be used on the property no longer adjacent to the watercourse, even if the landowner still owns the non-adjacent land. *See* Watkins Land Co. v. Clements, 989 Tex. 578, 585 (1905)(citations omitted); Burkett, 117 Tex. at 25-26; and David Klein & Robin Smith, *Exploring the Scope of Landowner Water Rights for Domestic and Livestock Purposes*, 7 TEX. TECH. ADMIN. L.J. 119, 138-140 (Spring 2006)(discussing instances in which the Commission has issued Notices of Violation for use of water on non-riparian lands without a permit).

Riparian rights attached to land can be transferred, severed or lost. For example, subdivision of riparian property can result in a transfer or extinguishment of a common law riparian right.

Riparian rights are transferable property rights. Houston Transp. Co. v. San Jacinto Rice Co., 163 S.W. 1023 (Tex. Civ. App.—El Paso 1914, no writ). As early as 1889, the Texas Supreme Court supported the idea that riparian rights could be severed by either express grant or reservation from riparian land to which they would normally attach. Reisen v. Brown, 10 S.W. 661, 662 (1889). Case law suggests, however, that a riparian landowner can only convey a riparian water right outright to another riparian landowner. *Id.* at 662. *See also* Richter v. Granite Mfg. Co., 174 S.W. 284 (Tex. 1915); Watkins, 98 Tex. 578; and Tex. Co. v. Burkett, 117 Tex. 16 (1927). Riparian rights can also be conveyed by easement. The scope of an express easement is determined by the same rules that apply to deeds and other written instruments. Wall v. Lower Colorado River Auth., 536 S.W.2d 688, 691 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.)(citing Armstrong v. Skelly Oil Co., 81 S.W.2d 735 (Tex. Civ. App.—Amarillo 1935, writ ref'd).

The riparian nature of the land must be continuous from the date of the grant from the sovereign. A landowner should perform a title search to determine whether an entire tract fulfills the requirement of continuous ownership. "Riparian rights arise out of the ownership of land through or by which a stream of water flows, which rights cannot extend beyond the original survey as granted by the government…[T]he boundary of riparian land is restricted to land the title to which is acquired by one transaction." Watkins, 98 Tex. at 585. Thus any severance of the riparian land from the watercourse would normally have the effect of severing the riparian rights, although the intent of the grantor is considered. *See* HUTCHINS, *supra*, at 327, 333.

Riparian irrigation rights can also be cancelled for non-use. Texas courts have allowed this because the usufructory nature of the riparian right means that no compensation is required for its cancellation. *See, e.g., In re* Adjudication of Water Rights of the Upper Guadalupe River Basin, 642 S.W.2d 438. The Texas Supreme Court interpreted Texas Water Code sections 11.011(b) and 11.320 to mean that after four years of continuous non-use of the water right, the state could cancel the water right after notice and hearing. Mud Creek Irrigation Agric. & Mfg. Co., 11 S.W. 1078; *In re* Adjudication of the Water Rights of the Upper Guadalupe River Basin, 642 S.W.2d at 444. The Court held that the cancellation was not an unconstitutional taking because the usufructory right is "a right to use the resource beneficially—not waste it." *Id.* at 444-445.

Any effective severance of the riparian rights from the riparian land (*i.e.*, through easement, conveyance, reservation, estoppel, condemnation, or non-use) divests the riparian land of its riparian rights.

B. The Domestic and Livestock Exemption and Other Related Exemptions

One qualifying phrase you may hear a lot is: "…except for D & L." "D & L" refers to domestic and livestock use of water. As you will remember, domestic and livestock use originated with the riparian water right system. As the riparian system was replaced with the appropriative system through the Irrigation Acts, this right to use water for domestic and livestock purposes was protected. They were expressly omitted from adjudication under the Water Rights Adjudication Act. *See* TEX. WATER CODE § 11.303(l).

The protection of this right is manifest in today's legal scheme by exempting domestic and livestock use from the requirement to obtain a permit. TEX. WATER CODE § 11.142(a) and TEX. ADMIN. CODE § 297.21(b) provide that a person may construct a reservoir on the person's own property and impound no more than 200 acre-feet of water for domestic and livestock purposes without obtaining a permit. The reservoir may be on-channel on a non-navigable stream, adjacent to the stream, or on a contiguous piece of property through which the stream flows. 30 TEX. ADMIN. CODE § 297.21(b). An exempt reservoir may not be located on a navigable stream. 30 TEX. ADMIN. CODE § 297.21(c). Remember that a navigable stream is one that maintains an average width of 30 feet or more from its mouth up. TEX. NAT. RES. CODE § 21.001(3); 30 TEX. ADMIN. CODE 297.1(33).

Water may also be diverted directly from the stream for domestic and livestock use. Under TCEQ rules, "a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit.

Manner of diversion may be by pumping or by gravity flow. Such riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights." 30 TEX. ADMIN. CODE § 297.21(a).

The definitions of domestic and livestock use are laid out in the previous section regarding permissible uses under a riparian right. The exemption does not apply if the water use supports a commercial operation. TEX. WATER CODE ANN. § 11.142(a); 30 TEX. ADMIN. CODE § 297.21(b). However, the rules specify that use of a reservoir by free-ranging wild game and fur-bearing animals that may be harvested by hunters and trappers who pay a fee to hunt or trap on the property does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir. 30 TEX. ADMIN. CODE § 297.21(d). Water from an exempt domestic and livestock impoundment can also be used for growing a family garden, even if some produce is traded with neighbors or used in a bake sale and potluck dinner. *Id.* The use of water to grow produce sold at a local farmers' market may not be exempt under this provision.

