

Part 1: Who has the water, where it's going

By Bill Hankins

The Paris News

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The tap is running in the State of Texas.

Water is flowing freely despite cries from scientists, lawmakers and environmentalists we must conserve for future generations.

The problem is no one seems to know who must lead the conservation efforts, and that issue is being clouded by who has the water and where it is going.

By luck, East Texas is one of the areas that has plenty of water - at least for now, but everyone from the Metroplex to West Texas seems to be looking thirstily in this direction.

The Metroplex wants to get control of our surface water as well.

There are fledgling operations out there who want to control East Texas aquifers and all the underground water.

Area farmers are trying to ward off everyone and keep the water for future crops and production.

Rumors run rampant that newly developing conservation districts across the state are getting a stronger hold on water supplies in the state.

There are those who say that changes are ahead for the decades old "rule of capture" laws that allow whoever can pump the underground water the fastest gets to keep it.

And there are people who deny that any changes are ahead.

Rest assured there are changes ahead, especially for areas such as West Texas where water supplies are being used in great quantities and the Texas Commission on Environmental Quality is urging action to control water supplies.

That area and several others across the state are considered Priority Groundwater Management Areas, meaning they are expected to experience, within 25 years, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal and contamination of groundwater supplies.

Sitting comfortably in East Texas, where water supplies are plentiful, farmers and landowners are wondering if or how soon those PGMA areas may begin siphoning off our abundant supplies.

TCEQ has recommended the development of groundwater conservation districts across the state. State law authorizes the citizens in a PGMA two years to establish a GCD.

If local action is not taken in that time frame, TCEQ is required to establish a GCD consistent with the original recommendation.

Under either scenario, the resultant groundwater conservation district would be governed by a locally elected board of directors.

But TCEQ has told Lamar County and the surrounding counties, because there is no anticipated water shortage, they do not need to establish a conservation district.

That alone has caused some concern, especially from Lamar County Judge Chuck Superville, who said he fears if we do not have a conservation district or a say in districts that may form elsewhere, then others might step in to try to control our own water.

Underground water supplied almost half the water used in the state a decade ago, and the supplies apparently are steadily decreasing.

Groundwater supplies are expected to decrease by 19 percent by the year 2050, while the population of Texas is expected to almost double during the same period.

State officials say groundwater is and will continue to be a major source of water for Texas, but today most of Texas is still not contained within the boundaries of a groundwater district.

The Texas Legislature has passed several pieces of legislation relating to groundwater regulation.

In 1913, the Legislature passed a law defining and prohibiting waste from artesian wells.

In 1931, it passed a law authorizing the Board of Water Engineers to promulgate rules to conserve groundwater.

In 1949, in response to excessive withdrawal of water from the Ogallala aquifer, the Legislature authorized creation of underground water conservation districts.

That act has been tweaked over the years, but Legislators have been verbal in criticizing the failure of groundwater districts to adequately regulate groundwater production within their jurisdictions.

No one has spelled out what more regulation on underground water would mean, or if the "rule of capture" could be affected by more controls.

Through the years, state agencies have put their thumbs down on what people could do with their water, and more changes appear on the horizon.

In the next few articles in this series, The Paris news will attempt to explain the different water districts, the problems and solutions of the handling of water, the changing face of water rights in Texas, planning districts and the rush to obtain surface water for major metropolitan areas and what the state has in its water plan for the future.

Part 2: Muddy the water

By Bill Hankins

The Paris News

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This is the second of a seven-part series on water rights in Texas - who has them and who does not. In this part, The Paris News deals with the laws, where they have been and where they are going.

Texas law governing water rights is complex.

It divides water into unrelated legal classes with different rules of law governing the ownership and use of each class.

Several classes of underground water and surface water have regulations controlling them, and the Legislature is turning more and more toward making rules about the moisture in the air.

Water rights law determines who is entitled to use the available water supply, in what quantities and for what purpose - and when it can be used.

Texas water law started before there was a Texas, back in the early 1800s, when land grants were being passed out to private settlers who were handed the riparian water rights on the property they received.

At that point, settlers could draw water from any streams or water areas for any purpose they wanted.

