

Avoiding, Identifying, and Resolving Ethical Issues in Land and Water Transactions

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For
Land and Water Law
HalfMoon Seminars
December 16, 2016

Ethics – moral principles that govern behavior

Specifically, ethics is the set of:

- Values
- Standards
- Rules and
- Agreements

that people or groups adopt for conducting their lives.

Water Ethics

Moral principles that govern a person's or group's behavior regarding management, regulation, and use of water.

Water ethics can be established:

- Globally
- Nationally
- Statewide
- Locally – city, county, or GCD
- Personally

Water and Land Transaction Ethics Can Involve Habitat and Other Species

Can water regulations or land transactions ignore the water needs of other species, such as:

Whooping Crane

Salamanders

or critical habitat, such as wildlife refuges?

Case Study: “Direct Reuse” v. “Indirect Reuse”

Direct: Reclaimed water via pipeline, storage tanks, etc directly from a water reclamation plant to a distribution system. Ex: Golf Course

Indirect: Placement of treated effluent back into a water supply source such as lake or river, then retrieved downstream to be used again. Bed and banks permit necessary.

Reuse Projects

1st: Colorado River Municipal Water District (2013) – reclaims wastewater effluent from City of Big Spring, produces 2 mgpd that is blended with raw water from reservoirs.

Ex 2: Parched Texas Town Turns to Treated Sewage as Emergency Drinking Water Source

WICHITA FALLS, Texas—City officials began blending 5 million gallons a day of treated wastewater into their municipal water system this week, launching one of the biggest so-called direct reuse programs in the country.

City officials and business leaders say it was the only way to adapt to an unprecedented dry spell. The lakes that supply the city have dropped below 25 percent of their capacity.

Scientific American July 11, 2014

Policy: State Water Plan

2012 SWP estimates that existing supply from reuse projects could produce 614,000 acre-feet per year by 2016.

Ethical Issue: Downstream water rights holders

If I reuse my treated effluent that previously went downstream to Springfield, will there be enough water in the river for Springfield to use its permitted amount?

- Surface holder may directly reuse effluent in same location, subject only to limitations in its underlying water right. TEX. WATER CODE § 11.046(c). No additional water rights needed.
- Effluent not directly reused and returned to watercourse for indirect reuse is “return flow.” Less clear authority for indirect reuse. Numerous contested permit applications before TCEQ. Need bed and banks authorization. Should this be a new appropriation?

Ethical Water Issues in Texas

Allocation and regulation of water
is a major concern:

How do we allocate water fairly?

Government or private ownership?

Farmers? Cities? Environmental?

Who should have priority in use?

Who should decide?

Groundwater in Texas and the Tragedy of the Commons

William Forster Lloyd, 1833: Unregulated cattle grazing on common land in the British Isles.

- All individuals have equal and open access to a resource
- Benefits of exploitation of the resource accrue to individuals or groups, each with motivation to maximize their use
- Cost of exploitation is borne by all of those to whom the resource is available (ie, negative externalities)

Groundwater in Texas and the Tragedy of the Commons

Examples:

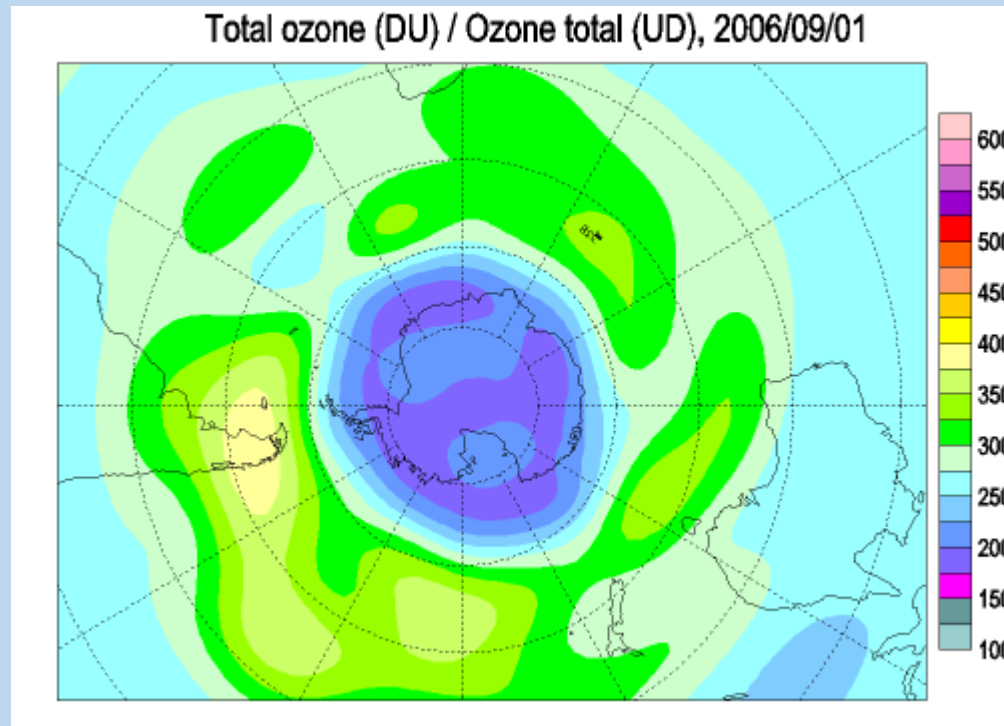
- Fisheries
- Groundwater
- Cattle grazing land
- Logging
- Antibiotic resistance

