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Water Planning and Drought Management Under the Prior Appropriation Doctrine

*The Supreme Court of Texas has now Confirmed
that the Prior Appropriation Doctrine must be
Followed in the Enforcement of Water Rights Which
Recognizes that the Doctrine is at the Core of
Water Planning and Drought Management in Texas*

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I. Prior Appropriation Doctrine

In order to understand and consider the significance of the Supreme Court's action in the *Texas Farm Bureau* case, it is necessary to briefly review the background and principles of the Prior Appropriation Doctrine.

The Prior Appropriation Doctrine has been the law in Texas since at least the passage of the Irrigation Act of 1889 making prior appropriative (first in time is first in right) the law in the arid part of the State. See *Act Approved*, March 19, 1889, 21 Leg., R.S., ch.88, 1889 Tex. Gen. Laws 100, reprinted in 9 H.P.N. Gammel, the Laws of Texas 1822-1897 at 1128. The Irrigation Act of 1893 and later the Irrigation Act of 1895 extended the scope of the 1889 Act and confirmed the application of the prior 1889 Act to the entire State of Texas. See The Act of March 29, 1895, 23d Leg., R.S., ch. 44, 1893 Tex. Gen. Law 47; Act of March 9, 1895, 24th Leg. R.S., Ch. 21, 1895 Tex. Gen. Laws 21 reprinted in 10 H.P.N. Gammel, the Laws of Texas 1822-1897 at 751.

These Acts created a dual system of water rights in Texas because the common law was adopted in 1840 carrying with it common law riparian rights. This was the legal situation until the enactment of the Water Rights Adjudication Act in 1967, which called for the adjudication of water rights over the State, and resulted in a single system of water rights where the common law riparian right claim was converted into an appropriative right in the adjudication process. See *In Re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 439 (Tex. 1982). For further discussion of the historical background of Texas surface water law, see Baad, *The Historical Background of Texas Water Law – a Tribute to Jack Pope*, 18 St. Mary's L. J. 2 (1986), and also, *Historical Development of Texas Surface Water Law: Background of the Appropriation and Permitting System and Management of*

Surface Water Resources, Glenn Jarvis, in *Essentials of Texas Water Resources*, Ch. 3 (State Bar of Texas, Mary K. Sahs, Editor, 2016).

The Prior Appropriation Doctrine was carried forward in state statutes through the 1913 and 1917-18 water statute and is now codified in § 11.027, Texas Water Code. All references in this paper are to the Texas Water Code, unless otherwise indicated.

The Doctrine is characterized as “first in time is first in right.” That is, the time that a water right holder obtains a water right establishes its priority. Under the Doctrine, the possessor of a more senior water right has priority over junior water right holders. Now, these rights are recognized through the adjudication process by Court Judgment and Certificates of Adjudication issued following the adjudication of rights in the various river basins over the State and by Permits thereafter granted. Post adjudication (new) Permits include specific dates, which are called priority dates and establishes the holder’s place in line of users. See §§ 11.121, 11.141. The holder of a water right with the earliest date on a given stream is the “most senior” right and the holder of a water right with the next earliest date is the next most senior and so forth.

The Appropriation Doctrine is the cornerstone and bedrock of water planning and drought management in Texas. If the doctrine is not enforced and followed, and a water right does not have the security of enforcement of the “first in time is first in right” protection, but be subject to a public safety and use priority determination by a regulatory agency then the security offered by the appropriation doctrine is lost. Large infrastructure investment made many years ago which depended upon this security of a water right is threatened. Certainty of the reliability of a water right is lost not only to those who relied upon the doctrine in the past, but to those in the future who are attempting to provide and make decisions relating to drought management and water planning for future needs.

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