TEXAS WATER LAW

I. Sources: A. Federal - Limited Provisions
B. State - Primary Source of Water Law

II. STATE WATER LAW - Separates Water into Two Types:

A.Surface Water
B.Ground Water

A.Surface Water

1. **Definition:** Surface water is exactly what it sounds like.
It is water flowing or impounded on the surface in lakes, creeks, rivers, or streams, even if they cross private property. Also includes Alluvial underflow and water in all bays and arms of the Gulf of Mexico. It is water in a defined body, a water course. It does not include diffuse water, such as from falling rains or melting snow, until that water reaches a bed or channel in which water is accustomed to flow. Groundwater which emerges from a spring, loses its characteristic as groundwater and becomesSurface Water. Surface Water which disappears into the ground and flows into an aquifer loses its characteristic asSurface Water and becomes groundwater.

2. **Ownership:** AllSurface Water belongs to the State of Texas.

Exceptions:
(a) Because certain Spanish land grants pre-date the State of Texas, if those grants included Riparian rights to rivers, those property rights are superior to State ownership.

(b) Permitted Impoundment. If you have a permit to construct a dam and impound water, you can own the water you saved (for example, Canyon Lake).

(c) Rio Grande. The Rio Grande water is owned by both Texas and Mexico and is regulated by an International Boundary Commission created by a series of Treaties.

3. **Regulation:**

(a) State owned water is regulated by TCEQ. TCEQ grants permits to parties to take and put to *Beneficial Use* State ownedSurface Water. These permits are administered on a first in time priority basis. That is, the older the permit, the higher the priority. A higher priority permit is entitled to satisfy his entire permit before a junior priority permit takes a drop, regardless of the use to which that water is put.

Beneficial use includes municipal, industrial, mining, agriculture, recreation, and many others. However, the TCEQ, by statute, is expressly prohibited from issuing a stand alone permit solely to preserve environmental flows.

Important Limitation: *Waste.* The permitee cannot waste the water. If he commits waste he can lose his permit. He can also lose it for Non-use.

Exceptions: Push Up Ponds – a person can construct his own dam and impound up to 200 ac ft for personal domestic and livestock use or for fish & wildlife use.

(b) River Authorities. Rivers and the water sheds contributing to them are subject to regulation by River Authorities. (SARA or GBRA, for example.) The various river authorities have ad valorem tax authority and are charged with both flood control and a general "health of the river" portfolio which gives them environmental authority. Some river authorities operate water utilities and own and operate public parks. They also participate in regional water planning organizations.

B.Ground Water

1. Definition: Ground water is water percolating under the surface of the earth, except for stream bed underflow.

2. Ownership: Ground water is owned absolutely by the surface owner of the land. However, it is subject to the *Rule of Capture.* The rule of capture states that any owner of surface who can capture underground water has the right to use as much of it as he can capture. This is sometimes called the Rule of the Biggest Pump. If land owner #1 is pumping X amount and his next door neighbor, land owner #2, puts in a bigger pump one foot across the property line, effectively draining

land owner #1, such that #1's pump can only produce .5X, land owner #1, whose water us being drained, has no right to complain. His sole remedy is to put in a bigger pump or deeper well of his own.

Note: This is very different that almost every other state. In most states,Ground Water is owned by the state, as an asset of the people.

3. Exceptions to the Rule of Capture

(a) Waste. An owner cannot commit waste with his use. Wasteful use can be enjoined by a court, but the owner never loses his ownership right to the water.

(b) Subsidence. If an owner' s use causes subsidence of adjoining land it can be enjoined, even if it is non wasteful. This is very important in the Gulf Coast Aquifer. Houston and other municipalities along the coast have serious Subsidence problems.

(c)Ground Water Conservation Districts. Since the 1995 creation of Chapter 36 of the Texas Water Code, more then 85% of Texas Groundwater has been incorporated into approximately 100Ground Water Conservation Districts (GCD). In 1989 the Legislative required GCD's to each develop a *Comprehensive Management Plan* addressing each of the following goals:

1. Providing efficient use of groundwater
2. Controlling and preventing waste of groundwater
3. Controlling and preventing subsidence
4. Addressing conjunctive surface Mgmt. Issues.
5. Addressing natural resources

In 1997 the Legislature adopted SB1 which created a Statewide *Water Planning Process* under the supervision of the Texas Water Development Board. (The charge of the Texas Water Development Board, "TWDB" is to plan for the future long-term water supply needs of the state and to provide financial assistance to build infrastructure - aimed principally at political subdivisions that could not obtain financing on the open market.) SB1 changed the content and methodologies of the GCD Comprehensive Management Plans. They were required to use uniform

scientific groundwater models in order to adopt *Desired Future Conditions* which the TWDB will use to determine the *Managed Available Groundwater*. GCDs are now required to meet with each other to develop Desired Future Conditions within each*Ground Water Management Area*.