Unlike riparian domestic and livestock users, exempt domestic and livestock users are not limited by statute or rule to using only the normal and ordinary flow of the river. One could argue that the exemption allows a person to store any state water on his property, including floodwaters. *See* TEX. WATER CODE ANN. § 11.021(a), defining "state water."

Nothing in the Water Code or rules suggests that the right to use water for exempt domestic and livestock purposes can be lost for non-use. However, the legislature has amended the exemption several times, changing the exempt impoundment limit from 50 to 500 feet. It is reasonable to conclude from this that the exemption may be modified again to change the allowable amount of storage or modify other conditions. This history of change suggests that the exempt domestic and livestock storage right is not a vested property right; therefore, no compensation would be required for any modifications to the exemption.

While domestic and livestock use is the most common exemption from permitting requirements there are a few other uses that enjoy this exemption:

- Fish & Wildlife Exemption – A person may construct a 200 acre-foot reservoir on his or her own property for fish and wildlife purposes in order to make the land qualify as "qualified open-space land" under Texas Tax Code Section 23.51. *See* TEX. WATER CODE § 11.142(b). A similar provision, enacted in the same year and also numbered as Texas Water Code Section 11.142(b), allows a person to construct a 200 acre-foot reservoir on his or her own property in an unincorporated area for fish & wildlife purposes as long as those purposes are not commercial in nature. Fish farming is not contemplated under this exemption.
- Petroleum Production Exemption – A person who is drilling and producing petroleum and conducting related operations may take up to one acre-foot of water per 24-hour period from the Gulf of Mexico, or its adjacent bays or arms. *See* TEX. WATER CODE § 11.142(c).
- Sediment Control Relating to Surface Coal Mining – A person may construct a reservoir for purposes of sediment control in connection with surface coal mining without needing a water use permit from TCEQ. *See* TEX. WATER CODE § 11.142(d).
- Mariculture Exemption – Texas Water Code Section 11.0421 provides a permit exemption for the use of salt or brackish water from the Gulf of Mexico or its arms or bays for the cultivation of shrimp, finfish, crustaceans and other aquatic species. This exemption is subject to the authority of the TCEQ to maintain freshwater inflows to protect bays and estuaries.
- Historic Cemetery Exemption – Texas Water Code Section 11.1422 provides a permit exemption for the diversion of up to 200 acre-feet of water per year to water historic (100 years old or older), tax-exempt cemeteries. The TCEQ may restrict water use under this exemption if necessary to protect water rights acquired before the effective date of this section, i.e., May 23, 1995.

V. MORE CONCEPTS IN CURRENT SURFACE WATER LAW

This section provides a brief discussion of some additional basic concepts of Texas surface water law. These are concepts and terms you are likely to encounter in a surface water case and in later portions of this CLE program. This listing is intended to provide you with a point of reference when they are used in the more advanced topics.

A. The Nature of a Water Right

A water right granted by the state under the prior appropriation system is a "usufructory right," i.e., a non-possessory right of use. Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 649 (Tex. 1971). The holder of the right does not own the corpus of the water. The State retains ownership of the water. South Texas Irrig. Co. v. Bieri, 247 S.W. 2d 268, 272 (Tex. Civ. App. – Galveston 1952, *writ ref'd., n.r.e.*). However, Texas Water Code Section 11.040 provides

that a permanent water right is an easement and passes with title to the land. *See* Lakeside Irr. Co. v. Markham, 116 Tex. 65, 285 S.W. 593 (Tex. Comm'n App. – 1926, *opinion adopted*). Water rights may be conveyed by deed, and the conveyance instrument may be filed in the county deed records. TEX. WATER CODE §§ 11.040(a) and (b). Like other interests in property, a water right may be taken by eminent domain. TEX. WATER CODE § 11.033.

B. Beneficial Use

A permit or certificate of adjudication authorizing use of state water under the appropriative system is a right to make a beneficial use of water. No right to appropriate water is perfected unless the water has been beneficially used for a purpose stated in the original declaration of intention to appropriate water or stated in a permit issued by the commission or one of its predecessors. TEX. WATER CODE § 11.026. The concept of beneficial use is used in two senses: with respect to the issuance of a permit and with respect to the vesting of a water right. The former refers to the purpose for which water is used and the latter refers to the amount of water being used for that purpose.

Before issuing a permit, the TCEQ must find that the applicant intends to use the water for a beneficial use. TEX. WATER CODE § 11.134(b)(3)(A). Many beneficial uses are specifically recognized in the Water Code at Section 11.023:

Tex. Water Code 11.023. PURPOSES FOR WHICH WATER MAY BE APPROPRIATED.

(a) To the extent that state water has not been set aside by the commission under Section 11.1471(a)(2) to meet downstream instream flow needs or freshwater inflow needs, state water may be appropriated, stored, or diverted for:

(1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals;
(2) agricultural uses and industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric;
(3) mining and recovery of minerals;
(4) hydroelectric power;
(5) navigation;
(6) recreation and pleasure;
(7) public parks; and
(8) game preserves.

An application to use water for one of these purposes meets the requirement for a beneficial use. But this list is non-exclusive. Subsection (b) provides that state water also may be appropriated, stored, or diverted for any other beneficial use, leaving the door open to other possible uses. However, the legislature recently added the provisions of Water Code Section 11.0235 (a) and (d):

Sec. 11.0235. POLICY REGARDING WATERS OF THE STATE.

(a) The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.
(d) The legislature has not expressly authorized granting water rights exclusively for:

(1) instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems; or
(2) other similar beneficial uses.

These were added after the San Marcos River Foundation case, in which the commission determined that instream uses was not a purpose authorized expressly in the Water Code and therefore could not be a use for which a permit is granted. See City of San Marcos v. Texas Comm'n on Envtl. Quality, 128 S.W.3d 264, 271-272 (Tex. App. – Austin 2004*), pet. denied*.

