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## **Chapter 14. Water Rights and Water Development**

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# Chapter 14. Water Rights and Water Development

By:

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## I. Introduction

### 14:1. Introduction

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 over the last twenty years, brought about by Senate Bill 1 (S.B. 1)<sup>1</sup> and Senate Bill 2 (S.B. 2),<sup>2</sup> legislation that overhauled Texas' systems for water resource planning, management, and development.<sup>3</sup> The chapter also addresses significant legal developments regarding Texas groundwater ownership, management, and regulation, and emerging areas involving environmental flows and strategies for water development.

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 water<sup>4</sup> or artesian water,<sup>5</sup> but not the underflow of a surface water river or stream<sup>6</sup> or the underground flow of water in confined channels. Groundwater is presumed to be percolating, unless proven otherwise.<sup>7</sup>

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<sup>1</sup> 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).

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

<sup>3</sup> 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).

<sup>4</sup> See TEX. WATER CODE ANN. § 36.001(5).

<sup>5</sup> See discussion below at § 14:2(b)(3).

<sup>6</sup> *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

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.<sup>8</sup>

(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.<sup>9</sup> Underflow is hydrologically connected to the surface flow of the stream and moving in the same direction as the surface water.<sup>10</sup> Underflow is considered to be property of the State, and the principles governing allocation and use of surface water apply.<sup>11</sup>

(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 characteristics of a surface watercourse. These characteristics are beds, banks that form a channel, and a current of water.<sup>12</sup> This determination is made on a case by case basis, and to date no subterranean streams have been found in Texas.<sup>13</sup>

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surface water river or stream).

<sup>7</sup> *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”)).

<sup>8</sup> 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.

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

<sup>10</sup> 30 TEX. ADMIN. CODE § 297.1(55).

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

<sup>12</sup> *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App. Austin 1989), writ denied, (Oct. 25, 1989). In *Denis*,

### (3) Artesian Water

Artesian water is groundwater confined under pressure by an impermeable geologic layer, capable of flowing “above the first impervious stratum below the surface of the ground” when properly cased in a well.<sup>14</sup> Texas courts have applied the principles applicable to percolating groundwater to artesian water. The only significant distinction is the existence of statutory provisions prohibiting the waste of artesian water<sup>15</sup> and requiring the approval of the Texas Commission on Environmental Quality (TCEQ) in certain circumstances for withdrawal.<sup>16</sup>

#### (c) The “Rule of Capture” and Common Law Restrictions

In *Houston & Texas Central Railway Co. v. East*,<sup>17</sup> the Texas Supreme Court adopted the English common law rule of *Acton v. Blundell*<sup>18</sup> that the owner of the land might pump unlimited quantities of water from under his land, regardless of the impact that action might have upon his neighbor’s ability to obtain water on his own land. This right is referred to as the “right to capture.” Neither an injunction nor damages will lie to prevent such action.

Only two significant limitations exist at common law on the landowner’s right to capture and use percolating water. First, the landowner cannot capture and use percolating water maliciously with the purpose of injuring a neighbor or in a manner that amounts to wanton and willful waste of the resource.<sup>19</sup> Second, since 1978 an action for damages will lie for the negligent pumping of groundwater that causes subsidence of neighboring land.<sup>20</sup>

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downstream landowners sought declarations that upstream landowners did not have any authority to appropriate waters adjacent to Kickapoo Springs for irrigation purposes. The court of appeals held that, absent proof that the subterranean watercourse possessed all the characteristics of a surface watercourse, the presumption of percolating groundwater is not rebutted. Also, the fact that springflow makes a sufficient addition to streamflow to be of benefit to downstream riparian owners does not make the underground flow qualify as an underground stream.

<sup>13</sup> The (former) Texas Water Commission attempted to apply this principle to the Edwards Aquifer, declaring it a subterranean watercourse by finding that the aquifer had all of the characteristics of a subterranean stream. The District Court of Travis County disagreed, and the Legislature reinforced this conclusion when it declared the Edwards Aquifer “a unique natural resource . . . but not an underground stream.” See Act of June 11, 1993, 73rd Leg., R.S., ch. 626, §1.01, 1993 Tex. Gen. Laws 2350.

<sup>14</sup> TEX. WATER CODE ANN. § 11.201.

<sup>15</sup> TEX. WATER CODE ANN. § 11.205.

<sup>16</sup> TEX. WATER CODE ANN. § 11.202. Pursuant to §§ 11.202(d) and (e), permission is required from the TCEQ for wells producing greater than 5,000 gallons per minute from the Edwards Aquifer.

<sup>17</sup> *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904) (known as the *East* case).

<sup>18</sup> *Acton v. Blundell*, 1843 WL 5768 (U.K. Ex Ct 1843).

<sup>19</sup> *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798, 801 (1955).

<sup>20</sup> *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21, 30, 9 Env’tl. L. Rep. 20452, 5 A.L.R.4th 591 (Tex. 1978).

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