Groundwater in Texas and the Tragedy of the Commons

Solutions?

- Private ownership
- Government regulation
 - “command and control” v. tradeable permit systems
- Social systems
 - Example: Swiss alps collective farmers collectively maintaining common lands since 1517 based on understanding of issues and common interest.

Case Study in Commons Regulation: Ozone Hole



Case Study in Commons Regulation: Ozone Hole

- Ozone layer, between 9 and 18 miles up, blocks sun's UV rays
- 1985: Hole discovered over Antarctic by surprise
 - CFCs used in aerosols and refrigerants
- Ozone layer is global common resource
 - If everyone keeps using CFCs, ozone hole keeps expanding.
 - But one government alone can't regulate away the problem.
 - And command and control approach penalizes developing countries

Case Study in Commons Regulation: Ozone Hole

- Solution: Global governmental cooperation needed
- 1987 Montreal Protocol adopted by every UN nation
 - Identified most reactive types of compounds to eliminate first
 - Different, stricter rules for developed v. developing countries
 - A “multilateral fund” set up to help developing countries phase out CFCs
- Result:
 - Atmospheric CFC levels are decreasing
 - Ozone hole is diminishing, may be back to 1950 levels by 2050.
 - Widely regarded as success of international cooperation
 - 2015 EPA study: Montreal Protocol will prevent 280 million cases of skin cancer, 1.5 million deaths in US alone

Case Study in Commons Regulation: Acid Rain



Case Study in Commons Regulation: Acid Rain

- Problem: Sulfur dioxide and nitrogen oxides cause acid rain, which is harmful to plants, trees, buildings, and aquatic life.
- Phrase first used in 1872 – Industrial Revolution
- Problem particularly bad on east coast, eastern Canada

Case Study in Commons Regulation: Acid Rain

- Solution: “cap and trade” program
- 1989 Clean Air Act amendment established Acid Rain Program.
 - Set “caps” on SO₂ from power plants. First phase (1995) was 110 biggest plants; second phase (2000) was rest.
 - Next came Clean Air Interstate Rule, which included further-reduced caps in eastern states.
- How does cap and trade work?
 - Like a combination of economics and government regulation.
 - Permits to pollute are distributed pursuant to cap; permit owners may then buy/sell those permit.
 - That way, plants will reduce emissions if it makes economic sense, ie, cost of reduction is less than market value of permit.

How to regulate water?

- It's a commons problem
- Everyone has incentive to use as much as we want
- Private ownership solution? Command and control solution? Cap and trade solution? Social contract theory solution?