The concept of beneficial use is also important in relation to the vesting of a water right. A right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriated. Thus, a water right or portion of a water right does not vest unless the water is actually being beneficially used. TEX. WATER CODE §11.025.

Generally, requiring that water be beneficially used works to eliminate the practice of speculatively obtaining the right to use water with no intention of actually using it, then profiting from its sale. In one caveat to beneficial use, the law does recognize that municipalities must plan in advance for growing water needs, and thus may need to obtain water rights it does not need currently so that it will have enough to serve its population down the road.

C. Prior Appropriation: "First in Time is First in Right"

Texas Water Code Section 11.027 provides: "As between appropriators, the first in time is the first in right." This encapsulates the concept of prior

appropriation, which is essential to the proper functioning of Texas' water rights permitting system. Prior appropriation is characterized by the rule that an earlier appropriator has a greater right to the use of water in the source of supply than a later appropriator.

But what does the principle of "first in time is first in right" contained in Water Code Section 11.027 actually mean? Wells Hutchins, one of the best-known Western water law scholars of the mid-Twentieth Century, explained that "the holder of the earliest priority on a stream is entitled to the use of all available water needed to satisfy the full terms of his particular water right, even though no excess is left in the source of supply for the use of later appropriators." Junior appropriators, he noted, had to yield to senior appropriators when there was not enough water for all. Location on the stream did not make a difference. However, as he noted, "this principle is not strained to the point of requiring junior appropriators to release water to flow downstream on the demand of the holder of an earlier right at times when so much water is lost in the streambed as to leave a remainder too small to be usable when received by the downstream appropriator." WELLS A. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS (Austin: Texas Legislature and Texas Board of Waters Engineers, 1961), p. 255.

To implement the prior appropriation system, TCEQ must keep track of the order in which water rights are secured. To do so, each new permit to appropriate water is assigned a priority date, which, among other functions, tells the water right holder where he stands in line relative to other water right holders in the same source of supply.

Tex. Water Code Section 11.141 provides that when TCEQ issues a permit, the priority date for the water right is the date when the permit application is filed. TCEQ rules at 30 Tex. Admin. Code Section 295.201(b) provide that no application will be considered "filed" for purposes of Water Code Section 11.141 until TCEQ's Executive Director declares the application administratively complete and files it with TCEQ's Chief Clerk. TCEQ's application processing rules at 30 Tex. Admin. Code Section 281.1, et seq. (Chapter 281), set out the applications processing procedures and deadlines. Chapter 281 also provides guidance on what constitutes administrative completeness. Thus, the application is only considered filed and the priority date is assigned on the date the application meets all requirements for administrative completeness.

The prior appropriation doctrine is currently receiving considerable attention due to dwindling water supplies and the severe drought. During the 2011 legislative session, the legislature adopted new Water Code Section 11.053, which authorizes the Executive Director (ED) of the TCEQ to temporarily suspend or adjust the use of water rights during a period of drought or other emergency shortage of water "in accordance with the priority of water rights established by Section 11.027." TEX. WATER CODE § 11.053(a). The Commission adopted rules implementing the statute in 30 TEX. ADMIN. CODE Chapter 36. One of these rules provides that the ED may determine not to suspend a junior water right based on public health, safety, and welfare concerns. 30 TEX. ADMIN. CODE § 36.5(c). Under these provisions, in November 2012, the ED issued an emergency order suspending the water rights of water rights holders in the Brazos River Basin with priority dates after 1942, but exempted municipal and power generation water rights from the suspension, even if their priority dates were junior to 1942. The Order was affirmed by the Commission in December. Tex. Comm'n on Envtl. Quality, Docket No. 2012-2421-WR, *Order Affirming and Modifying the Executive Director's Order Suspending Water Rights on the Brazos River* (Dec. 5, 2012). Some argue that the TCEQ rule is inconsistent with the prior appropriation doctrine. The Texas Farm Bureau (TFB) recently filed a lawsuit to challenge the constitutionality of the TCEQ rule and Order. Texas Farm Bureau et al. v. Texas Comm'n on Envtl. Quality**,** No. D-1-GN-12-3937, 98th Dist. Court, Travis County (filed Dec. 14, 2012). The suit alleges that the rules and their application have unconstitutionally taken the vested property rights of TFB members without just compensation. This case will be covered in more depth by other speakers at this conference.

D. The Four Corners Rule and the *Marshall* Case

You may hear water lawyers refer to the "Four Corners Rule." The four corners to which this refers are the four corners of the water right permit document. The basic premise of the rule is this: if an amendment to a water right on its face (within the four corners of the permit) cannot impair another water right or the environment, there is no technical review to perform because no one can be harmed, and the change should be issued without issuance of notice to other water right holders in the basin. This rule is primarily applied to changes in or additions to authorized purposes of use and or places of use. Because a water right holder has the right to use the entire amount of his water right, a change in or additional use or change in place of use would not result in the diversion or use of any greater amount of water, and could not impair anyone.

In 1997, the legislature enacted Texas Water Code Section 11.122(b), which reflects the "Four Corners" principle:

Water Code Section 11.122(b) 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 an 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.[4]

The Commission has interpreted this section to mean that with a few exceptions, an amendment that does not change the amount of water to be taken, the diversion rate, or a diversion point, shall be issued without notice or opportunity for a hearing. The commission does not perform a technical review on water availability or impact on the environment because the permittee or certificate owner can take all of the water he is authorized to take under the existing water right.