The concept now is that GCD's cannot issue permits in excess of their Managed Available Groundwater. However, there is no guidance how that should be reached. Most have issued permits on a *First in Time, First in Right* basis, and also based on tract size, service area, and well spacing allocations. Most also adopted pumping limits and export limits. Wells drilled for livestock purposes are exempt from permit requirements if they produce less than 25,000 gallons per day.

Although the Legislature hoped for some sort of unity, the result has been chaotic. Seeing limitations, water rich districts have intentionally under estimated their resources and refused to cooperate with the DFC of their neighbors.

The process has resulted in a state wide water plan. However it is not considered accurate or workable. But the process of refinement continues.

Limitation: GCD's are supposed to regulate the production of groundwater within their districts through pumping limits. By statute, however, the GCD's have no authority to regulate groundwater pumped for the purpose of Oil & Gas development. In some areas of the state that is a significant amount of water. In the Eagle Ford Shale area (which covers parts of 12 counties, over 6 million acres) for example, a single vertically drilled well might use approximately a half million gallons of water. However, depending upon the length of a horizontal well, the horizontal wells typically use 5 million gallons of water, mostly in the hydraulic fracturing operation. In the Eagle Ford, most horizontal sections run less than a mile and have 7 - 12 frac stages, with a few up to 15. In the west Texas Permian Basin (which is very hot for horizontal drilling right now) some horizontal wells are two miles long with 40 frac stages. The water used by oil companies does not need to be drinking water quality and some are experimenting now with brackish water. Most attempt to recycle their water but even the most efficient only recover around half of their frac water.

Priority Groundwater Management Areas (*PGMA*). PGMA's are areas that TCEQ, TWDB, and Texas Parks & Wildlife have jointly determined to be critical groundwater problems or may have such problems in the future. Critical groundwater problems are defined as "shortages of Surface Water or groundwater, land subsidence resulting from withdrawal of groundwater, or contamination of groundwater." Once designated, areas within the PGMA must become part of a GCD to address regulation of the water. 18 areas have been considered and 6 have been designated, two of which were merged. The designated areas are: (1) parts of Regan, Upton and Midland counties, (2) Swisher and parts of Brisco and Hale counties, (3) part of Dallam County, (4) part of El Paso County, (5) Bandera, Blanco, Gillespie, Kendall, and Kerr Counties, merged with parts of Bexar, Comal, Hays, and Travis Counties (Hill Country Area).

(d) Edwards Aquifer Authority

1. The EAA was created in 1993 by the Texas Legislature and began operations in 1996. It is not a Groundwater Conservation District as it covers (mostly) an Entire Aquifer. It covers all or part of 8 counties: Uvalde, Medina, Bexar, Atascosa, Comal Guadalupe, Caldwell and Hays Counties.

2. The EAA is charged with Management and protection of the Edwards Aquifer. Essentially the EAA has two functions: Water quality and water quantity. It is in part an environmental protection agency, in that is responsible for the springs at San Marcos and Comal where it protects certain specific, aquifer dependent, species such as the Blind Salamander, the Fountain Darter, and Texas Wild Rice. It also works with invertebrates such as Riffle Beetles and Amphipods. It is also a water quantity agency in that it controls the amount of pumping from aquifer through issuance of Permits. The legislature set the EAA pumping cap at 572, 000 ac/ ft of water and the EAA has permitted 100% of that on a first in time, first in right basis. The permitted uses include municipal (67 %), industrial (7%), and agricultural irrigation (26 %). Domestic & livestock use of less than 25,000 gallons per day is exempt from permitting. (The actual use depends upon rainfall: in 2016, a rainy year, the actual use was municipal (74 %),

industrial (8 %), and agricultural irrigation (18 %). During times of plenty there is no need to regulate the amount pumped. No one every pumps their full permit as nature is giving the water away for free. The pumping limits only become an issue during droughts, and then the EAA is the agency which orders that people can not water during certain days. (Actually the EAA orders SAWS (and all other pumpers) to reduce its pumping, and SAWS implements that order by rationing the pumping to certain days and certain times of the day). In 2015 there were 27 cases of overpumping, but in 2016 there were only 16 cases.

3. The EAA funds and oversees several million dollars of scientific research every year much of which is submitted to peer reviewed journals. It sponsors international symposia on various hydrological topics. It also monitors thousands of water wells (each one a potential point source of pollution or of over production); it has authority to force plugging of abandoned and non-permitted wells; it overseas a cloud seeding program to increase recharge; owns a number of recharge dams (which hold flood water so it can recharge the aquifer), and it funds efficient farming techniques (lower loss technologies such as low loss irrigation heads and laser leveling of rice ponds). It re-plants wild rice populations and maintains offsite breeding stocks of its endangered species. It has two different rigorous three dimensional computer models of the entire aquifer which are used to predict results of rainfall or drought in different places, the flowpaths of point source pollution, and other uses. It uses two statistically different models in order to check one against the other.