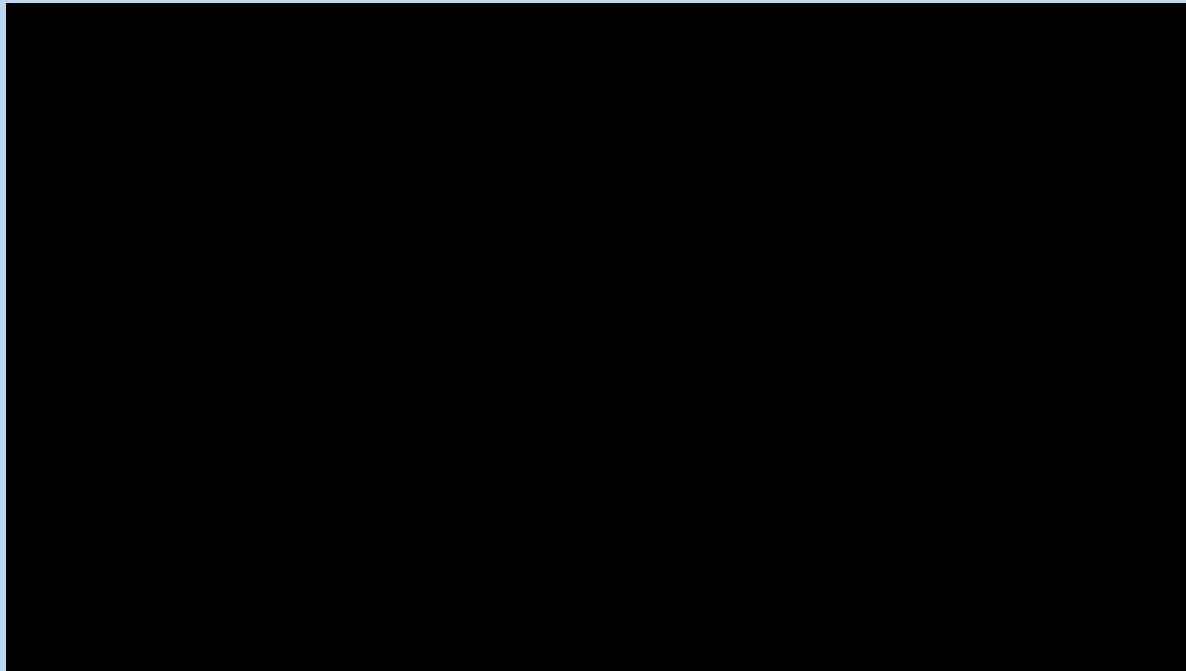
Groundwater and the Tragedy of the Commons

- “Rule of Capture” – like in O+G, the common law rule of non-liability and ownership of captured natural resources.
- Groundwater belongs to surface owner, w/ right to capture groundwater that is available, regardless of effects on neighboring wells. “Law of the biggest pump.”
 - Exceptions: Trespass (slant wells); malicious pumping to injure neighbor; waste; contamination of neighbor’s well; subsidence or surface injury from negligent pumping

Groundwater and the Tragedy of the Commons

I DRANK YOUR MILKSHAKE

(2:27-3:19)