In 2000, the City of Marshall filed an application to amend an existing permit by adding a new authorized use for 16,000 acre feet of water annually. The executive director issued the permit without notice, and the commission affirmed that decision in 2002. On June 9, 2006, the Texas Supreme Court decided that TCEQ's issuance of a permit to the City of Marshall to add industrial use to its 16,000 acre feet authorization for municipal use without notice might be error, and remanded to the executive director of the TCEQ. City of Marshall v. City of Uncertain, 206 S.W.3d 97 (Tex. 2006). The question for the court was whether notice and an opportunity for hearing should be required for an application for a change in or addition of an authorized use to an existing permit. The court interpreted the statute to require the TCEQ to assess the listed criteria in the Water Code for the issuance of a water right other than impacts on other water rights holders and the on-stream environment. These other criteria are procedural requirements in filing the application, whether the application is detrimental to public welfare, whether the use will be a beneficial use, whether the applicant has shown that it will implement conservation, and whether the application is consistent with the state and regional plan. The court held that a hearing would be required "if water rights or the on-stream environment would be impacted beyond or irrespective of the full-use assumption." *Id.* at 111. As examples, the court specifically mentions a change in diversion point, or a change from a nonconsumptive use to consumptive use as being "beyond or irrespective of the full use exception." *Id.* The court gave discretion to the TCEQ and its executive director to determine whether a contested case hearing would be needed even on these issues other than water availability and environmental impact, saying "if it is apparent from the application that those limited public interest criteria are not adversely impacted, then no hearing on the application would be required," and "[i]t may generally be possible for the Commission to determine from the face of a proposed amendment that the relevant criteria are met or are not implicated by a particular amendment application, in which event a hearing would not be necessary. But if an issue is raised as to the effects, a hearing should be afforded to assess them." *Id.*

The TCEQ's procedure to comply with the Marshall decision involves a staff-written Notice Determination Memorandum on amendment applications subject to the decision. The memo discusses whether the public interest will be impacted by the amendment and whether the staff believes that there is an impact on water rights or the environment beyond or irrespective of the full use assumption. This creates a record of the TCEQ's consideration of each of the elements discussed by the court when deciding whether or not notice of the amendment is necessary.

E. Unappropriated Water and the Stacy Dam Case

Before granting a water right, the TCEQ must find that unappropriated water exists in the source of supply to satisfy the request. TEX. WATER CODE § 11.134(b)(2). Under *Lower Colo. River Authority v. Texas Dep't of Water Resources*, often referred to as the "Stacy Dam" opinion, the court held that the "unappropriated water" means the amount of water remaining in the source of supply after taking into account complete satisfaction of all existing uncancelled permits and filings valued at their recorded levels. 689 SW 2d 873 (Tex. 1984). The Commission must look at all water rights granted in the stream and assume, for permitting purposes, that all water rights are being used to the full extent authorized. This is done using computer models, which are discussed later.

In the wake of the Stacy Dam decision, the Legislature authorized the granting of permits for a term of years in areas where the "paper water rights," i.e., the water rights actually authorized in permits,

[4] This last clause is commonly referred to as the "full-use assumption." It refers to the analytical premise that a water right holder is using all of the water to which it is legally entitled.

were not being used to their full extent. Holders of term water rights are authorized to use water that has already been appropriated, but is currently unused. TEX. WATER CODE § 11.1381; 30 TAC § 297.19.

F. The "No Injury" Rule

Texas Water Code Section 11.134(b)(3)(B) is often referred to as the "No Injury" Rule. It states that the commission shall grant the application only if the proposed appropriation does not impair existing water rights or vested riparian rights, among other requirements. This "rule" is implemented in the TCEQ rules at Section 297.45(a), which provides:

> The granting of an application for a new water right or an amended water right shall not cause an adverse impact to an existing water right as provided by this section. An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators. For the purposes of this section, adverse impact to another appropriator includes: the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; increasing an appropriator's legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time of the appropriator's water right was granted.

G. Interbasin Transfers ("IBTs")

Often, the users of a water supply are not located in the same river basin as the supply. In such cases, an interbasin transfer of water—moving state water from one basin to another basin—may be necessary. Texas Water Code Section 11.085 prohibits the diversion and transfer of water from one river basin to another without authorization from the TCEQ. The statute contains detailed procedures for notice and a hearing on applications to make an interbasin transfer (called an "IBT"). Section 11.085(v) contains some exceptions to the notice and hearing requirements. The corresponding TCEQ rule is found at 30 TAC Section 297.18. Requirements for applications requesting an interbasin transfer are found at 30 TAC Section 295.13. Importantly, under Section 11.085(s), any proposed transfer of all or a portion of a water right pursuant to an IBT is junior in priority to water rights granted before the time application for transfer is accepted for filing. In other words, even if it was diverted under an old water right with an early priority date, once water is transferred, it receives a new, junior priority date.

H. Bed and Banks Authorizations and Reuse: Tex. Water Code Section 11.042

Water rights holders may wish to use the existing river to transport water from one point to another. So-called "bed and banks" authorizations are governed generally by Tex. Water Code Section 11.042. In some cases, a water right holder might want to use the bed and banks to discharge treated water upstream and then reclaim that water further downstream. This is called indirect reuse and also requires authorization under Tex. Water Code Section 11.042. TCEQ water rights rules relating to these types of authorizations are found at 30 Tex. Admin. Code Sections 295.113 and 297.16.

1. Conveyance of stored water supplied under a contract. Texas Water Code Section 11.042(a) authorizes persons or entities supplying stored water to customers under a contract to use the bed and banks of streams to transport the water from the place of storage to the place of use or diversion, subject to rules prescribed by the TCEQ. The relevant rules are found at 30 Tex. Admin. Code Sections 295.111 and 297.91–94.

