

**AN AGGIE**

Roads Scholar



A green rectangular sign with rounded corners and a white border, mounted on a silver metal pole. The sign features the word "Welcome" in a bold, white, sans-serif font. The background is a clear blue sky with the bare, brown branches of a tree visible in the upper right and lower right corners.

**Welcome**



# SIGN OF THE TIMES



**DO NOT DRINK  
THE WATER**



SIGN OF NEW TIMES



NO WATER  
TO DRINK



# THE REAL ESTATE CENTER

AT TEXAS A&M UNIVERSITY



Judon Fambrough

Attorney at Law

***A WATERED-DOWN  
SPEAKER!***

# **PUBLICATIONS OF INTEREST FROM THE REAL ESTATE CENTER**

- Hints on Negotiating an O & G Lease
- Secrets on Negotiating a Groundwater Lease
- Wind Rights and Wrongs
- Understanding the Condemnation Process in Texas with emphasis on pipelines (Updated for 9/1/11 changes.)
- Texas Easements
- The Texas Deer Lease



Helping Texans make better real estate decisions.



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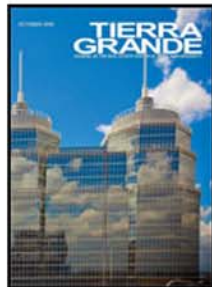


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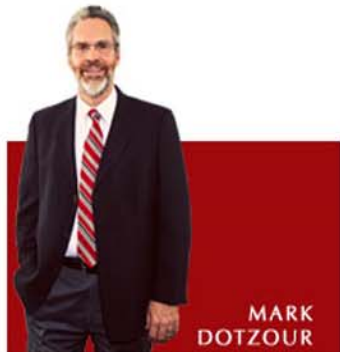
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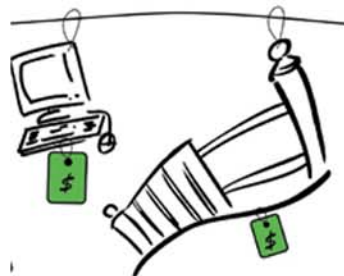
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How does the Texas economy compare with the national one? This report looks at all the angles with a particular focus on employment and unemployment. It includes rankings of various industries by employment.



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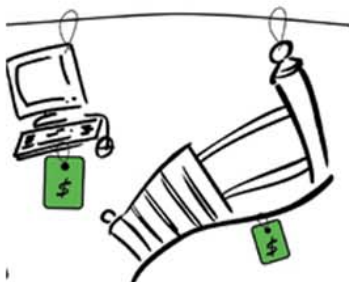
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***COOL, CLEAR  
WATER***

**Who Sang Dat Song?**



A serene landscape featuring a calm body of water in the foreground, reflecting the sky and the surrounding trees. The sky is a mix of blue and light orange, suggesting a sunrise or sunset. The trees are silhouetted against the light, and their reflections are clearly visible in the still water. The overall mood is peaceful and natural.

**TEXAS WATER LAW  
IS BASED ON LOCATION.**

**For example, where would  
you expect to find this Sign?**



**PARK  
TRASH  
ONLY**

HSI



**In front of my designated  
parking place at work?**





**AT THE ENTRY TO  
THIS GATED  
SUBDIVISION?**





At the Sonora City Park  
next to the Dumpster?



# Location, Location, Location...

Texas Water Law is divided into four (4) categories, all based on location:

**Surface Water having two categories**  
and **Groundwater having two categories.**

Groundwater greatly impacts oil and gas production.



# Observation

Most **Surface Water** is owned by the state while most (if not all) **Groundwater** is privately owned.

First, the Surface-Water categories...

# Diffused Surface Water

(Privately Owned)

Freshly fallen rainwater or melting snow spread over the surface of the ground before it:

- (1) reaches a bed, channel or **watercourse**;
- (2) soaks into the ground; or
- (3) evaporates.

You can divert the flow of **DSW** onto your neighbor w/o liability. Once it reaches a watercourse, you cannot.



# A “WATERCOURSE” has three distinct features:

1. DEFINED BED,
- 2 . VISIBLE BANKS AND
3. PERMANENT (RECURRING) SUPPLY OF WATER. (All-Weather Stream?)

But “Recurring” means “Sporadic” or “Whenever-it-rains”.



# Description of State-Owned Surface Water? (Section 11.021(a), Texas Water Code)

“The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico,... and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.”



# Use of State-Owned Surface Water

- Do you need a permit to build a pond or lake? (To impound state water)
- Depends on size (acre feet).
- You need a permit from the TCEQ to use state-owned surface water except for household and domestic purposes and to water livestock based on “Riparian Water Rights”.



# Riparian Water Rights

- “Riparian Land” means land situated on or bounded by a stream.
- Each landowner, who has a flowing watercourse on his or her property, has the right to the natural, uninterrupted flow of the water and to make a reasonable, beneficial use of that water. The use cannot injure another riparian neighbor’s use. The use must be on riparian land.

# Interfering with Flow of Stream?

- Okay as long as it does not interfere with a lower riparian water rights. Any use of a nonconforming riparian water right can be prevented.
- Riparian rights entitled the owner to a reasonable use, without waste, unrestricted as to quantity but restricted by equity, and not lost by nonuse.
- **Prevails over appropriative rights, i.e., permits issues by TCEQ!!!!**



# GROUNDWATER

(Again, Two Categories)

- 1) **ALL GROUNDWATER IS PRESUMED**  
**“PERCOLATING WATER”** and privately owned.
- 2) WATER IN AN UNDERGROUND STREAM OR LAKE IS STATE-OWNED, but none has ever been declared or found so far in Texas.