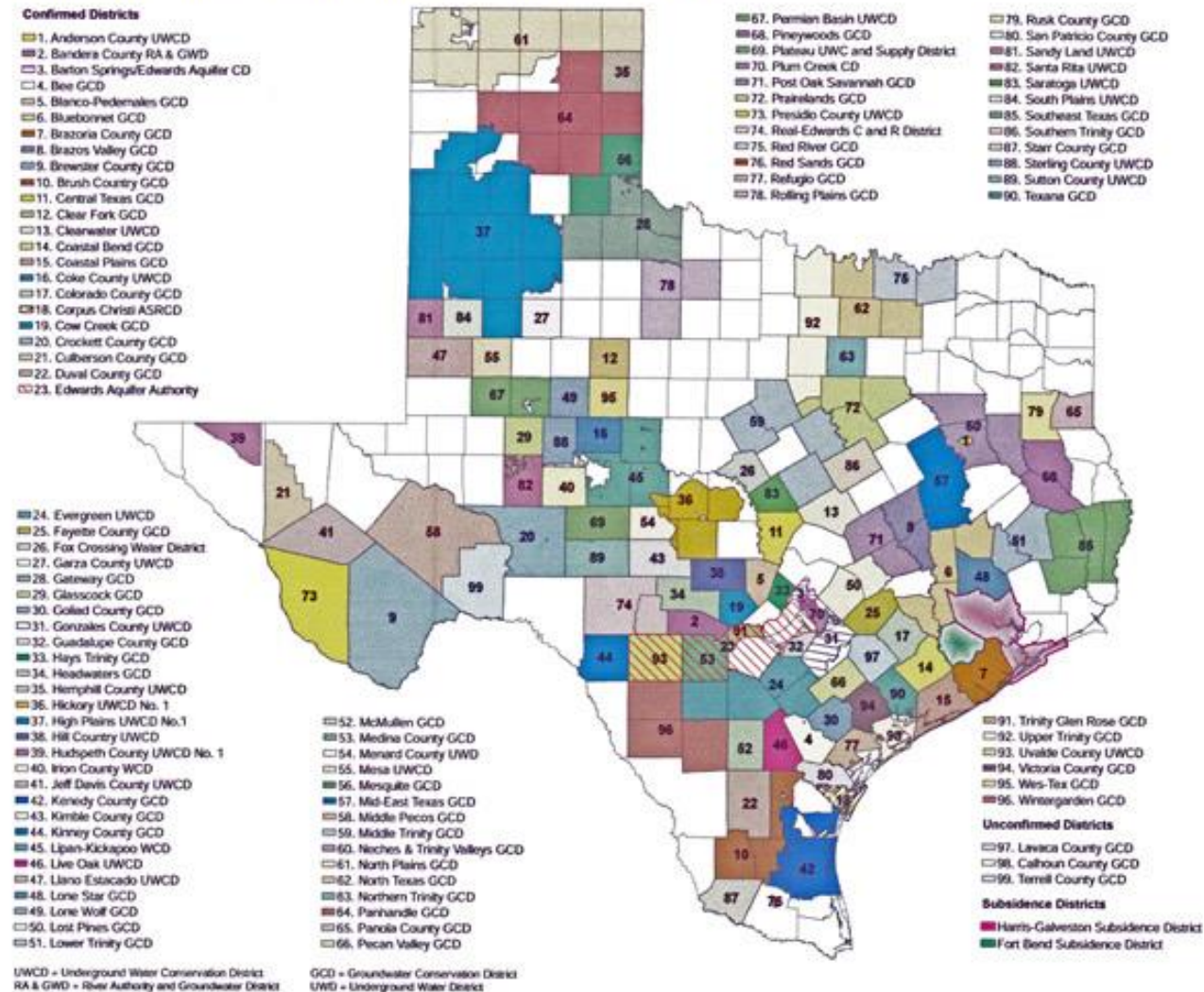


Groundwater and the Tragedy of the Commons: Regulation

- GCD is a local unit of government ratified at the local level to manage and protect groundwater
- Each aquifer has a different recharge rate (based on rainfall level, soil composition, and recharge features) and pump rate (agriculture and municipal activity)
- GCD develops groundwater management plans to balance property rights and protection of the resource.
 - Estimate amount being used, and amount of usable water.
 - Adopt rules to implement plan
 - Coordinate planning with regional planning groups
 - Keep records of drilling and production of wells
 - Permit and register non-exempt wells; adopt permitting program.
 - Board meetings, audits, other records.
- BUT: If no GCD in your area, rule of capture applies, essentially unregulated use.

Groundwater and the Tragedy of the Commons: Regulation

FIGURE 1.3. GROUNDWATER CONSERVATION DISTRICTS IN TEXAS.



Groundwater and the Tragedy of the Commons: Regulation

- Ways to create a GCD:
 1. Action of the Legislature – special legislation
 2. Petition by property owners. If area has more than 50, petition must be signed by at least 50 landowners.
 3. Initiation by TCEQ, followed by confirmation election
 4. Addition of territory to an existing district (by landowner petition).

Case Study in Commons: Neighbors Oppose Electro Purification Production Plans



Case Study: Electro Purification

- Water marketer leases groundwater in “white” area not subject to GCD
- Enters into an agreement to sell water to Buda + others
- Proposed production is 5M gpd, 24/7 operation
- Evidence indicates that this amount of production will substantially impact neighboring Trinity Aquifer wells
- Neighboring property owners worried about water being drained from their wells; taking action

Electro Purification

What are the water ethics involved:

1. Is it ethical to obtain and sell water knowing the amount of production will injure other owners in aquifer? (Tragedy of the commons!)
2. Is it ethical for the City to buy water under these circumstances?
3. Is it ethical for an engineer or attorney to broker this transaction?

Case Study: Electro Purification

- Texas Legislature gets involved
 - Lawsuit filed by Trinity Edwards Springs Protection Association (TESPA) – neighboring landowners. Dropped when Legislature acted
 - BSEACD's jurisdiction expanded to cover Trinity aquifer as well.
 - Recently: EP dropped its temporary permit application, and instead filed a Test Well Permit application. It is now testing 3 of its 6 existing test wells to support a future production permit application.