Texas Water Code Sections 11.042(b) and (c) govern authorizations for reuse. The term "reuse" generally refers to the reuse of wastewater effluent after it has been treated. There are two kinds of reuse: direct reuse and indirect reuse. Direct reuse occurs when water is used, treated, and used again without injecting it into a stream or aquifer and taking it out again. Direct reuse could include recycling water back into a municipal system, but it would also include converting treated sewage effluent to other uses such as irrigation of parks or golf courses. Indirect reuse usually involves initial use, treatment, and then discharge into a river for removal and reuse downstream.

Direct reuse does not require a water rights authorization but does require a water quality authorization under Chapter 210 of the Commission's rules.

Indirect reuse requires authorization from TCEQ under Texas Water Code Section 11.042(b) or (c), depending on the source of the water.

Conveyance of return flows derived from privately owned groundwater. Texas Water Code Section 11.042(b) requires a person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater to obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization will take into account carriage losses and may have special conditions attached to protect existing water rights or help maintain instream flows.

Section 11.042(b) governs the practice of discharging groundwater-based effluent into a stream and taking a like quantity of water out downstream. Section 11.042(b) requires TCEQ authorization for that practice. The TCEQ may impose restrictions on the authorization to account for channel losses (water lost in transit), to protect existing water rights users in the stream, and to address environmental concerns. TCEQ water rights rules relating to these types of authorizations are found at 30 Tex. Admin. Code Sections 295.112 and 297.16.

2. Conveyance of water, in general. Under Texas Water Code Section 11.042(c), unless supplying stored water under a contract under subsection (a), a person who wishes to convey and later divert water in a watercourse or stream must obtain a bed and banks authorization. The statute provides that authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries. The statute also prohibits significant degradation of water quality due to water discharged into a watercourse or stream under Chapter 11.

Texas Water Code Section 11.042(c) speaks in very general terms about conveying and withdrawing water in a stream but does not specify the source of the water. There is some debate as to whether this section applies to return flows of surface water. *See, e.g.*, Douglas C. Caroom, *Indirect Reuse of Municipal Effluent, Senior Appropriator's Perspective,* 67 Tex. B.J. 206 (March 2004). Section 11.046(c) of the Water Code provides that once water has been diverted under a permit, certified filing, or certificate of adjudication and then returned to a watercourse or stream, it is considered surplus water and therefore *subject to* reservation for instream uses or beneficial inflows or to appropriation by others. (emphasis added). TCEQ has interpreted Section 11.046(c) to allow for indirect reuse of surface water-based return flows under 11.042(c).

I. Environmental Flows

Senate Bill 3, adopted during the 2007 Legislative Session, mandated the development of Environmental Flow or "E-Flow" Standards. The bill amended the Water Code by adding Section 11.1471 requiring the Commission to adopt, by rule, appropriate environmental flow standards for each river basin and bay system in this state that are adequate to support a sound ecological environment, to the maximum extent reasonable considering other public interests and relevant factors. TEX. WATER CODE § 11.1471(a). The Commission is also required to establish, by rule, an amount of water, if available, to be set aside to satisfy the environmental flow standards to the maximum extent reasonable when considering human water needs.

To establish environmental flow standards, the Legislature created expert advisory panels to gather and analyze information and develop these standards. This was intended to result in a "consensus-based, regional approach." The Environmental Flows Advisory Group developed recommendations based on reports from teams for two regions (Trinity/San Jacinto and Sabine/Neches River basins). These were delivered to the Commission, which will now consider rulemaking based on the recommendations. The rules are scheduled for adoption at the Commission's open meeting on April 20, 2011.

J. Cancellation of Water Rights

Even a vested property right to the use of state water can be lost through nonuse over an extended period of time. A water right does not include a right to non-use. Thus, the TCEQ can cancel a water right for nonuse. Texas Water Comm'n v. Wright, 464 SW 2d 642 (1971).

Cancellation procedures are found in Texas Water Code Sections 11.171–.186. These statutes provide for cancellation of a water right in whole or in part to the extent that the water right has not been used for a period of ten years and the water rights holder has not used reasonable diligence to apply the unused portion of water to beneficial use. *See* TEX. WATER CODE § 11.177. In *Texas Water Rts. Comm'n v. Wright*, the Texas Supreme Court reviewed an earlier cancellation statute, Vernon's Ann. Civ. Stat., art. 7519a [repealed]. There, the water rights in question had been used beneficially until a flood washed out the pumps. *Wright* at 644. However, in upholding the Commission's statutory authority to cancel the water right, the Court held that at no time were permittees vested with a right of non-use. *Id.* at 648.

The TCEQ may also cancel a water right if the permittee fails to construct necessary diversion works within the time prescribed by law. *See* Tex. Water Code §§ 11.145–146; 30 Tex. Admin. Code § 297.51.

VI. ENFORCEMENT

A. Enforcement in General

The TCEQ has general jurisdiction over water rights enforcement. TEX. WATER CODE § 5.013. Under Texas Water Code Section 11.081, no person may willfully take, divert, or appropriate any state water for any purpose without first complying with all applicable requirements of the Water Code. The Water Code provides both civil and administrative penalties for unlawful use of water.

Willful violations of permit terms or water rights laws are subject to a maximum civil penalty of $5,000 for each day of each violation in suits that the Attorney General brings on TCEQ's behalf in the district courts. *See* TEX. WATER CODE § 11.082. The Attorney General, on referral from the TCEQ, may also seek injunctive relief in Court for violations of TCEQ rules and orders, including those relating to water rights. *See* TEX. WATER CODE §§ 7.002, 7.032, 7.101 and 7.105. *See also*, TEX. GOVT. CODE § 2001.141.

