

Presented:
2012 Texas Water Law Institute

November 1-2, 2012
Austin, Texas

TCEQ WATER CURTAILMENT RULES How Meaningful is the Priority System?

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I. INTRODUCTION

The “first in time, first in right” doctrine¹ is the foundation of the Texas water appropriation model, and is based on the priority of water access given to senior over junior water rights holders. Drought and emergency water shortage laws in the Texas Water Code have protected the priority doctrine since its creation, and are relied upon by decision makers and those holding water rights. The computer models used to determine whether new water rights can be granted and the reliability of existing water rights are also based on the priority system. In response to the severe drought Texas was experiencing, the 82nd Legislature in 2011 passed House Bill 2694² which added Section 11.053 to the Texas Water Code. Section 11.053 required the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) to adopt rules to implement curtailment procedures during “a period of drought or other emergency shortage of water...in accordance with the priority of water rights established by Section 11.027 [of the Texas Water Code].”³

The rules adopted by TCEQ in Texas Administrative Code Title 30, Chapter 36, to implement Section 11.053 of the Texas Water Code are arguably inconsistent with the priority doctrine, as they allow the Commission to consider public health, safety, and welfare concerns

¹ Tex. Water Code § 11.027 (“As between appropriators, the first in time is the first in right.”).

² Act of May 28, 2011, 82nd Leg., R.S., ch. 1021, § 5.03, 2011 Tex. Gen. Laws 2579, 2593.

³ Tex. Water Code § 11.053(a).

instead of priority rights when deciding which water right to curtail during water shortages. This and other implications of the new rules pose significant threats to the priority doctrine and could call into question many assumptions upon which the Texas surface water allocation system is based. Ironically, the curtailment rules essentially reenact the controversial but likely constitutional provisions of the Wagstaff Act,⁴ which was repealed in 1997 because of a concern that it devalued vested water rights. This paper will discuss the background of Texas water rights, House Bill 2694, the TCEQ's adopted curtailment rules, and the legal and practical implications these pose on the enforcement of the priority doctrine.

II. WATER RIGHTS BACKGROUND

A. Spanish and Mexican Civil Law Water Rights

Because Texas was originally part of Spain and then later Mexico, many land grants were controlled by the civil law of Spain and Mexico. As it turned out, Texas courts did not consistently interpret what the actual civil law was with regard to grants of water rights. In *Mott v. Boyd*,⁵ the Texas Supreme Court protected the terms of rights granted riparians when land grants were made during Mexican civil law, recognizing a riparian right of reasonable water use for property owners adjacent to a watercourse. Later, in *State v. Valmont Plantations*,⁶ the San Antonio court, after an extensive analysis of civil law, determined that there was no such thing as a Spanish or Mexican riparian right to irrigate. In order to have an irrigation water right, the land grant must have expressly granted such a right.⁷ There were, in fact, some grants expressly providing for water rights.⁸

⁴ Act of May 18, 1931, 42nd Leg., R.S., ch. 128, 1931 Tex. Gen. Laws 217 ("Wagstaff Act").

⁵ 116 Tex. 82, 286 S.W. 458 (1926).

⁶ 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

⁷ *Id.* at 856.

⁸ *Id.*

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First appeared as part of the conference materials for the
2012 Texas Water Law Institute session

"TCEQ Water Curtailment Rules: How Meaningful Is the Priority System?"