Case Study: Electro Purification

Ethical considerations in legislation:

Should like situations always be treated the same?

Are there reasons to treat similar situations differently?

If GCD denies permit application, helping neighboring well owners, how to measure the harm to EP? Takings litigation may ensue.

Second Case Study in Groundwater Regulation: Bragg Pecan Farms

Question: How do you treat someone who buys land where there is no GCD, then one is created?

Should that person have to reduce their consumption of water? Have they lost a property right? If so, who should pay for it – the GCD? The State? “Caveat emptor?”

How does this influence our ethical obligations to advise our clients?

Second Case Study in Groundwater Regulation: Bragg

Conflicting Mandates on GCDs:

- “Unquestionably, the State is empowered to regulate groundwater production” – *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012)
- “Regulation is essential to [groundwater’s] conservation and use.” – *Id.*
- Groundwater is important to protecting life, water supplies, industry, and economic development

vs.

- Each landowner “owns separately, distinctly, and exclusively all the water under his land.” *Id.* at 832.

Second Case Study in Groundwater Regulation: Bragg

- 1979, Braggs purchase Home Place Orchard in Medina Co., plant 1,820 pecan trees, drill Edwards well.
- 1983, Braggs purchase D'Hanis Orchard, with 1,520 existing trees; shallow wells eventually go dry, apply for permit from Medina Co. GCD for Edwards well in 1995.



Second Case Study in Groundwater Regulation: Bragg

- Edwards Aquifer Authority (EAA) Created by Legislature in 1993
- Empowered to implement regulatory scheme to control and manage use of the Edwards Aquifer – created aquifer-wide cap on withdrawals. Like a “cap and trade” except one buyer dominates.
- Permit system gives preference to “existing users” who filed a declaration of amount of use during historical period between 1972 and 1993



Second Case Study in Groundwater Regulation: Bragg

- Home Place Orchard: Applied for 228.85 ac/ft per year, granted permit for 120.2 ac/ft (in 2004)
- D'Hanis Orchard: Applied for 193.12 ac/ft, permit application denied due to no Edwards use in historical period (in 2005)
- November 21, 2006, Braggs file suit against EAA for taking of property and violation of federal civil rights.
- Federal court dismissed civil rights claims and remanded takings claims to state court



Second Case Study in Groundwater Regulation: Bragg

- **Issue One: Was there a taking?**
- Landowner has “absolute title in severalty to the water in place beneath his land.” *Day* at 831.
- However, this is subject to law of capture as well as police regulations.
- Key Question : Does EAA go so far in restricting Braggs’ use of their water that this amounts to a taking that “in all fairness and justice” the cost of which should be borne by the public?
- Court applies the regulatory takings test, which is an ad hoc, factual inquiry governed by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)
- *Penn Central* does not supply “mathematically precise variables,” but rather “important guideposts” that must be considered together to determine if compensation must be paid.

Second Case Study in Groundwater Regulation: Bragg

- Three “Penn Central” factors:
 - The economic impact of the regulation
 - Braggs Win. Substantial enough impact b/c had to scale back orchard operations
 - The owner’s reasonable investment-backed expectations
 - Braggs Win. Discussed further on next slide, but in short, Braggs invested in property in way in which they could reasonably expect returns
 - The character of the regulatory action
 - EAA wins. Gov’t has weighty interest in conserving and regulating water use.
- Fourth, amorphous “other factors” factor:
 - Braggs win.
 - Here, Court considered the nature of the Plaintiffs’ business, which is heavily dependent on water
 - Also, that rain alone was not a sufficient source of water

So, balance the factors...Braggs win.

Second Case Study in Groundwater Regulation: Bragg

- The “existing and permitted uses of the property” are the primary expectation of a landowner affected by a regulation
 - Knowledge of existing regulations is to be considered
 - Did the plaintiff have a reasonable expectation of being able to use the property and therefore deserve compensation?
- Braggs bought both orchards before EAAA, invested time, money, and effort, and expected to use as much groundwater as needed to irrigate
 - Braggs bought their land based on expectation of use of Edwards water.
 - Their expectations thus were “reasonable” based on understanding of pecan crop and no limits on use of water.

Second Case Study in Groundwater Regulation: Bragg

- S.A. Court of Appeals: Regulatory taking occurred. Supreme Court refused to overturn.
- But...how does one compensate the plaintiff? What specifically was taken?



