

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

- Hints on Negotiating an O & G Lease (#229)
- Whose Water Is It Anyway? (#2069)
- The Texas Deer Lease(# 570) (Contains New Laws on Agritourism and Waivers for Minors)
- Understanding and Nego. Res. Title Policy (# 2111)
- Understanding the Condemnation Process in Texas (#394)
- Texas Easements (#422)

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# Going Up? What Mortgage Rate Changes Mean for Homebuyers

JAMES P. GAINES

Aug 31, 2015

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## NewsTalk Texas



Dallas' Victory Park wins another tower: 25-story Victory Place

Lockheed Martin loosens bolts on 87 jobs at Port San Antonio

Sequoia at Cable Ranch links to San Antonio sale

Lubbock 2015 Student Housing Market Coldwell Banker

Beep, beep! Traffic rolls into Houston along with commuters

Epic! Piping plant ramping up to 300 jobs in San Marcos

Palestine 60-room La Quinta Inn sold

Houston's commercial real estate market shaky, GHP

TECHNICAL REPORT



## The Texas Deer Lease

Judon Fambrough  
Sep 10, 2015

Declines in revenues from agriculture and petroleum give added importance to income generated by lease hunting. This

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## Profitability of Texas Homes

Ali Anari  
Aug 28, 2015

Texas homes are profitable investments, with yields exceeding the national average for homes in

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## Property Tax Legislation 2015

Charles E. Gilliland  
Aug 28, 2015

A \$10,000 increase in the homestead exemption, appealing unequal appraisals and using an

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## Modular Housing

Harold D. Hunt  
Aug 25, 2015

Modular housing is not the same as manufactured housing. These homes are built to the same code as site-built homes in the area.



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### Monthly Review of the Texas Economy

By Ali Anari No.1862, Technical Report

Sep 23, 2015

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.

Topic: Texas Economy

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### Outlook for the Texas Economy

Luis Torres, Wayne Day No.2046, Technical Report

Sep 23, 2015

This monthly report offers an overview of the various sectors of the Texas economy, including housing, manufacturing, energy, employment and trade.

Topic: Texas Economy

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### Home Security: Understanding and Negotiating Title Insurance

Judon Fambrough No.2111, Tierra Grande

Sep 14, 2015

Acquiring a title insurance policy is a challenging task in the homebuying process. Most buyers are not aware of what the policy covers or the changes that can be made.

Topic: Legal Issues



# Today's Topic

Water:

Location, Ownership  
and Uses



# Better Topic?

Water Location  
Determines Ownership  
and/or Use

**Sexier Topic?**

**“BEDS AND BANKS”**

# 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.



# General Observation

If you can see the water, it belongs to the state. If you cannot see it, it's privately owned.

Most **Surface Water** is owned by the state while most **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 lake, channel or “watercourse”;
- (2) soaks into the ground; or
- (3) evaporates.

You cannot divert the flow of **DSW** onto your neighbor w/o liability. But, once it reaches a “watercourse”, you can!

# A “WATERCOURSE” has three distinct features:

1. DEFINED BED,
2. VISIBLE BANKS AND
3. INTERMITTENT SUPPLY OF WATER.



So, a “WATERCOURSE” really  
has two distinct features:

1. DEFINED BED and
2. VISIBLE BANKS.

And, any water in this watercourse is state-owned which is borne out by statutory law.

# 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 (Playa Lakes) and watershed... is the property of the state.”

# Use of State-Owned Surface Water

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



# Sizes?

(Sec. 11.142 of Water Code)

- If the normal storage capacity does not exceed 200-acre feet, no permit required and no limit on # of dams.
- If the normal storage capacity is >200 to 500-acre feet, need a permit and meet **dam safety requirements** (w/exceptions).
- Over 500-acre feet, need permit, meet **dam safety requirements** (no exceptions)

# Problem with Pond Dams

- Both the **Federal and State Law** governs watercourses. The TCEQ governs the use of the water and permits for ponds depending on size.
- The EPA via the Clean Water Act governs interference with (or the invasion of) wetlands which could involve constructing dams on Streams and Gullies.
- Beware of WOTUS if it is implemented.

# Over Permitting a Stream

- “Riparian Land” means land situated on or bounded by a flowing stream.
- Each landowner with a flowing stream on 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 downstream riparian owner’s use. The use must be on riparian land.
- **Superior to State Appropriated Water.**



# 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.

# Ownership of GW

- If the Mineral Estate and the Surface Estate have been split, who owns the groundwater, the Mineral Owner or the Surface Owner?
- **Answer:** The Surface Owner does if “groundwater” is not named in the reservation.
- Is it ever possible the Mineral Owner ever own the groundwater?
- Implications of Surface Ownership of groundwater in Oil and Gas Production? (Later)

# Drainage and “Rule of Capture”

With three exceptions, you can legally drain your neighbors' groundwater without liability as long as it is done on from a *legal surface 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 and pumping limits.

If there is no GWD, then a legal location is 50’ from the property line with no limits on pumping **except for the 3 exceptions for drainage** on next slide.

# The 3 EXCEPTIONS TO LEGAL DRAINAGE

(Generally Speaking)

- INJURY YOUR NEIGHBOR
- WASTE THE WATER
- CAUSE SUBSIDENCE

# Groundwater 101

- **1)** Does the Oil Co. have the automatic right to use groundwater, **free of charge and without surface owner's consent**, in association with oil and gas drilling and production?