According to the Handbook of Texas Online, in 1872, the Texas Supreme Court decided that doctrine was not adequate since much of the state was arid or semiarid and needed some of the water that was plentiful in other areas.

That was the first real controls by the state on its water.

Since that time, individuals must appropriate water rights from the state through established statutory procedures.

Until 1913, a landowner could appropriate water from a stream merely by filing a sworn statement and map with his county clerk describing the diversion. After that date, the individuals were required to make application to a state agency.

In 1967, all water rights claims were ordered recorded with the Texas Water Commission, and the state learned there was an abundance of water users with unrecorded claims.

The TWC then had to sort out all those who claimed water rights and determine the validity of those rights, and for the first time in history, the maximum quantity of water that could be taken and the number of permit holders was limited.

Now, with new lake construction, the state allows massive amounts of water to flow from one area to another in the state, feeding metropolitan areas with rural water supplies and allowing the bartering of water from city to city.

That sometimes becomes a problem when a metropolitan area buys water from a rural area, then uses that water as a bargaining tool to draw industrial development, leaving smaller city economic development commissions competing with the big cities.

Water that flows over a land area before it is concentrated into a channel or stream is another legal class of water.

Texas law allows a landowner to trap all the diffused surface water on their land into ponds or farm tanks without a permit, so long as the reservoir does not exceed 200 acre-feet in storage capacity and the water is used only for domestic and livestock purposes.

Above that amount, a permit is required, but those ponds and tanks can have an adverse affect to the flow of nearby streams and downstream water use.

Under the present Texas law, downstream water users have no recourse to protect their existing water rights.

Water beneath the surface is another legal classification.

According to the Texas Water Development Board, that underground water provides 60 percent of the state's water needs.

Water stored naturally underground in aquifers is in constant use for agriculture. Wells allow a constant draw from the aquifers and other underground streams.

The aquifers are naturally replenished by rainfall, but in some dry areas of the state more is being pulled from the aquifers than is returned.

In 1904, the Texas Supreme Court provided the rule that remains today in Texas - the rule of capture in which the owner of the overlying land can pump and use the water with few restrictions, no matter what the effect on adjacent landowners or more distant water users.

That rule, commonly known as the rights of the man with the bigger pump, has not been altered, but now is undergoing some pressure from newly established conservation districts.

Those conservation districts can exercise some control over landowner rights to underground water.

There is the regulation power over well spacing, water proration and groundwater conservation, but the conservation districts, first permitted in 1950, have yet to exercise the powers they have.

If they do, it could bring new Supreme Court challenges by landowners seeking to protect their rule of capture rights.

State Rep. Mark Homer, D-Paris, has repeatedly said: "I do not think the Legislature will ever change the rule of capture laws."

Another water source - atmospheric moisture - is being studied, with scientists looking at weather modification to increase rainfall and suppress hail. No Texas statutes deal with rights to atmospheric moisture, but Texas courts have allowed private efforts, saying: "We believe that the landowner is entitled to such rainfall as may come from clouds over his own property that nature in her caprice may provide."

A Weather Modification Act passed in 1967 puts weather modification under the control of the Texas Water Development Board, and since 1977, the Texas Water Commission took over the issuance of licenses and permits required for weather modification operations.

Texas Water Development Board officials have said the diversity of laws governing different water sources makes it almost impossible to achieve coordinated and efficient use of water.

The State of Texas does claim ownership to all water within the state, but controlling it will likely take much more time and many court battles.

Then, there is the new approach to obtaining water in Texas - desalination, the purifying of gulf

waters.

No laws to date govern that.

Part 3: Water: Who has control, who wants control

By Bill Hankins

The Paris News

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This is the third of a seven-part series on water rights in Texas. In this part, The Paris News deals with the many different agencies, boards and water districts in the state.

Texas Commission on Environmental Quality has broad powers governing the state's water supply, and it is moving quickly to solidify its powers and take firm control on water, both in quantity and quality.

In 1985, the Legislature moved Texas closer to a more comprehensive local management and regulation of groundwater than had previously been authorized.

It gave the TCEQ the authority to set up a structure to designate "critical groundwater areas" and provide economic incentive to create underground water districts.