Second Case Study in Groundwater Regulation: Bragg

- What Plaintiff wanted:
 - Like oil and gas cases, damages should be based on the value of the water actually taken
 - i.e. how many gallons they wanted to pump but couldn't because of EAA's regulations, X fair market value of water.
- What Defendant wanted:
 - "Parcel as a whole" rule, comparing value of the entire property (not just groundwater) before EAA was created by the Legislature, v. value after.
 - Also, that the State of Texas pays the bill, because the Legislature required EAA to deny the Braggs' permit applications.

Second Case Study in Groundwater Regulation: Bragg

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Second Case Study in Groundwater Regulation: Bragg



- Compensation is based on the highest and best use of the properties, which are commercial pecan orchards
 - Because this was the investment-backed expectation of the plaintiffs in buying the property – to raise pecan crop.
- Therefore, the “property” taken was the unlimited use of water to irrigate a commercial pecan orchard
 - And the measure of damages is the value of the commercial pecan orchards right before and right after the EAAA was implemented and applied to the Braggs.

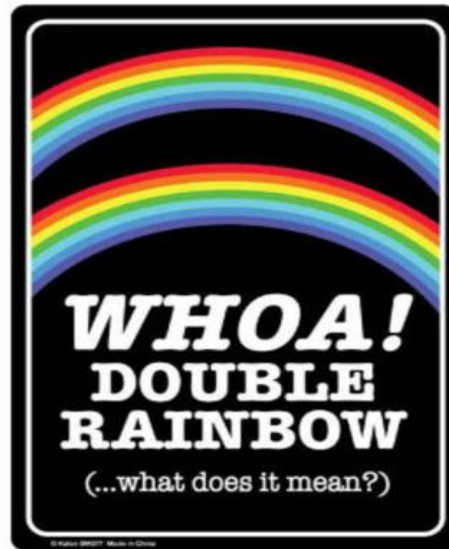
Second Case Study in Groundwater Regulation: Bragg

- Remanded to trial court to calculate what that amount of compensation should be.
 - Reached a number that was far more than EAA wanted, and well less than Braggs wanted.
- EAA didn't timely add State of Texas as a party to the litigation, so its permit holders and taxpayers bear the cost of takings.
- Is this the ethical outcome? Who should bear the costs, if any, of regulation that benefits all people who rely on Edwards Aquifer?



Second Case Study in Groundwater Regulation: Bragg

- What does this mean for the rest of the state? Will there be takings suits every time we try to regulate groundwater use? Will GCDs be afraid to deny permits?
 - No investment backed expectations if landowner bought with knowledge of regulations
 - Economic impact of regulation – still a factor
 - Positive finding for GCDs on need for regulation of groundwater
- Is it ethical to advise client to buy property in a “white area” to pump for export?



Accommodation Doctrine: Balancing Surface Uses v. Groundwater Extraction

Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016).

- The “accommodation doctrine” long applied to severed oil and gas estates.
 - A way to balance interests of surface and mineral rights owners, while recognizing dominance of mineral estate.
 - Surface owner must prove that the mineral owner’s use precludes or substantially impairs the existing surface use, that there’s no reasonable alternative for the surface user to continue their existing use, and there are other reasonable, customary, industry-accepted methods for the mineral rights owner to get their minerals and allow the surface owner’s existing use.

Accommodation Doctrine: Balancing Surface Uses v. Groundwater Extraction

- Question: Should the accommodation doctrine extend to severed groundwater estates as well?
- Facts in case:
 - 1953, Lubbock bought groundwater rights, and an easement to use all of the lands necessary to produce the water. Deed did not specify whether it can do anything anywhere on the land, or only what is necessary or incidental to access the water.
 - City wanted to build a new wellfield
 - Surface owner sued, alleging City had obligation to accommodate its existing surface rights, and place wells where it allows (so long as City can still get its water).

Accommodation Doctrine: Balancing Surface Uses v. Groundwater Extraction

- Holding: Accommodation doctrine applies to groundwater too, not just oil and gas.
 - AD applies if the deed doesn't resolve the rights between the surface owner and the groundwater rights owner.
- Lessons learned:
 - Carefully draft that deed to specify what activities are allowed, where, for how long, construction easement issues, access to wellfield, etc.
 - Groundwater owners must respect existing surface uses, and explore/drill/operate in a responsible way that doesn't interfere with surface uses.
 - Ranching/grazing
 - Recreation
 - Conservation

Surface Water Ethics: Whose Uses Do We Prioritize?