TCEQ may assess administrative penalties for violations of permit terms and conditions or water rights laws under Texas Water Code Section 11.0842. Designated TCEQ personnel may also issue field citations for violations that they observe, somewhat like a traffic ticket, which the alleged violator may pay or contest in an administrative permit hearing. TEX. WATER CODE § 11.0843.

B. Regulation by Watermaster

Water rights in certain river basins are subject to regulation by a watermaster who can investigate water use and cause diversion works to be cut off in certain situations. *See, e.g.* TEX. WATER CODE § 11.326, et seq. The TCEQ's watermaster programs ensure compliance with water rights by monitoring stream flows, reservoir levels, and water use. They also coordinate diversions in the basins which are managed by their programs. The watermaster regulates reservoirs as needed to prevent the wasting of water or its being used in quantities beyond a user's right.

Before diverting water from the stream, a water right holder must notify the watermaster of the intent to divert at a specific time and the specific amount of water to be diverted. Assuming that the water is available and that the water right holder has not exceeded, or will not exceed, the annual authorized appropriation of water, the watermaster then authorizes the diversion and records this against the right. The two watermaster programs include staff "deputies" who daily, weekly, or monthly make field inspections of authorized diversions to insure compliance with the water right (e.g., that the diversion rate is not exceeded).

If a water right holder does not comply with his or her water right or the rules of the Commission, the executive director may direct the watermaster to adjust the control works to prevent the owner from diverting, taking, storing, or distributing water until he or she complies.

Watermasters are funded by the water right holders in their area. TEX. WATER CODE § 11.3291. They can be established by appointment by the Executive Director under Texas Water Code Section 11.326, the court under Texas Water Code Section 11.402, or by petition of water right holders. Watermasters' duties generally are to divide the water of the streams or other sources of supply of his division in accordance with adjudicated water rights, and regulate or cause to be regulated the controlling works of reservoirs and diversion works in time of water shortage, as is necessary because of the rights existing in the streams of his division, or as is necessary to prevent the waste of water or its diversion, taking, storage, or use in excess of the quantities to which the holders of water rights are lawfully entitled. TEX. WATER CODE § 11.327.

Currently, watermasters operate in three large areas. The first is the Rio Grande Basin, where watermaster operations are governed by TCEQ rules at 30 Tex. Admin. Code Sections 303.1, et seq. Various other South Texas watersheds are under the regulation of the South Texas Watermaster, based in San Antonio. The South Texas Watermaster operations and other watermaster operations outside the Rio Grande are governed by TCEQ rules at 30 Tex. Admin. Code Sections 304.1, et seq. and by Texas Water Code Sections 11.326 et seq. Finally, the South Texas Watermaster has the additional job of functioning as watermaster for the Concho River. *See* TEX. WATER CODE § 11.551 et seq.

The South Texas Watermaster's and now the Concho River program's rules, are in 30 Tex. Admin. Code Chapter 304, and the Rio Grande Watermaster rules are in 30 Tex. Admin. Code Chapter 303. These rules specifically set out how the watermasters will function in their areas. Common to all areas is that before a person may take water under his permit, he must ask the watermaster and receive approval for the diversion. The watermaster will decide if there is water for them to take that is not being requested by a senior water right. The Rio Grande Watermaster's rules also contain provisions related to how water will be divided amongst the water right holders since their water comes from two reservoirs, Amistad and Falcon. Also, Mexico gets some of the water in the Rio Grande.

The Sunset legislation for TCEQ, passed last session, required the TCEQ to evaluate and issue a report assessing the need to appoint a watermaster for all river and coastal basins that do not currently operate under a watermaster. TEX. WATER CODE §11.326(g)-(h). The bill requires TCEQ to conduct this assessment at least once every five years and the TCEQ developed

a schedule to consider several basins each year. During 2012, the TCEQ evaluated the need for a watermaster in the Brazos River Basin, the Brazos-Colorado Coastal Basin, the Colorado River Basin, and the Colorado-Lavaca Coastal Basin. The Commission decided that it would not initiate on its own motion proceedings to appoint a watermaster in either the Brazos or Colorado River Basin. Note that the Commission cannot unilaterally appoint a watermaster – a hearing is required. The Commission can request a hearing and recommend creation of a watermaster through that hearing process. The Commission determined that it would be more appropriate for the water right holders in a given basin to petition to create a watermaster instead. A petition for a watermaster in the San Saba watershed of the Colorado River Basin signed by approximately 30 domestic and livestock water users was filed with the Chief Clerk on October 10, 2012. This petition is currently under review by the ED's Staff and is likely to be set for consideration by the Commission soon.

C. Dam Safety

TCEQ may enforce its dam safety rules by administrative order. *See* TEX. WATER CODE § 12.052. It may also ask the Attorney General to seek injunctive relief in district court to enforce its dam safety rules and orders. *See* TEX. GOVT. CODE § 2001.202, TEX. WATER CODE §§ 7.002, 7.032, 7.101 and 7.105. If a person willfully violates a TCEQ dam safety rule, he is subject to a civil penalty of not more than $5,000 per day for each day of violation.

The dam safety rules classify dams according to size (a function both of the height of the dam and the amount of water to be impounded behind it) and according to hazard classification (an estimate of the potential damage to human life and property if the dam fails). 30 TAC §§ 299.13 and 299.14. Based on a matrix incorporating these classifications and other agency design guidelines, TCEQ staff determines the minimum design criteria for the dams. 30 TAC § 299.15. TCEQ may reclassify a dam at any time. 30 TAC § 299.12(b). Evidence that a dam is deteriorating or evidence that later downstream development has substantially increased the threat to life and property in the event of dam failure are indicators that typically prompt a reclassification.

