

Texas Groundwater Law In Flux; Primer Is Constantly Changing

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AUSTIN – Groundwater law in Texas is definitely in a state of flux. And while local control has been deemed the state's preferred method for management of this natural resource, interpreting just what that means has become increasingly difficult.

Thus a primer on groundwater law and the powers of locally controlled groundwater districts has become a standard instructional topic during the annual CLE International Texas Water Law conference.

Ronald Kaiser, professor of water law and chair of the Texas A&M University water program, told listeners that water is a resource that binds us together yet can also divide us.

"It's the full employment act for attorneys, hydrologist and engineers," he joked.

Kaiser offered some facts that he said may help illustrate why the struggles have been so mighty over the past 10 to 15 years, particularly with respect to groundwater.

Groundwater, he noted, accounts for about 60 percent of the state's total water use, and nine major aquifers supply some 97 percent of Texas groundwater.

"The Ogallala is the granddaddy of aquifers," he pointed out. "Sixty-six percent of all groundwater we use comes from this one aquifer, and 38 percent of all water used."

He also noted that about 80 percent of the state's surface land mass overlies an aquifer.

The rule of capture, Kaiser commented, applies where there are no groundwater districts, while surface water is governed by prior appropriation doctrine.

The state uses some 16.5 million acre-feet of water annually. Of that total, groundwater accounts for 60 percent while surface water accounts for 40 percent. Agriculture uses 80 percent of all groundwater in the state. Cities, however, use their fair share. In fact, Kaiser said, groundwater accounts for more than 55 percent of all the water used in 134 of the 254 Texas counties.

"You would think in East Texas where there is an abundance of surface water that these counties would rely mostly on surface water. They don't, and it's not rocket science why they don't," Kaiser told listeners.

"Groundwater is relatively inexpensive," he explained. "They don't have to build a huge infrastructure to pipe water to reservoirs. They can put in a well field and begin to pump the water."

In terms of surface water, the state has 191,000 river miles, 15 major river basins and 11,250 named rivers, streams and creeks, Kaiser said.

"In a good year almost 50 million acre-feet of water runs through our watercourses," he told listeners. To capture this runoff, Texas has built some 211 major reservoirs throughout the state. However, about 95 percent of water storage is held in just 75 reservoirs in the state.

"Although reservoirs are located throughout the state, one half of all our storage is held in the Sabine, Neches and Trinity rivers east of Interstate 45. The folks in East Texas want to hold their water and the people on the other side look at it with envy," he commented.

"There are some 6700 surface water holders, 90 percent of the state's surface water is held by some 200 water users, and those are predominantly public entities."

The state, he noted, has done a good job of allocating surface water, as some 12 to 15 river basins are fully spoken for.

Brian Sledge, water attorney with Lloyd Gosselink, Blevins Rochelle & Townsend, P.C., Austin, provided an overview of Chapter 36 of the Texas Water Code, the part of the code that deals with groundwater conservation districts.

The Legislature deemed groundwater districts the state's preferred method of groundwater management, and today there are 89 some districts, 84 of which have been confirmed.

Water districts, he reminded, are created in one of three ways. They're either granted by the Legislature, by the Texas Commission on Environmental Quality through a landowner petition process, or through the priority groundwater management area process. To date, most districts have been created by the Legislature, though some have been created by the priority groundwater management area process. No districts have been created by the TCEQ.

Groundwater districts typically have an elected board of directors, though some, Sledge noted, are appointed. Groundwater districts are typically funded by ad valorem taxes, though some are funded by user fees, sometimes referred to as production fees, which are based on the amount of permitted water or use of water. Some districts have a combination of user fees and taxes.

Local groundwater districts have been empowered by the Legislature to fashion rules and regulations that best suit the needs for their particular resource. Districts must adopt a management plan which sets forth the goals and objectives for managing the water resource, and that plan has to be approved by the Texas Water Development Board, he said.

"The theory is that the district will adopt regulations to implement the management plan that will accomplish those goals and objectives," Sledge said.

Districts regulate groundwater primarily through two methods. One is through the spacing of wells, by requiring new wells to be a certain distance from existing wells or from property lines.