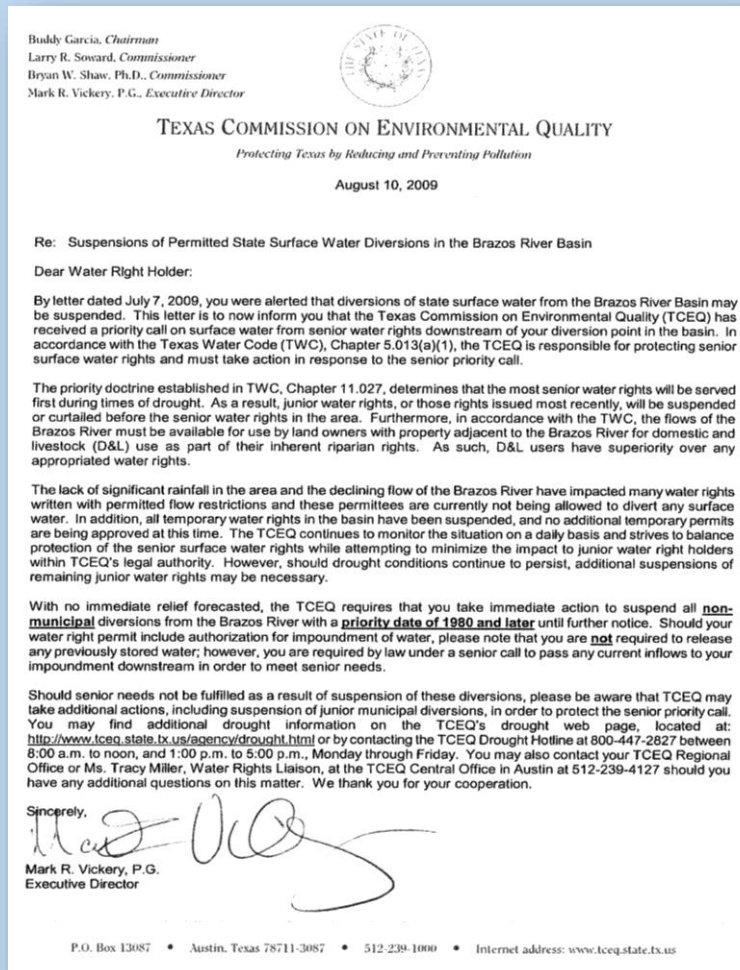
- Texas Farm Bureau v. TCEQ, 460 S.W.3d 264 (2015) (pet. denied)
- Texas Farm Bureau: 483,000 member families in Texas, represents irrigators.
- “First in time is first in right.”
- Droughts of 2009 and 2011 led to priority calls in the Brazos
 - 2009: Non-municipal, junior to 1980 shut off
 - 2011: Non-municipal and power, junior to 1960 shut off

Surface Water Ethics: Whose Uses Do We Prioritize?

Example:

2009

Suspension
Order



Surface Water Ethics: Whose Uses Do We Prioritize?

- TWC § 11.024: When appropriating water, preference given to uses in descending order:
 - ✦ Domestic/municipal use
 - ✦ Agricultural/industrial use (includes non-hydro power generation)
 - ✦ Mining/mineral recovery
 - ✦ Hydroelectric power
 - ✦ Navigation
 - ✦ Recreation
 - ✦ “Other beneficial uses”



Surface Water Ethics: Whose Uses Do We Prioritize?

- 2011: TCEQ Adopts “Drought Rules”
- **Conditions Under Which Order May be Issued:**

30 Texas Administrative Code § 36.3 (a):
During a period of drought or other emergency shortage of water, the executive director may, ***in accordance with the priority doctrine in Texas Water Code, §11.027:***

- (1) temporarily adjust the diversion of water by water right holders; and
- (2) temporarily suspend the right of any person who holds a water right to use the water.



Surface Water Ethics: Whose Uses Do We Prioritize?

36.5(c): The executive director may **determine not to suspend a junior water right based on public health, safety, and welfare concerns.**

Surface Water Ethics: Whose Uses Do We Prioritize?