Query: Is it possible for the state to ever own groundwater after SB 332? (Later)

**WHO OWNS THE RIGHTS TO  
PERCOLATING GROUNDWATER WHEN  
THE MINERALS HAVE BEEN SEVERED  
FROM SURFACE?**



WHAT UNNAMED SUBSTANCES DO YOU GET WHEN YOU RESERVE THE “MINERALS” or “OIL, GAS AND OTHER MINERALS”?

- OIL
- GAS
- SULFUR
- URANIUM
- SALT

WHAT UNNAMED SUBSTANCES DO YOU NOT GET (STAYS WITH THE SURFACE), “AS A MATTER OF LAW” under the same circumstance?

SAND

**GRAVEL**

CALICHE

SURFACE SHALE

BUILDING STONE

WIND???

LIMESTONE

\* COAL

\* LIGNITE

\* IRON ORE

**GRD. WATER**



# Oil-and-Groundwater Mix

(The Dominance of the Min. Est.)

- Groundwater is connected to oil and gas in that an oil company can use as much of the groundwater as reasonably necessary to explore and produce the oil and gas without asking the surface owners for permission or having to pay for it.
- These wells are **exempt** from local GWDs' jurisdiction except for production (**fracking**) purposes.

# Can the Mineral Owner Ever Own the Groundwater?

- Yes.
- How is it possible?



GROUNDWATER IS CONSIDERED A SURFACE  
SUBSTANCE... AND BELONGS TO THE SURFACE  
OWNER...UNLESS **SPECIFICALLY NAMED IN**  
**THE RESERVATION WITH THE MINERALS.**

# Drainage and Rule of Capture

With three exceptions, you can legally drain your neighbor's **groundwater** without liability as long as it is done on the surface from a *legal location and within prescribed pumping limits of the GWD.*



# What is a “Legal Location” for Draining Groundwater?

If there is a Groundwater District (GWD), a legal location is dictated by its spacing rules.

If there is no GWD, then a legal location is the property line and no limits on pumping (drainage) **except for three circumstances.**

# The 3 EXCEPTIONS TO LEGAL DRAINAGE

(Generally Speaking)

- INJURY YOUR NEIGHBOR
- WASTE THE WATER
- CAUSE SUBSIDENCE



# Question

- How did the recent **Legislation (SB 332)** and **Tx S. Ct.** decision in the *Day Case* affect the **Rule of Capture** for Groundwater and drainage without liability?

# Senate Bill 332

(Vested Water Rights Statute 9/1/11)

“The Legislature recognizes a landowner owns the groundwater below the surface of the landowner's land as real property...”

1) Can the mineral owner still own the groundwater? (It's not below the property.)

2) Does this eliminate the possibility of the State ever owning groundwater?

3) Does this statute supersede the Rule of Capture...no more drainage...it's vested?

# More Language from SB 332

- “By being vested”, it entitles the landowner to drill for and produce the groundwater if done:
  - (1) in compliance with the applicable Groundwater District’s rules, and
  - (2) without causing waste, malicious drainage or negligently causing subsidence.



Did New Statute  
Change the Common Law for  
Drainage?

Maybe

Here's the wording change.

# ONE-ON-ONE COMPARISON

(You are liable for drainage if...)

- Statute says: You cause waste.
- Common Law says: You wantonly and willfully cause waste.
- Statute says: You drain your neighbor maliciously.
- Common Law says: You drain the water maliciously for the sole purpose of injuring your neighbor.

# FINALLY

Statute says: If the drainage is done negligently and causes subsidence.

Common Law says: If done negligently and it is the proximately cause of subsidence.

**YOU BE THE JUDGE! Are there two standards or one?**



# What Did the New Statute Accomplish?

- Who knows? Creates confusion?
- The attorney who drafted it says it created a new standard for drainage and liability.
- Which standard would you rather be sued under as a defendant?

# The *Day Case*

## Three Issues

- 1) Can the state take away **all** your rights (through a permitting system) to withdraw (pump) groundwater from beneath your property?
- 2) If so, does this constitute a **regulatory taking** and entitle you to compensation?
- 3) Do you own the groundwater prior capture?

# The Answers

1) The state cannot deny you the right to pump any water from beneath your property if it is for a beneficial use.

“A **full development** of the record **MAY** demonstrate that EAA regulation is too restrictive of Day’s groundwater rights and without justification in the ***overall regulatory scheme***”.

# Key Ruling

- “Land ownership includes an interest in groundwater **in place (before capture)** that cannot be taken for public use without adequate compensation guaranteed by Article I, Section 17(a) of the Texas Constitution.”
- You must give the landowner his or her **fair share** for **beneficial uses** or be liable.



**THAT'S THE "COLD,  
HARD FACTS"**



**Hope You Aggies Don't Forget  
Anything on the way Home.**



SEP 23 2006



# Reasonable Uses?

- You are unrestricted for “Natural Uses”... those **absolutely necessary** for existence.
- However, for “Artificial Uses”...those that increase a person’s comfort and prosperity but not essential or indispensable for a person’s existence, you are restricted to a reasonable use.