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Chapter 14. Water Rights and Water Development

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I. Introduction

14:1. Introduction

The topic “Water Rights and Water Development” covers a broad area. The purpose of this chapter is to provide the reader with an overview of Texas water law and a basic understanding of the concepts and principles in this area of the law. Interwoven in this discussion are the major revisions to Texas water law brought about by Senate Bill 1 (S.B. 1)¹ and Senate Bill 2 (S.B. 2),² legislation that overhauled Texas’ systems for water resource planning, management, and development.³ The chapter also addresses significant legal developments regarding Texas groundwater ownership, management, and regulation.

This chapter focuses on laws and institutions related to water rights, *i.e.*, the right to store, divert, produce or use water. As a general rule, Texas water is categorized as groundwater or State (surface) water for regulatory purposes; thus, this chapter discusses these types of water rights and regulatory systems in separate sections. Any discussion of such a broad subject must necessarily be in general terms. This chapter does not discuss the shades of grey, and presents only major exceptions or qualifications to general rules.

II. State Water Law

14:2. Groundwater

(a) Definition

Groundwater or underground water is water occurring under the surface of the land. The term “groundwater” can include percolating water⁴ or artesian water,⁵ but not the underflow of a

¹ Act of June 2, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (codified in scattered sections of the Water Code, Government Code, Agriculture Code, Tax Code, and Health & Safety Code).

² Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

³ See Hubert and Bullock, Senate Bill 1: The First Big and Bold Step Toward Meeting Texas’ Future Water Needs, 30 TEX. TECH L. REV. 53 (1999).

⁴ See TEX. WATER CODE ANN. § 36.001(5).

⁵ See discussion below at § 14:2(b)(3).

surface water river or stream⁶ or the underground flow of water in confined channels. Groundwater is presumed to be percolating, unless proven otherwise.⁷

Texas, unlike most other western states, has a statewide regulatory program only for surface water, and not for groundwater. Recent trends in Texas law provide for the creation of local groundwater conservation districts to provide some regulation of groundwater. These local districts control withdrawals and uses of groundwater within their jurisdictions. In Texas, surface water is considered property of the State, while groundwater and the right to capture groundwater is considered the property of the owner of the surface estate and treated much like a mineral or oil and gas, with some differences.⁸

(b) Exceptions

Certain categories of underground water, however, are legally distinct from “groundwater” in terms of the ownership interest and/or the applicable regulatory jurisdiction. Each of these distinct categories of underground water is summarized below:

(1) Underflow of a Watercourse

“Underflow” is that portion of the flow of a surface watercourse that flows through the sand and gravel deposits beneath the surface of the bed of a stream.⁹ Underflow is hydrologically connected to the surface flow of the stream and moving in the same direction as the surface water.¹⁰ Underflow is considered to be property of the State, and the principles governing allocation and use of surface water apply.¹¹

(2) Underground Streams in Defined Channels

The courts make a critical distinction between percolating groundwater and groundwater flowing in defined subterranean channels and streams. The landowner’s rights with respect to groundwater flowing in a well-defined and known subterranean stream are the same as would apply for a surface watercourse. The subsurface watercourse, however, must have all the

⁶ *Pecos County Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.--El Paso 1954, writ ref’d n.r.e.) (holding that groundwater is water occurring under the surface of the land other than underflow of a surface water river or stream).

⁷ *Pecos County Water Control & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503 (Tex. Civ. App.--El Paso 1954, writ ref’d n.r.e.); *see also Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App. Austin 1989), writ denied, (Oct. 25, 1989) (citing *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 54 A.L.R. 1397 (1927) (“In the absence of such testimony, the presumption is that the sources of water supply obtained by such excavations are ordinary percolating waters, which are the exclusive property of the owner of the surface of the soil, and subject to barter and sale as any other species of property”)).

⁸ For a brief discussion relating to the nature of a landowner’s property interest, vis-à-vis the regulatory authority of groundwater districts, *see* §§ 14:2(c) and (d) below.

⁹ *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273, 276, 54 A.L.R. 1397 (1927).

¹⁰ 30 TEX. ADMIN. CODE § 297.1(55).

¹¹ TEX. WATER CODE ANN. § 11.021(a) (definition of “state water”).

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