Events leading to litigation:

- Dow Chemical Co. priority call 11/14/12
- ED Suspension Order Issued 11/19/12, Affirmed by TCEQ on 12/5/12
- Order suspended water rights located below Possum Kingdom Reservoir with a priority date junior to February 14, 1942
- **But** This order exempted all **municipal and power generation rights** from suspension.

Surface Water Ethics: Whose Uses Do We Prioritize?

- Dec. 14, 2012 – Suit Filed
- Relief Sought
 - Declaratory Judgment that Drought Rules are invalid
 - Injunction of Suspension Order



Surface Water Ethics: Whose Uses Do We Prioritize?

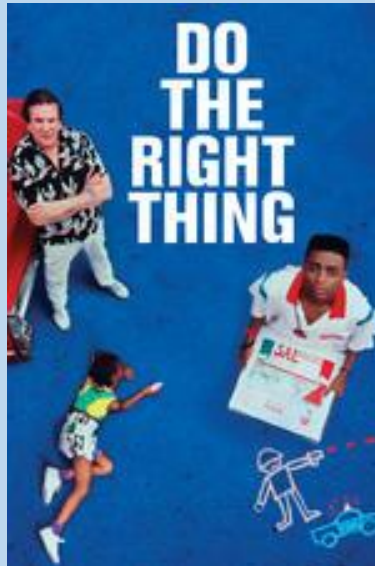
- Drought Rules invalid b/c TCEQ lacks statutory or express authority for rules
 - Suspension Orders are examples of how TCEQ have and will apply the Rules.
- Texas Water Code § 11.001(a): “[n]othing in this code affects vested rights to the use of water”
- § 11.053(a): “During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, *in accordance with the priority of water rights established by Section 11.027*, [suspend water rights].”
- Section 11.027 = First in time, first in right
- Legislature intentionally added this into 11.053(a)

Surface Water Ethics: Whose Uses Do We Prioritize?

- ✧ Tensions at issue in this case:
 - ✧ How to get more water to cities in times of drought?
 - ✧ How much do we expect cities to be prudent water planners?
 - ✧ Are cities and power plants' water uses more important than farmers and ranchers?
 - ✧ Who do we expect to invest in water supply projects?
 - ✧ Should Legislature change statute so that priority of water rights incorporates TCEQ's use priorities in granting new permits?
 - ✧ BUT! Permits are vested property rights! Takings litigation!

Surface Water Ethics: Whose Uses Do We Prioritize?

- ✧ Postscript: TX SCt denies TCEQ Petition for Review
 - ✧ TCEQ's drought rules are invalid
 - ✧ But TWC 11.053 still requires TCEQ to draft and adopt drought rules!
 - ✧ Does TCEQ



Conservation Easements and Land/Water Transactions: An Ethical Approach?

- A conservation easement is an interest in real property established by agreement between a landowner and a land trust or unit of government.
 - It runs with the land
 - Recorded as a real property interest in local records
 - Part of chain of title
 - Easement purposes may be to maintain and improve water quality, protect forest or habitat, ensure that lands are available for sustainable agriculture, etc.

Conservation Easements and Land/Water Transactions: An Ethical Approach?

- Conservation easements can be done to protect watershed that feeds into aquifers or springs. City of Austin owns a number that allow for deer leases and limited development rights (family home sites, youth camps) but otherwise restrict development.

Amazing Water Facts!



Water Saving Measures as Part of Your Water Ethos

Fix that dripping faucet already!

A faucet that drips 1 drop per second would waste 27,000 gallons of water per year

Flush the Classy Way – With a Low-Flush Toilet

The average American uses about 9,000 gallons of water to flush 230 gallons of waste down the toilet per year

Conventional toilets use 3.5 to 5 gallons or more of water per flush, but low-flush toilets use only 1.6 gallons of water or less.

Water Saving Measures as Part of Your Water Ethos

Put off doing the dishes (Yeah!)

10 to 20 gallons of water a day can be saved by running the dishwasher only when it is full.

Low-Flow Showerheads Help

One study indicates that indoor water use per person dropped 6.4 percent after low-flow showerheads were installed.

For more ideas:

- http://eartheasy.com/live_water_saving.htm
- <http://www.bewaterwise.com/tips01.html>
- <http://water.epa.gov/polwaste/nps/chap3.cfm>
- http://livinggreen.ifas.ufl.edu/water/water_conservation.html
- <http://sfwater.org/index.aspx?page=139>

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