Those districts could only be formed when supplies of groundwater in an area were critically short.

Statute required the boards be run by local folks, providing regulations for local folks concerning local folks' water and the conservation of it.

TCEQ apparently figured locally established restrictions would be better accepted than if the state put controls on underground water.

Priority Ground Management Area boards would have the power by vote to establish regulations on how much water could be pumped from land and how it was to be used, altering if not eliminating the state's rule of capture.

Northeast Texas, according to TCEQ, would not be affected by a PGMA, because "it is not expected to have a critical shortage of water in the next 25 years."

However, in areas where there is no water shortage or an anticipated water shortage, groundwater management districts are being formed across the state.

To date, almost 100 groundwater management districts have been formed.

TCEQ informed Lamar and other Northeast Texas counties, they do not need to form groundwater management districts.

There are those who argue that not needing to have the area's groundwater regulated could become a problem itself - leaving Northeast Texas counties without a say in such cases if the state decides to regulate areas without locally formed management districts.

County judges in five Northeast Texas counties have said they prefer at least having a voice in any area or state water management areas.

The state's "Conservation Amendment," Article XVI, gives the Legislature greater power than it has ever had to regulate specific resource areas than the general power to regulate already provided in the Texas Constitution.

Among other powers, the article authorizes and, in fact, imposes a duty on the Texas Legislature to regulate groundwater and oil and gas production.

The Texas Supreme Court has recognized the Texas Railroad Commission has the power to regulate use of the state's groundwater.

Texas Water Development Board, operating along with the authority of the TCEQ, has the authority to determine the water resources in the state and the quality of the water.

The TWDB also is responsible for developing and continuously updating the state's 50-year water plan, which often is the source and the drive for legislation governing water - both surface water (in streams and stored in reservoirs) and groundwater.

The concerns over water management districts is that they have the authority to limit production based on tract size to conserve, preserve and protect groundwater to achieve a district's conservation goal.

According to attorney's Michael J. Both and Ross Richard-Crow, attorneys for the Panhandle Groundwater Conservation District, "authorizing production limits (of groundwater) to be based on tract size to achieve a district's conservation goal clearly curtails the rule of capture's doctrine allowing a small tract landowner to produce as much water as a large tract owner."

In addition to groundwater management areas, there are the established Water Planning Districts across the state, mostly concerned with surface water, but looking more closely at underground water sources for future development.

As long as both surface and groundwater is plentiful in Northeast Texas, landowners have little to fear in the changing of their rights, but as major areas such as the Metroplex continue to pull water from Northeast Texas, that volume of water could be diminished in the future.

Rule of Capture applies now, but it may not always.

Part 4: Will NE Texas run dry?

[By Bill Hankins](#)

The Paris News

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This is the fourth of a seven-part series on water rights in Texas. Underground water is taking on a larger role in the state's water supply.

The population of Texas is expected to double in the next 50 years, and that means twice as much water will be needed to keep pace with today's water use.

Texas Water Development Board has said the amount of surface water, unless there are major new lakes built, will not be enough to supply that increase in population.

Where will the state get its water to keep up with its growth?

TWDB officials have said look beneath your feet to the replenishing supplies of underground water in the state's aquifers.

Those aquifers have been tapped for many years, but never to the point anticipated in the next 50 years.

As the importance of the state's groundwater began to grow, the Legislature quietly began moving to develop new rules concerning its use.

Things began to change in 2005, with House Bill 1763 in how groundwater availability is determined, and the amount of groundwater available for use affects where Texans will be getting their water in the future.

Important changes brought on by House Bill 1763 are regionalization decisions for groundwater, requiring regional water planning groups to use groundwater availability numbers from the groundwater conservation districts and setting up permitting targets for groundwater production.

The changes affect the rules and plans of groundwater conservation districts and especially the state's regional water plans.

Those who look closely at water law in Texas have said the underground water belongs to the state, but those who have grown up with the old water laws have said it still does and always should be the rule of capture that allows landowners to draw and use all the water they want.

Farmers and landowners are not willing to give up that right, but Legislative changes are leaning toward controlling the amount of water that can be drawn from underground.

Northeast Texas has an abundance of water.