VII. THE LOWER AND MIDDLE RIO GRANDE – UNIQUE IN TEXAS WATER LAW

The Lower Rio Grande (from Falcon Dam to the mouth of the Rio Grande), and the Middle Rio Grande (from Amistad Dam to Falcon Dam) are unique in Texas water law. Rather than prioritize water rights based on the date of the appropriation, water rights in the Lower and Middle Rio Grande Basin, supplied by storage in Falcon and Amistad Reservoirs, are prioritized based on three categories of use.

This unique system had its origins in the crisis precipitated in the drought of the 1950s. Drought and changes in the Rio Grande created a need to adjudicate competing water rights claims. The result was the landmark opinion of the Corpus Christi Court of Civil Appeals that made substantial changes in water management in the Lower Rio Grande Valley. State v. Hidalgo County Water Improvement Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App.–Corpus Christi 1969, writ ref'd n.r.e.) ("Hidalgo County"). In Hidalgo County, the Court of Civil Appeals established three classes of water rights: (1) Domestic, Municipal, and Industrial uses ("DMI"); (2) Class A rights; and (3) Class B rights. Class A water rights were recognized for claimants whose rights were based on compliance with prior appropriation statutes or other legal theories. Class B water rights were recognized for claimants who had used water in good faith but could not establish a legal basis for their claim. The Court recognized water rights in these claimants under the Court's equity powers. *See id.* at 748–750. Most often Class A and B rights are irrigation rights, but they can be for mining or other purposes not contemplated under DMI rights.

In its opinion, the Court of Civil Appeals noted that the 1945 Treaty between Mexico and the United States, which contemplated the construction of reservoirs on the Rio Grande, changed the river drastically so that the prior appropriation system would not be workable. *See*, 59 Stat. 1219 (1945); and *Hidalgo County* at 735–737. The treaty had an effective date of November 8, 1945, and the Court of Civil Appeals refers to it as the "1945 Treaty." It was signed on November 8, 1944, and many people also call it the "1944 Treaty."

Beginning in the 1970s, existing water rights in the Middle Rio Grande were adjudicated under the Water Rights Adjudication Act of 1967. *See* TEX. WATER CODE § 11.301 et seq. The proceeding, commonly referred to as the "Middle Rio Grande Adjudication," was conducted before the Texas Water Rights Commission, predecessor agency of the TCEQ. Because water rights in the Middle Rio Grande are supplied from storage in Amistad Reservoir, the Water Rights Commission determined that the system of weighted priorities that the Court of Civil Appeals applied in the Hidalgo County case should apply in the Middle Rio Grande as well. The Water Rights Commission's decision to apply the priority of use system in the Middle Rio Grande Adjudication was upheld by the district court. *In re*: Adjudication of the Middle Rio Grande and Contributing Texas Tributaries, No. 322,018, 200th Dist. Ct., Travis County, Tex. (November 9, 1982). It was not appealed.

Today, the weighted priorities system is set forth in TCEQ rules at 30 Tex. Admin. Code Sections 303.1 et seq. Every user has a water account based on available storage in Falcon and Amistad Reservoirs that is allotted to the United States under the 1945 Treaty. DMI rights have priority over all others. In times of shortage, they are protected first; when the water supply in storage is replenished, their accounts are filled first. *See* 30 TAC §§ 301.21–.22.

The Upper Rio Grande and tributaries of the Rio Grande not supplied by reservoir storage are governed by the prior appropriation system. *See* 30 TAC § 301.23. Water rights in the Lower Rio Grande and Middle Rio Grande may not be changed so that they are diverted from the River or used in the Upper Rio Grande above Amistad Dam. *See* 30 TAC § 303.42(3). However, TCEQ rules allow water to be transferred from the Upper Rio Grande to the Lower and Middle Rio Grande, subject to certain restrictions. *See* 30 TAC §§ 303.42(4); *see also*, Brownsville Irr. Dist. v. Texas Comm'n on Envt'l Quality, 264 S.W. 3d 458 (Tex. App. – Austin 2008, *pet. denied*), for an illustration of how TCEQ has applied § 303.42(4).

VIII. A WATER RIGHTS APPLICATION

A. Types of Permits

The TCEQ issues several types of permits:

- "11.121" Permit – A permanent water right issued under Chapter 11 of the Water Code is sometimes referred to as an "11.121 Permit," named for the section that prohibits use of state water without a permit.
- Term Permit – A term permit is a permit issued for the use of water that has already been appropriated to another, but is not being used during the term of years for which the term permit is granted. Term permits are governed by Tex. Water Code § 11.1381 and 30 Tex. Admin. Code § 297.19.
- Temporary Permit – Temporary permits for a maximum term of three years may be granted under Tex. Water Code § 11.138. Typically, these permits are granted for specific projects such as the use of water for dust suppression during road construction.
- Seasonal Permit – Under Tex. Water Code § 11.137, the TCEQ may issue permits for specific seasons under the same terms as it issues regular permits.
- "11.143" Permit – A person may impound state water for domestic and livestock and some other uses without obtaining a permit under Tex. Water Code § 11.142. However, when the water in these exempt reservoirs is used for non-exempt purposes, a permit must be obtained under § 11.143.

The application forms for permanent and temporary water right applications are available at http://www.tceq.texas.gov/permitting/water_supply/water_rights/wr_applications.html. Usually, a term permit is granted when a person applies for a permanent water right, but it is determined that insufficient unappropriated water is available in the source of supply for a permanent water right, so only a term permit can be granted.

