

Protecting the drops we drink: Who owns Texas water?

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As Texas population continues to increase, so will demands for water. The answer to the question of who owns Texas water will continue as a point of argument.

Water availability has become such a critical issue that many statewide meetings, legislation and court cases revolve around the subject. A recent state-wide conference, devoted to water, was the Texas Section Society of Range Management annual meeting held in Uvalde. The opening remarks presented by Charles Porter addressed the question of water ownership.

Porter suggested looking at three geological water containers – natural surface, diffused surface and groundwater – to determine ownership. Each container has different ownership and regulations. Porter is an author, speaker, fulltime visiting professor at St. Edward's University, and a water rights and real estate expert nationwide.

Natural surface water

“All natural surface water found in watercourses is owned by the state and held in trust for the people,” Porter said. “It includes the ordinary flow, underflow and tides of every flowing natural watercourse with a definite bed and banks. Storm water and floodwater found in natural lakes, rivers and streams are also considered state water.”

“With only a few exemptions, a person must file a permit to use state water and obtain a water right from the Texas Commission on Environmental Quality,” said Tiffany Dowell Lashmet of Texas A&M University. Lashmet has served as an agricultural law specialist for Texas A&M AgriLife Extension Service since 2013.

“A water right is defined as a right acquired under the laws of Texas to impound, divert or use state water,” Lashmet said. “A water right does not transfer ownership from the state, but instead merely grants the holder a right to use it.”

“One of the few exemptions from surface water use permits applies to landowners with property adjacent to a river or stream,” said Judi Pierce of the Brazos River Authority. “These landowners can divert and use water for domestic and livestock purposes on their property without obtaining a permit. Included are household use, watering a lawn or garden

and water for livestock. Irrigation of crops or hay sold commercially are not exempted and require a permit.”

“Texas surface water law is governed by the doctrine of prior appropriation,” Lashmet said. “Most western states, including Texas, define prior appropriation as ‘first in time, first in right.’ Essentially the first person to receive a permit to put surface water to beneficial use has a ‘senior water right’ that is superior to all junior water right holders.

“In the most basic sense, prior appropriation means ‘first come, first served.’ In times of shortage, a senior water right holder receives all the water to which he or she is entitled before a junior user can use any water.”

To make water use rights more confusing, there are 17 river authorities in Texas which hold permits for surface water use. The river authorities sell water to individual land owners, industry and municipalities through contracts which contain water conservation clauses. Most readers of Land and Livestock Post farm and ranch within the river basin managed by the Brazos River Authority.

“The Brazos River Authority was created by the Texas Legislature in 1929 and was the first state agency in the United States organized specifically for developing and managing the water resources of an entire river basin,” the authority’s Pierce said. “Responsibilities of the Brazos River Authority are to develop and distribute water supplies, provide water and wastewater treatment, monitor water quality, and pursue water conservation through public education programs.”

The Texas Commission on Environmental Quality is the regulatory authority over surface water in the state. Responsibilities of the commission are monitoring water use and enforcing Texas surface water law throughout the state.

“Watermaster programs are a division of [the Texas Commission on Environmental Quality] and include South Texas, Rio Grande, Concho River and Brazos,” Pierce said.

“Watermasters monitor water use and enforce water rights in their areas every day by checking meters, monitoring stream flows and determining whether water right holders can divert water. All permit holders must report their water usage.

“The Brazos Watermaster Program was established by petition from water right holders and subsequent Order issued by the [the Texas Commission on Environmental Quality] commissioners on April 21, 2014. The program has jurisdiction over the Lower Brazos River Basin below and including Possum Kingdom Lake.

“Five watermaster deputies patrol the counties (Table 1) in the basin from offices located near their jurisdictional areas,” Pierce said.

Surface water

“Under Texas law, diffused surface water is a subcategory of surface water,” A&M’s Lashmet said. “Diffused water is defined as water on the ground surface that has not yet entered a watercourse with defined bed and banks.

“Prior to entering a watercourse, a flow of water and a permanent source and supply, such as farm ponds and springs, are not owned by the state. Instead, these waters belong to the owner of the land over which they flow.

“Diffused surface water is generated by rain or melting snow. Once this water reaches a watercourse, it becomes state-owned surface water,” Lashmet said.

Diffused surface is the one source of water that is owned totally by the landowner, so it is wise to capture as much of it as possible by maintaining a continual grass cover through good range and pasture management. Under good management, diffused surface water runoff is reduced which results in more percolation into the soil and availability for use by plants.

Reduced runoff also prevents soil erosion and improves water quality.

Groundwater

“Groundwater is defined as water beneath the land surface,” Porter said. “It fills pore spaces of rock and soil material and supplies wells and springs. Texas Senate Bill 332, enacted in the 2011 legislative session dictated that groundwater is private property. This ownership was further confirmed in the Day McDaniel court ruling on Feb. 24, 2012.”

Texas Commission on Environmental Quality regulates treatment of groundwater as a potable municipal supply, but it doesn’t regulate its use in most cases. In areas with groundwater conservation districts, they regulate use and in areas without GCDs, use is unregulated.

Three primary groundwater conservation district legislatively-mandated duties include: permitting water wells, developing a comprehensive management plan, and adopting necessary rules to implement the management plan. The principal power of a groundwater conservation district is to prevent waste of groundwater by requiring all wells, with certain exceptions, to be registered and permitted. Permits are usually required by a district for all wells except for those specifically exempted by a conservation district and statutorily-exempt wells including wells used solely for domestic use or for providing water for livestock or poultry purposes; the drilling of a water well used solely to supply water for a rig actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; and the drilling of a water well authorized by the that commission for mining activities.

Wells with permits are subject to groundwater conservation district rules governing spacing, production, drilling, equipping, and completion or alteration. Even exempt registered wells

are subject to district rules governing spacing, tract size, and construction standards to prevent unnecessary discharge of groundwater or pollution of the aquifer.

As of January 2016, a total of 101 groundwater conservation districts have been created in the state. The total includes 100 established (confirmed) districts and one unconfirmed district. The 100 established districts cover all or part of 180 of the state's 254 counties. Groundwater conservation districts within the principal LLP reader area are listed in Table 2.

Texas water ownership is complex and confusing, so it is a good idea to visit with the involved state agency before making any management changes concerning surface and ground water. Good contacts on surface water are the watermaster, river authority and the Texas Commission on Environmental Quality.

For proposed actions on water wells, contact the groundwater conservation district first and, secondly, the Texas Commission on Environmental Quality.

It is always wise to ask before making changes in water management to avoid penalties for violating regulations.

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