If, indeed as the law says, it belongs to the state, then the state, without a local say in the issue, can put controls on underground water use.

Yet the Texas Commission on Environmental Quality has told Northeast Texas it does not need a groundwater conservation district because it is not expected to have water problems in the next 25 years.

By not establishing a water conservation district, that would leave the area without a say in changes in controls or use of underground water.

That possibility has brought out such water entrepreneurs as T. Boone Pickens in the Panhandle and Rural-Urban Resources in Northeast Texas who contend the state is cracking down on underground water use and landowners should develop their own systems to control the water.

Both groups have plans to harvest underground water and sell it to the highest bidder, maintaining some profit for the landowners much the same as with oil and gas.

Rural-Urban Resources is seeking to contract with landowners to sell the water under their land to municipalities and others interested in getting water from any source.

The efforts of Pickens and Rural-Urban Resources falls in point-blank opposition to the state's conservation districts, and when the clash occurs, perhaps in the state's court system, it will be heard loud and clear across the state and especially in Northeast Texas.

In 2001, the Legislature directed the TWDB to use major and minor aquifers boundaries for the groundwater management area boundaries.

Northeast Texas has several aquifers beneath its soil.

Some of those aquifers stretch into other parts of the state.

There is a likelihood, that in areas where water conservation districts exist, controls will be put on what can be pulled from an aquifer, while the same aquifer will be left to the rule of capture in other areas.

It is the same water. It belongs to the state, but landowners in different areas can draw from it in different amounts.

That is a problem the state faces with underground water policy.

The rules are changing, like they say of the weather in Texas: "Just wait a few minutes and see."

Part 5: 'Rule of capture': The changing viewpoint

[By Bill Hankins](#)

The Paris News

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This is the fifth in a series of seven articles on water rights in Texas. In this article, The Paris News discusses the history of rules concerning underground water and the courts' interpretation of those rules.

The court system has played a major role in interpreting, establishing and preserving water rights policy in Texas.

Judges have traditionally leaned toward the "historic water use rights," upholding the rule of capture in almost every case brought before them.

But the rule of capture may be one of the most misinterpreted of all water policy.

According to Greg Ellis, executive director of the Texas Alliance of Groundwater Districts, the rule of capture is a common law tort rule that prevents one landowner from suing a neighbor for damaging his well.

"Because the courts won't impose limits, people have interpreted that court rule as permission to pump unlimited amounts of groundwater, but that really is not the case," Ellis said.

"Although the Texas Supreme Court has never specifically decided the question of whether there is a vested property right in groundwater beneath a landowner's property, the fact no landowner has won a case trying to protect that 'property right' gives us a pretty good indication of how they will finally decide that issue."

Ellis said it is his legal opinion that rule of capture actually means the exact opposite: Because you cannot protect your groundwater from 'trespasses,' your property interest does not vest into a property right until it is actually captured."

Ellis said based on that interpretation of rule of capture, there is no way or reason for a water management district to move against it.

"The tort rule still applies whether or not there is a district in place, and certainly a number of

districts have restricted groundwater withdrawals to ensure a sustainable source of fresh water," he said.

In a case 10 years ago, *Sipriano v Great Spring Waters of America, Inc.*, better known as the Ozarka case, Ozarka was sued because its continued drawing of water lowered the aquifer levels to nearby property.

The Texas Supreme Court ruled in favor of Ozarka, saying the longtime rule of capture policy was valid and allowed it to draw as much water as it wanted.

Times have changed since then.

This month, in the *Guitar v Hudspeth* case heard by the Supreme Court, there appears to be a new leaning on water rights.

Some of the basics in the case are:

- . legislative changes have created new rules;
- . new rules have created several new types of groundwater withdrawal permits, including "validation permits" for those who have been pumping groundwater in the past 10 years;
- . validation permits can be amended to change the point of withdrawal, purpose of use, place and use and ownership;
- . limits can be set on the total amount of groundwater that can be pumped in order to make sure the aquifer is sustainable in the long term;
- . export permits (those permits that allow water to be pumped from one area and then sold or taken to another) can only be issued to those with validation permits.