**Yes.** The mineral owner (or mineral lessee) has the implied right to use as much of the **surface and surface substances** as reasonably needed to explore and produce the minerals without asking permission or having to pay for it.



# Another Question

- Are oil companies subject to the GWD for the location for drilling its water wells and the amount of groundwater used for fracking?
- ANSWERS: For Location? **NO**
- For the amt. of GW? **MAYBE**
- The GWD may be able to limit **the amount** of groundwater used for “production.” But no case law as to whether fracking is an “exploratory” or “production” activity.

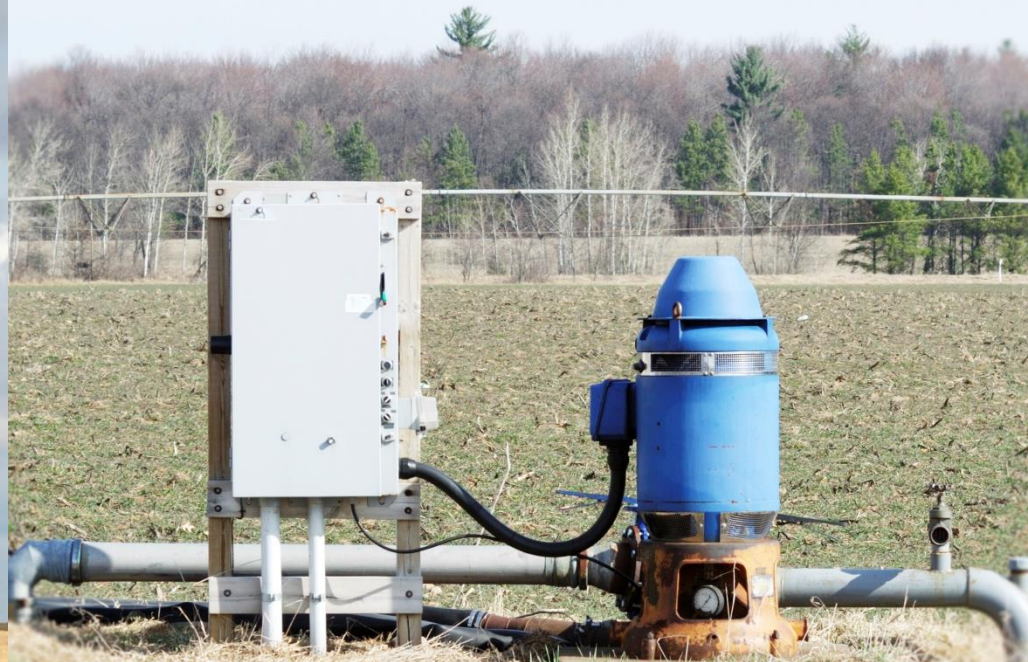
# REVIEW

- The Water Cycle

- **UPDATE**

**Oil and Gas Lease**  
versus

**GROUNDWATER  
DEED OR RESERVATION**



**How are they similar?**

**Both are Deeds.**



# Groundwater Update

- On May 31, 2016, the Texas Supreme Court in *Coyote Lake Ranch v. City of Lubbock* that the Accommodation of the Estate Doctrine applies to severed groundwater production.
- Before, the Doctrine applied only to the exploration and production of oil and gas.
- See *Surface Tension: The Accommodation of the Estates* pub. 2090 on the Center's website.

# Facts

- City purchased the groundwater (with deed, not a lease) from Ranch in 1953. Comprehensive agreement accompanied the deed regarding permitted surface operations.
- City proposes development in 2012. The Ranch seeks an injunction to stop development because of (1) environmental concerns and (2) the agreement omitted too many details.

# Environmental Concerns

- Mowed paths would not allow grass to grow because of cows, wind and drought.
- Hawks would land on overhead poles and wires and prey on prairie chickens.
- Agreement too lax on where drill sites could be located and the roads and pipelines leading to them. (Wherever reasonably necessary or incidental...)
- This is too abstract?????



# Holdings

- T/Ct grants injunction and applied the Doctrine to groundwater.
- Appellate Ct. reverses. The Doctrine applies only when one estate is dominant over the other.
- T.S.Ct. reverses App. Ct. and applies Doctrine to groundwater and reinstates the injunction.

# Sur. Owner's BOP

- 1) The groundwater owner's use of the surface precludes or substantially impairs the surface owner's (man-made) existing use.
- 2) The surface owner has no available, reasonable alternatives to continue its existing use.
- 3) The groundwater owner has available reasonable customary and industrial-acceptable means to produce the water and allow the surface owner to continue its use.

# Problems with Case

- Departs from requiring a permanent, pre-existing man-made condition on property. Now pre-existing environmental concerns may serve as the basis for applying the doctrine.
- How sufficiently much surface operations be described in oil and gas leases? (They are goa' get much longer.)
- Will every oil and gas lease now be attacked based on environmental concerns or lack of clarity?

# Other Views

- The burden on landowners to prove application of Doctrine is quite difficult.
- However, how hard is it to prove that the wind blows and the grass don't grow?
- Bad Facts make Bad Law!