

Texas Water Law

<http://texaswater.tamu.edu/waterlaw.texas.htm>

In Texas, water rights depend on whether the water is groundwater or surface water.

Generally, Texas groundwater belongs to the landowner. Groundwater is governed by the rule of capture, which grants landowners the right to capture the water beneath their property. The landowners do not own the water but have a right only to pump and capture whatever water is available, regardless of the effects of that pumping on neighboring wells.

Surface water, on the other hand, belongs to the state of Texas. It can be used by a landowner only with the state's permission.

Groundwater

Water found below the earth's surface in the crevices of soil and rocks is called percolating water, or more commonly groundwater. Texas groundwater law is judge-made law, derived from the English common law rule of "absolute ownership." Groundwater belongs to the owners of the land above it and may be used or sold as private property. Texas courts have adopted, and the legislature has not modified, the common law rule that a landowner has a right to take for use or sale all the water that he can capture from below his land.

Because of the seemingly absolute nature of this right, Texas water law has often been called the "law of the biggest pump." Texas courts have consistently ruled that a landowner has a right to pump all the water that he can from beneath his land regardless of the effect on wells of adjacent owners. The legal presumption in Texas is that all sources of groundwater are percolating waters as opposed to subterranean rivers. Consequently, the landowner is presumed to own underground water until it is conclusively shown that the source of supply is a subterranean river.

The state of the law with respect to ownership of subterranean rivers is not settled in Texas. Both stream underflow and subterranean rivers have been expressly excluded from the definition of underground water in Section 52.001 of the Texas Water Code.

The practical effect of Texas groundwater law is that one landowner can dry up an adjoining landowner's well and the landowner with the dry well is without a legal remedy. Texas courts have refused to adopt the American rule of "reasonable use" with respect to groundwater.

Exceptions to Absolute Owner Rule. There are five situations in which a Texas landowner can take legal action for interference with his groundwater rights:

If an adjoining neighbor trespasses on the land to remove water either by drilling a well directly on the landowner's property or by drilling a "slant" well on adjoining property so that it crosses the subterranean property line, the injured landowner can sue for trespass.

There is malicious or wanton conduct in pumping water for the sole purpose of injuring an adjoining landowner.

Landowners waste artesian well water by allowing it to run off their land or to percolate back into the water table.

There is contamination of water in a landowner's well. No one is allowed to unlawfully pollute groundwater.

Land subsidence and surface injury result from negligent overpumping from adjoining lands.

Limited Regulation of Groundwater. The Texas Legislature acknowledged private ownership of percolating groundwater in legislation passed in 1949 and again in 1985, when it authorized the establishment of underground water conservation districts. These districts generally have the authority to promulgate rules for conserving, protecting, recharging, and preventing waste of underground water.

Surface Water

Texas water law has evolved from conflicts between competing legal systems and from the necessity of developing a system that

fits the needs of Texas. Water law will continue to evolve as the conditions of society, politics, populations, and economics changes. Two legal doctrines of surface water law are recognized in Texas today—the riparian doctrine and the prior appropriation doctrine.

Riparian Doctrine. The riparian doctrine is based on English common law. These court-developed rules are used in deciding cases that involve water use conflicts. The basic concept is that private water rights are tied to the ownership of land bordering a natural river or stream. Thus, water rights are controlled by land ownership.

Riparian landowners have a right to use the water, provided that the use is reasonable in relation to the needs of all other riparian owners. Riparian owners retain the right to use water so long as they own the land adjacent to the water.

Prior Appropriation Doctrine. This doctrine, on the other hand, is controlled by statute. Applied in the western states, prior appropriation is not related to land ownership; instead water rights are acquired by compliance with statutory requirements. While the principles of riparian rights were appropriate in areas of England and the United States where rainfall averages 30 inches or more a year, these rights were not suited to the arid West.

During their early development, western states failed to control rivers and streams, and water was treated as though it belonged to no one. In the absence of any rules, people simply took water from streams and used it; that is, they appropriated it. When this practice became legalized, it became known as the Doctrine of Prior Appropriation.

In 1967 the Texas Legislature merged the riparian rights system into the prior appropriation system with passage of the Water Rights Adjudication Act. The act required any person claiming a riparian water right to file a claim for the right by 1969 with the Texas Water Commission. With passage of the 1967 act, Texas consolidated the allocation of surface water into a unified water permit system. Anyone wishing to use surface water (exclusive of

drainage water) must receive permission from the state in the form of a "water right." Awarding permits for these "water rights" is a task of the Texas Commission on Environmental Quality.

Drainage Water

Diffused surface water, in its natural state, occurs after rainfall or snowmelt and flows across land from high elevations to lower elevations. This diffused water is often called stormwater, drainage water, or surface runoff.

Once the water flows into a clearly defined watercourse, it is claimed by the state and is subject to appropriation. On its way to the watercourse, drainage water often flows across privately owned lands. In such cases the water does not automatically become the property of the landowners, although they may capture and use it. Legal problems arise when a landowner interferes with the natural flow of drainage water by capturing and holding the flow or by diverting or increasing it. There are three general rules of law that apply when diffused surface water is captured or diverted.

Common Enemy Rule. One is called the "common enemy rule." Under this rule, drainage water is regarded as an enemy common to all landowners. The law allows every owner to take any measure to protect property, regardless of the consequences to other neighbors.

Natural Flow or Civil Law Rule. This rule recognizes that each landowner is entitled to rely upon continuation of the natural flow. Under this rule a landowner who increases runoff, thereby causing flooding, is liable for damages.

Reasonable Flow. This rule allows landowners to divert or change drainage water, even to the extent of harming adjoining neighbors, so long as the diverter's actions are "reasonable" considering all circumstances.