That being the case, the courts have now ruled underground water management districts (sponsored by the state) can restrict the amount of water being pulled from aquifers or moved from one district to another;

One interpretation of the court ruling is that those seeking new permits may be left out in the cold because the validation permits already issued take up the total amount of water that can be drawn.

"Certainly a number of districts have restricted groundwater withdrawals to ensure a sustainable source of fresh water," Ellis said.

In the Houston area, the subsidence districts have required reductions in the level of groundwater withdrawals up to 90 percent of total water demand.

In the San Antonio region, the Edwards Aquifer Authority issued permanent permits based on actual groundwater use over the prior 21 years, and anyone who did not have historic use did not qualify for a permit and will not be allowed to drill or operate a well except for a small number of exempt uses.

In the Panhandle, the districts there are limiting groundwater withdrawals to ensure no more than 1.5 percent drawdown in any single calendar year.

The methods and means of protecting the aquifers vary throughout the state based on the aquifer conditions and economy for that area.

Ellis said the unifying themes are:

- . to preserve the aquifer;
- . to protect the property rights of those who use that aquifer and
- . to preserve the economy of the area.

In Northeast Texas, water is plentiful. No such restrictions apply, but that could be changed in the future.

NEXT: Some people fear the state is slowly taking over all water rights in Texas.

Part 6: The fight is on

By Bill Hankins

The Paris News

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This is the sixth in a series of seven articles on water rights in Texas. In this article, The Paris News discusses the private groups seeking to market underground water.

In the late 1990s, Dallas billionaire T. Boone Pickens began quietly buying up water rights from landowners in the Texas Panhandle and across eight other states in the Southwest.

His intent was to sell water to cities and water districts across Texas, and especially to the thirsty Metroplex.

There were those who jumped in quickly to say his efforts were just a bit of folly and his plan would never work.

But Pickens had plans far greater than anyone knew.

He campaigned and lobbied legislators to make subtle changes in the state's water laws and water plans, and now he sits on top of an empire called Mesa Water and Mesa Power, benefiting from the legislature's newly weakened requirements for water districts.

Pickens' interests in water started in 1997, when the Panhandle's Canadian River Municipal Water Authority bought the rights to water under land near his ranch to supply Amarillo and Lubbock.

Pickens knew his ranch sits atop the Ogallala Aquifer, which covers parts of eight states, and he knew the Canadian River Municipal Water Authority would pull water from under him out of that aquifer.

He organized some of his neighbors, bought up vast water rights and sought a way to sell aquifer water.

He applied to form a fresh water supply district in 2002 but abandoned the effort when it ran into serious challenges. But in the past general election he brought back the fresh water district, which gained approval from a small group of selected landowners.

Pickens also has moved into other areas such as the production of electricity through wind-powered generators. He is now seeking to build lines to transfer the water and electricity from his panhandle ranch to the Metroplex.

Pickens is not alone in bucking what some entrepreneurs interpret as the state's hold on water and its drive to control all the water in Texas.

A fledgling organization in Northeast Texas called Rural-Urban Resources this year began much the same as Pickens did, contracting with neighbors and landowners in the area for their underground water rights, with the intent to sell the water to anyone who wants to buy it, including the Metroplex.

Rural-Urban Resources is operated by Mickey Anderson of Bagwell and Jake Street of Paris.

"We have had many contracts, and we anticipate negotiations on the sale of water early in 2008," Street said. "We have deliberately tried to stay below the radar of the various state agencies that deal in water matters. The TWDB (Texas Water Development Board) and other state agencies and the existing water districts are not support agencies for us."

Street said Senate Bills 1, 2 and 3 and other legislation on the books have set the plan in place for state control of all water resources.

"You cannot have a Master Plan on Development of Water Resources without control of groundwater," he said.

Street said: "What we are doing is standing in their way to gain control. Our warnings that state control is coming is a red flag to landowners everywhere, which puts pressure on the elected officials who oversee the agencies of the state."

Street said Rural-Urban Resources' objective is to help keep the "rule of capture" for area landowners, and to make money for them while doing so.

"That is not in the state's interest," he said.

Street said different state agencies are presenting different opinions on water laws that serve their own individual purposes.

