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Texas Surface Water: Ownership and Uses

By Judon Fambrough

Texas surface water is far more visible and accessible to landowners than groundwater — but landowners should be careful. Much surface water belongs to Texas, and using it without a permit can cost as much as $5,000 per day. To avoid such onerous problems, it is critical that landowners know the definitions of various types of surface water and the permitted uses associated with each.

Publicly Owned Versus Privately Owned Water

The key element determining whether surface water belongs to the state is the presence or absence of a watercourse. Texas owns all surface water in a natural body of water or watercourse. According to Texas case law, a watercourse contains three features: a defined bed, visible banks and a permanent supply of water.

The supply of water need not be continuous to satisfy the definition, but a recurring flow is essential. Streams and creeks are publicly owned because they have a permanent supply of water. Draws, gullies, ravines and swales have defined beds and visible banks but they do not have a permanent supply of water. Water in these is considered diffused surface water and is privately owned.

All water that has not reached or entered a natural body of water or a watercourse is diffused surface water and is privately owned. It includes drainage originating from rainfall or melting snow and spring water that has not been collected in a watercourse. Water captured in depressions is considered diffused surface water and belongs to the landowner.

Floodwater created by the overflow of streams is considered part of a watercourse and is state owned. However, floodwater that becomes permanently severed from the watercourse and spreads out over the surface is diffused surface water and belongs to the landowner.

Surface Water Uses

According to the Texas Water Code, a person is liable for a civil penalty of as much as $5,000 per impoundment for each day state water is taken, diverted or appropriated without a permit from the Texas Natural Resources Conservation Commission (TNRCC) (Section 11.081). There are exceptions.

"Without a permit, a person may construct on his own property a dam or reservoir with normal storage of not more than 200 acre-feet of water for domestic and livestock purposes" (Section 11.142). A permit is required if the water from the dam or reservoir is used for other purposes. These sections of the code refer to impounding state-owned water in watercourses, not to water in draws, gullies, ravines or swales (Section 11.082).

The news recently featured the problem of state versus private ownership of surface water. The situation involved a rancher near Boerne who runs a successful tourism business on his property. While repairing his seven ponds that were damaged by 1998 floods, the TNRCC notified him that he would be fined $35,000 ($5,000 per pond) per day until he obtained the necessary permit.

TNRCC had discovered that the rancher's tourism business involved recreational use of the ponds. As a result, it determined that the ponds' primary uses were for entertainment, not for "domestic or livestock" purposes. Therefore, a permit was needed. Interestingly, the code refers to using the water **from** the reservoir, not water **in** the reservoir.

The problem could have been avoided had the dams been constructed across draws, gullies, ravines or swales. No permit would be required to build the impoundment, no size limitation would be imposed and the landowner would not be limited as to how the water was used.

So far there has been no litigation. In the meantime, two bills passed the recent legislature amending Section 11.142. HB 247 provides the water from the reservoir may be used without a permit "for commercial or noncommercial wildlife management, including fishing, but not including fish farming." SB 2, on the other hand, provides the water may be used without a permit "for fish and wildlife purposes if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by Section 23.51, Tax Code. This exemption does not apply to a commercial operation." It is unclear how the discrepancies will be rectified.

Public Access to Impounded Water

Depending on the circumstances, landowners may construct dams across watercourses considered navigable, but certain problems do arise. The Texas Water Code prohibits the obstruction of any stream navigable by steamboat, keelboat or flatboats with a dike, milldam, bridge or other obstruction (Section 11.096).

Public access is another consideration. The public has the right to access impoundments built across navigable streams. Texas recognizes two tests for navigability. One is "navigable in law," the other "navigable in fact." A stream

is navigable in law if the average width from its mouth upstream is 30 feet or more. The volume of water carried is irrelevant.

A stream is navigable in fact, regardless of its width, if the volume of water will support shipping, commerce and travel. One case declared the commercial-use test is met if the stream can float logs at some time during the year. However, floating canoes or other recreational activities do not satisfy the test.

If a stream is navigable by either definition the state owns the streambed. As public property, the public has the right to traverse it. If a dam is built across a navigable stream, the public has access to the resulting reservoir because of the streambed. If the dam is built across a nonnavigable stream, the public could be denied access as long as the reservoir does not border on public property.

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