4. Among the regulations on Ground Water issued by the EAA are: **(a)** EAA permits are required for all water wells in the Edwards Aquifer and the permits have limits on production during droughts, **(b)** bans on underground gasoline storage tanks on the recharge zone, **(c)** prohibits coal-tar sealants for parking lots, **(d)** publishes standards for and inspecting of retention ponds, **(e)** capping of abandoned wells **(f)** and prohibiting Edwards Water from being exported (such as for frac-ing). We also (with COSA) bought the Bracken Bat Cave and have purchased thousands of recharge zone conservation easements (133,447 acres).

5. The EAHCP. The most significant achievement of the EAA is the negotiation, adoption, and implementation of the Edwards Aquifer Habitat Conservation Plan. It was a multi-disciplinary multi stakeholder combination designed to define the environmental needs of the Edwards Aquifer dependent species, define a mechanism to address those needs, and obtain community buy in on the funding of the program. After several years of research and negotiation the parties achieved a consensus and the Federal Government approved the HCP and granted the EAA an Incidental Take Permit. The HCP requires that the EAA undertake environmental remediation, that it implement a VISPO program where it pays irrigating farmers not to use their permits, and that it place thousands of acre feet of water into the SAWS ASR project for use in times of drought. The ASR is one of the most successful water conservation projects in the nation. It is essentially an underground reservoir, a water bank, into which Edwards Aquifer water is pumped in times of plenty and from which that water can be drawn out during times of drought. Because San Antonio's water can be drawn out in a drought, its pumping from the aquifer under those conditions can be reduced, thereby leaving water behind for the needs of the species. The EAHCP has been hailed as a model of cooperation and success for other communities to emulate.

4. Legal Conflict: Property Rights vs Peoples' Rights. So if Texas Law says that a landowner has the absolute right to own, pump, and use the groundwater under his property (the Rule of Capture) how can the Law also require a permit and compel reductions in the amount he can pump? On the one hand you own it but on the other hand you cannot pump it. *Isn't that the government taking a private property right?* Answer: *yes it is.* The government is confiscating his property for the public good, and that is prohibited by the Fifth Amendment to the U.S. Constitution -- unless the land owner is compensated. The EAA was sued (Bragg v. EAA) and the Texas Supreme Court held that pumping reductions are a compensable taking of private property. Fortunately only a few landowners were smart enough to sue on that basis before the statue of limitations ran out. However, some of the GCD's may not be so lucky. It is a real problem for future water use regulation in Texas.

III. FEDERAL LAW. Two federal laws are discussed with regard to Texas Water Law. They are:

A. Clean Water Act. This really does not apply to our discussion. It sets purity standards for Municipal drinking water supplies.

B. Endangered Species Act ("ESA")

1. The Endangered Species Act took effect in 1973. Its purpose is to conserve and recover listed endangered species and the ecosystems upon which they depend. It provides that an "interested person may petition the Secretary of the Interior through the U.S. Fish and Wildlife Service that Species be added to the Endangered Species List." USFWS considers factors such as the population, destruction of the species habitat, and other threats. USFWS makes a designation of "*critical habitat*". Generally speaking the designation of public or private land as critical habitat is hotly contested.

2. Section 9 of the ESA prohibits a "*Take"* of an endangered species without specific authorization from the USFWS. Take means to "harass, harm, pursue, hunt, shoot, wound, kill or injure" a listed species, and has been defined to include any significant modification or degradation of habitat impairing essential behavioral functions such as feeding and breeding. *So a Take can be either of the Species or of their Habitat.* The ESA provides for both Civil and Criminal prosecution for illegal "Takes" . Further there is a Private cause of action – that means an alleged Take can be enforced either by a government agency or by private parties or groups. That is why Sierra Club or others, even individuals, can sue under the ESA.

3. Because there may be situations where a "take" of a species is unavoidable, the ESA provides a mechanism for the issuance of an Incidental Take Permit. To issue an ITP, USFWS requires a Habitat Conservation Plan (HCP) to be approved. The HCP must specify: the likely impact of the taking, the steps the Applicant will take to minimize the taking and the funding available for that purpose, what alternative actions were considered and why they were not utilized, and any other measures the Secretary of the Interior may require. The ITP will be issued only if the Secretary finds that the taking will be Incidental, that the

Applicant, to the maximum extent possible, will minimize and mitigate the impacts of the taking, that the Applicant ensures sufficient funding for the HCP, and that the proposed Take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

C. **Waters of the United States ("WOTUS")**. The Obama administration announced a rule regarding what constitutes "waters of the US" for the purposes of Environmental Protection Agency ("EPA") jurisdiction on June 29, 2015. It expanded the jurisdiction of the EPA beyond the navigable waters traditionally believed to be subject to Federal jurisdiction to include any water course and wet land that eventually leads to a navigable waterway. The rule was immediately challenged in court. It has been abandoned by the Trump administration.