The second way they may regulate groundwater is production regulation through a permitting process. Some districts issue permits based on the amount of land owned. In this scenario landowners

typically are permitted so many acre-feet of water per surface acre of land owned contiguous to the well site from which the water is being produced, he explained.

“That’s a real good system of allocating a resource, particularly on areas where you have aquifers of low transmissivity,” Sledge commented, “like in the Ogallala. It doesn’t seem to work as well in the karst limestone aquifers like the Edwards and Bone Springs, where you have high transmissivity.”

In the karst aquifers, groundwater districts typically assign permits based on a first in time, first in right type of use or they may issue permits based on a defined historic use period. Still other districts may choose to regulate production through the use of production fees by placing a value on the groundwater produced or to be produced.

“The idea is that this would or should incentivize folks to preserve water or at least be a little more mindful of how they use it,” Sledge noted.

Sledge also reminded listeners that there are three basic statutory permitting exemptions. The one that affects most landowners is the domestic and livestock use exemption on tracks of land greater than 10 acres.

The second exemption is the oil and gas exemption.

“This is something that’s getting a lot of play right now on the Barnett Shale,” he told listeners. “A lot of folks are not happy about gas wells coming in next to their homes, and they’re asking what the groundwater district is doing about this issue.

“Unfortunately, they’re finding that in some cases those groundwater districts’ hands are tied. That’s because the Legislature struck a deal with the oil and gas industry. Water wells used for secondary recovery operations have to be permitted, but water wells used for exploration drilling do not have to be permitted,” he stressed.

The third permitting exemption is for surface coal mining.

Groundwater districts may also regulate export of groundwater outside district boundaries.

“This used to be a big topic of discussion and contention, but the Legislature clearly settled this awhile back,” Sledge told listeners. “In SB 2 the Legislature amended Chapter 36 to say that a district can’t be any more restrictive or treat anyone who wants to export that water any differently. They can, however, charge an export surcharge, though that surcharge is statutorily capped and is tied either to the district’s tax rate or their production use fee rate or some deal negotiated between the district and the permittee,” Sledge explained.

Sledge then switched gears to focus specifically on changes made to Texas water law in this past legislative session. He told listeners that two bills really affected Chapter 36 of the Texas Water Code.

HB 2423, authored by Robert Puente, chairman of the House Natural Resources Committee, dealt with landowners participating in the Conservation Reserve Program. Essentially this bill said that

districts that have adopted historic use cannot prevent those participating in CRP from obtaining a permit just because they didn't use water during the defined historic use period.

“This bill sent a clear message to districts that they could not discriminate against those participating in the federal CRP.”

The other big water bill that came out of the 79th Legislature was HB 1763, authored by Rep. Robby Cook and sponsored by Sen. Robert Duncan.

“This bill outlined a clear set of new process procedures for groundwater districts to use in rulemaking proceedings and permit proceedings and hearings,” Sledge said. “The second big thing, the most important thing this bill did, was it called for a complete overhaul of the planning process with regard to groundwater conservation districts.”

With regard to planning, Sledge outlined what he identified as “four big changes.” First and foremost, he noted, determining groundwater availability has been regionalized.

“The state has been divided into 16 groundwater management areas,” he explained. “All the districts within a defined GMA have to work together to come up with the desired future conditions of the aquifer within that GMA.”

Each district within the GMA has one vote, and the ultimate decision is based on a two-thirds majority vote. Also, he noted, the GMAs are statutorily charged with completing this task by 2010.

The desired future conditions for each respective GMA are then submitted to the Water Development Board, which comes up with a quantified number representing “managed available groundwater.” That number is then used by the districts in their permitting process.

“That’s a number that districts can statutorily exceed if they want to, but they have to at least permit that total amount so long as they have permits in the door requesting it,” Sledge told listeners.

HB 1763, he said, also made it possible for virtually every phase of the water planning process to be legally challenged.

“The established future desired conditions by the GMA groups and districts can be challenged; approval or disapproval of the plan can be challenged; the establishment of available groundwater that can be challenged; etc.,” Sledge commented.