B. Requirements for granting a permit

A person who wishes to appropriate surface water must obtain a permit under Texas Water Code Sections 11.124-11.136. A permit application must be filed and fees paid. The TCEQ may deny or grant a permit application – in whole or in part – pursuant to Tex. Water Code Section 11.134(a). However, certain conditions must be met by the applicant in order for a permit application to be granted. Section 11.134(b) provides:

> (b) The commission shall grant the application only if:
>
> (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
> (2) unappropriated water is available in the source of supply;
> (3) the proposed appropriation:
>
> (A) is intended for a beneficial use;
> (B) does not impair existing water rights or vested riparian rights;
> (C) is not detrimental to the public welfare;
> (D) considers any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and
> (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Section 11.002(8)(B).

In addition, § 11.134(c) provides:

(c) Beginning January 5, 2002, the commission may not issue a water right for municipal purposes in a region that does not have an approved regional water plan in accordance with Section 16.053(i) unless the commission determines that conditions warrant waiver of this requirement.

The Executive Director's staff in the Office of Water reviews applications for new or amended water rights for compliance with the requirements of Texas Water Code Section 11.134.

Now that most of the surface water in the state is spoken for under a water rights permit or Certificate of Adjudication, item (2) on the list above, whether unappropriated water is available in the source of supply, is often the proverbial "sticky wicket" in any application for a new appropriation of water. The hydrology team of the Water Availability Division at the TCEQ reviews each application to determine whether there is unappropriated water available for appropriation in the source of supply and whether existing water rights or vested riparian rights could be impaired by the diversion or storage.

The Commission employs water availability models for each river basin to determine whether water would be available for a newly requested water right or amendment. A water availability model ("WAM") is a computer-based simulation predicting the amount of water that would be in a river or stream under a specified set of conditions. The model of a specific river basin consists of two parts: the modeling program, called "WRAP," short for Water Rights Analysis Package, and a text file that contains basin-specific information for WRAP to process (these text files are called input files). TCEQ staff uses two model "runs" in evaluating applications:

- the "Full Authorization" simulation, in which all water rights utilize their maximum authorized amounts, is used to evaluate applications for perpetual water rights and amendments.
- the "Current Conditions" simulation, which includes return flows, is used to evaluate applications for term water rights and amendments.

If water is available, these models estimate how often the applicant could count on water under various conditions. As set out in 30 Tex. Admin. Code Section 297.42, for non-municipal permits, the commission generally employs a 75/75 rule to determine that water is available—that is, 75% of the amount of water requested must be available 75% of the time in order to declare water "available" for the permit. Because reliability of a water supply for human consumption is so important, the requirement for municipal use permits is usually that 100% of the water be available 100% of the time. However, Section 297.42 sets out some exceptions. The most common exceptions are that the applicant has an alternate source of water that it can use or is taking flood flows. Alternate sources of water that are often used to support a water right application include contracts to purchase water from another water right holder, such as a river authority, and groundwater.

C. Amendments to Water Rights

A person may amend an existing permit, Certificate of Adjudication, or Certified Filing under Texas Water Code Section 11.122. Section 11.122(a) requires permittees or holders of Certificates of Adjudication to obtain an amendment from the TCEQ to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right. If a permittee is asking for more water, it must provide the same information for that new water that it would have to provide for an application for a new water right. The application to amend a water right is also on the TCEQ web site mentioned above.

D. The Contested Case Hearing Process

A contested case hearing process is available if a person wishes to contest the agency's decision to grant or deny a particular water right application. A contested case hearing is an administrative hearing governed generally by TCEQ rules in Chapter 55 and the Administrative Procedure Act, Tex. Gov't Code Chapter 2001. To initiate the hearing process, a person must file a request for a contested case hearing and show that he qualifies as an "affected person." Applications declared administratively complete on or after September 1, 1999 are subject to the rules in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Sections 55.251 (b) and (c) of Title 30 of the Texas Administrative Code specify that a hearing request must: be in writing and be filed with the Office of the Chief Clerk during the public comment period; give contact information for the person who files the request; identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain

language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and request a contested case hearing.

A request for a contested case hearing must be granted if the request is made by an affected person and the request: complies with the requirements of 30 Tex. Admin. Code Section 55.251; is timely filed; and is pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b)(2). An "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 TAC § 55.256(a).

Once a hearing request has been granted, the case will be referred to the State Office of Administrative Hearings for a proceeding similar to a civil trial. When the hearing is over, the hearing officer, known as an Administrative Law Judge, issues a Proposal for Decision ("PFD") making a recommendation to the TCEQ as to the decision it should make based on the record of the hearing. The final decision rests with the three-person Commission, who must vote on the decision at an open meeting.

After the Commission makes a final decision, a party may appeal that decision to the District Court. TEX. GOV'T CODE § 2001.171. The Travis County District Court is proper venue for all such appeals. TEX. GOV'T CODE § 2001.176(b)(1). The Texas Office of the Attorney General represents the TCEQ. Generally, on appeal, the court follows the substantial evidence rule. TEX. GOV'T CODE § 2001.174. If the agency's decision is supported by substantial evidence, it will be affirmed. If not, the court can remand the matter back to the agency with instructions for further proceedings.

IX. CONCLUSION

Hopefully by now you have a general understanding of some of the fundamental concepts of Texas surface water law and how this important area of law affects you. You will need this foundation to explore the myriad refinements and complex questions that arise when these basic concepts are applied to real-life legal problems and to understand how the law is changing. I continue to be amazed that after a century and a quarter under the appropriation construct, Texas surface water rights law is still in a constant state of flux. The most dramatic changes in water law tend to come in response to catastrophic drought; the 2011 drought, from which we are still suffering, is just such a catalyst. When coupled with increasing demands for water for new residents and businesses, the drought has caused even the most fundamental concepts of surface water law, such as those covered in this paper, to be considered anew. I watch with great interest to see what changes lie ahead in this dynamic area of law.