He said each agency is pushing and selling its own agenda for influence and power in water circles and officials of those agencies spout opinions that have little basis in fact or law.

"That's why water laws are so confusing, but regardless of what some may claim, our opinion is that control is coming," Street said.

Pickens may have an edge from both sides, with his deep pockets and his lobbying efforts. He apparently is working from both sides to achieve the same goals.

Mesa Water said if it is allowed to build a pipeline to Dallas it will allow it to legally extract up to 200,000 acre-feet of water a year from the Ogallala Aquifer.

If he gets his way, some water officials contend, the Ogallala Aquifer could lose up to half its water by the year 2050.

The battle lines are set between the conservation districts who want to keep the aquifers full and

the organizations that want to sell off the water.

Right now, they are nose and nose, but the finish line is years away.

Part 7: Growth stirs a battle to draw more water

By Bill Hankins

The Paris News

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This is the last article of a seven-part series on water rights in Texas, and in it The Paris News looks at how the state will keep up with water use and what the future holds.

Texas is the fastest growing state in the nation.

Its population is expected to more than double in the next 50 years.

Unless something changes, water supplies in the state will drop in that same period of time, because residents of Texas are using more and more of the precious liquid that sustains its cities and towns and provides the life for business, industry and agriculture.

The Texas Water Development Board is charged with finding a way to conserve the state's water supply while developing new sources of water.

Its task is formidable.

It has to look at surface water (the state's reservoirs, streams, ponds and rivers), underground water (wells, underground streams and aquifers), diffused water (water that hits the ground when it rains and flows overland to a holding area), desalination (making salty gulf water into usable fresh water), atmospheric water (water that can scientifically be tapped from the clouds and from the atmosphere), brackish water (underground water that so far has not been considered for use as fresh water), and come up with a comprehensive plan to make the supplies of all of them grow to meet the state's future needs.

The legislature has approved the development of water control districts, water conservation districts, priority water control districts, water planning districts and now must contend with private interests want-ing to put their buckets under the tap to sell water to municipalities and private entities.

The state has 16 water planning groups, operated by people who represent a variety of interests.

Below those there are almost 100 water control districts, and newly forming across the state are the water conservation districts, each with a mandate to protect Texas' diminishing water supply.

Add to that recipe, operations such as T. Boone Pickens Mesa Water and Northeast Texas Rural-Urban Resources, who want to tap the underground water supplies and the aquifers to sell to organizations needing water.

There are those who have said it may be time to take that next step and privatize water services in Texas much as the state did with electricity suppliers in the 20th century.

Each of the state's regional water planning groups compiles a regional water plan, which is sent to the TWDB for approval. Regional water plans then are used to develop the state water plan.

Then the legislature gets back into the water development mix, deciding how to finance the state water plan, if it needs to build new reservoirs, if it needs to address the environmental water needs, what steps to take about conservation and water reuse.

Moves by the legislature already have been to turn most of the water planning over to regional groups and to give them power to govern their region and establish their own rules.

In the past few years, the legislature has loosened its hold on some of the old rules in favor of more controls and more conservation of water.

The state already owns all surface water in Texas and now may be moving to at least control all the underground water.

The rule of capture in which a landowner could drill a well and use all the water he or she can capture is under bombardment from a continuous flow of legislation that has turned toward conservation.

Now there are controls on how many wells can be drilled, where they can be drilled, and in some areas, how much water can be pulled from those wells.

TWDB has oversight of all this and must develop a 50-year water plan for the state and keep it updated each year.

The task is made more difficult by unpredictable water resources that can be affected by droughts, diminished water supplies and the growing thirst of a growing population.

The future of Texas water depends on many things, the largest among them will nature replenish the water supply as rapidly as the state's residents need the water.

Will the laws change to determine who will be in control of the water, and what rules will apply to conservation of that water?

Another big issue facing Texans is all the state's areas do not have an equal amount of water, and how will the state solve the disparity.

The cost of water to residents also differs greatly across the state, from only a few cents per 1,000 gallons to a few dollars for the same amount.

It was Benjamin Franklin who said: "When the well's dry, we know the worth of water."

Will the well run dry in Texas?

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