



1-1-1986

Introduction.

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Recommended Citation

Larry Soward, *Introduction.*, 17 ST. MARY'S L.J. (1986).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol17/iss4/2>

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INTRODUCTION*

Larry Soward**

It is a very distinct honor to have the *St. Mary's Law Journal* invite me to share with you some thoughts and ideas today on the topic which you all selected. I look at the Symposium schedule and the list of people that you have brought together to speak today—and you are to be commended for the foresight and the commitment to gather information involved in discussions on the area of water rights law in Texas. You have distinguished experts as your speakers. You have distinguished experts as your guests and participants. And those two working together and discussing matters today should benefit us all in the area of water rights law in Texas.

Basically, I will discuss and review, as my part of the program introducing the Symposium, the “state-of-the-state” with regard to water rights law in Texas. There are a number of matters that presently exist or that have recently occurred which are of interest and which you will discuss during the course of the day. There are other matters which you will not discuss because of time limitations, but I challenge you to think about and discuss them in the future to help us all address the water rights aspects of the law in this state—both present and future.

The State of Texas has had what is known as the Water Rights Adjudication Act since 1967, and its purpose was to evaluate and quantify all the water rights in Texas with regard to surface waters, including riparian rights. This program existing since 1967 was, in effect, completed by the Texas Water Commission in the summer of 1985. We have completed all of our evidentiary hearings and investigations and have made decisions with regard to water rights in Texas and the surface waters used. Those decisions have been forwarded along to the various courts in this state, to ratify the commission's

* This is a transcript of the introductory address given by Mr. Soward at the St. Mary's Law Journal Water Rights Law Conference which was held in San Antonio, Texas, April 4, 1986.

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decisions and to give the rights to surface waters in this state as the statute provides. Once the courts have finished the reviews and have ratified the agency decisions or modified them, we will use what is known as "certificates of adjudication" in each river basin in this state; in essence, forwarding water rights to all the surface water users that we have determined to have those rights. This will play an important part in our future because it fortifies and causes an inventory of those surface water rights so that the commission can then determine in the future what water rights can be given for water available and how it might be used to meet all of our needs.

A matter of great interest to you perhaps, certainly of interest in the last couple of years, to the extent that it will bear on all of our futures, is *The Lower Colorado River Authority v. The Texas Dep't of Water Resources* decision, commonly called the "Stacey decision." That decision by the supreme court held that the Texas Water Commission in determining unappropriated water for the issuance of future permits had to consider the full value of water rights rather than just the present usage of water rights in the state. The commission had to look at the paper rights that existed rather than the actual uses. In fact, in most cases, that is what the commission has traditionally been doing for some time. Under the supreme court's decision, however, it became the law of this state and was mandated in all aspects.

At present, and since the *Stacey* decision, the commission continues to look at existing uses in relation to riparian rights in determining whether or not the commission can provide for present and short term future use of surface waters through the issuance of what we call "term permits." There is a school of thought advocating that "term permits" were not the subject matter of the supreme court's decision in *Stacey*. Instead, this school believes that the *Stacey* decision involved a perpetual permit, and therefore, the court did not rule on whether the commission could consider "term permits," even when the paper rights for a particular river basin decision are available. Certainly, the ingenuity of the legal system has now taken care of that to some extent, in that, we have an appeal in the courthouse that is challenging the authority of the commission to issue "term permits" in light of the *Stacey* decision. We are, however, actively defending that decision through the Texas Attorney General's Office and we expect the courts to rule on the issue in the near future. Additionally, we expect to try to procure legislative verification in the next session as to what the commission can or cannot do in light of the *Stacey*

decision. We may very well need to ask the legislature for clear statutory authority in "term permits" for surface water that exists based on non-use even though the paper rights would cause that water to be considered unappropriated under the *Stacey* decision.

In addition to *Stacey* implications, I want to touch briefly with you on what's known as House Bill 2. The Texas voters in November, 1985, passed what was known as the Texas Water Plan by an overwhelming majority. That Texas Water Plan was known as House Bill 2 in the legislature, and one of the important aspects of House Bill 2 for us presently and in the future, is that it directed the Texas Water Commission, to the extent practical, to consider when issuing water rights' permits in areas within 200 river miles from the coast, conditions necessary to maintain beneficial inflows to any affected basin estuary system. For the first time, the commission is directed to consider the effects on the basin estuary from the environmental, fish, and wildlife standpoints when considering the issuance of water rights' permits and the criteria that the commission must consider. House Bill 2 further goes on to require the commission to consider the effects of water use permits on instream flows, water quality, and fish and wildlife habitats. Again, the new language recommends setting forth criteria for the commission to consider in these regards. It provides that the Texas Parks & Wildlife Department will be afforded party status in all commission hearings on water use applications. Furthermore, this is an expression by the legislature that the determination by the commission on water use permits must go beyond merely the consideration of "is there a new program of water available or is it going to be filtered down to individual use." Thus, this legislative mandate recognizes that there are other aspects of water resources that must be considered.

Under that same legislation the commission for the first time is mandated to consider, and indeed, require evidence that applicants for water use permits have pursued "reasonable diligence" to avoid waste of water and to achieve water conservation. Applicants in this state for water use permits must now demonstrate, to the commission's satisfaction, that they have exercised reasonable diligence. At the present time, we are developing rules and regulations for that purpose. This is of great importance because water conservation, even though talked about much in the past, must become a reality of the state.

You may have heard the little antedote about the good news and

the bad news. The good news is that by the year 2000 we are all going to be drinking treated sewage effluent. The bad news is that there is not going to be enough to go around. Therefore, water conservation has got to be an integral part of all our works so that we will have an adequate supply of water for our beneficial needs. It does not matter what the quality of the water is, if the water is not there. And today, like too many times in the past, we have been concentrating on the environmental aspects of water quality, which is extremely important, but overlooking the fact that we need to ensure that the water is going to be there in the future.

Water conservation has to be an integral part of our water rights laws, and the issues of recycling and reuse of water must be pursued. I know that Mr. Frank Booth in the past, for example, has talked about the aspects of recycling and reuse, and if we go to that, what impact will this approach have on the water rights holder downstream who have relied on return flows from cities and industries. It is definitely going to present legal problems that we will have to address in the future.

With regard to cancellation, the Texas Water Commission has never had a distinctive cancellation program primarily because of perceived, if not real, legal limitations from the adjudication program and the inability to cancel water rights until they have finally been adjudicated. As I indicated to you at the outset, we have completed the adjudication program, and as we move to the formalization of those rights through the courts, we anticipate comprehensive cancellation programs to be developed in the State of Texas. These cancellation programs will free up water that is not being beneficially used and allow it to be used for others.

Compliance and enforcement in Texas, unfortunately for us all, has for so many years relied on the honor system for adherence in the water rights/water use field. We need permits, but we really have no enforcement mechanism in place to make sure that those permits are complied with so that everyone has their rights available to them for beneficial use. It is a challenge for us all to develop effective, meaningful water rights and enforcement programs so that we can ensure that if you have a right to water, it is available to you. Through an effective enforcement program, we can assure that water is being beneficially used and not wasted or being used where it is not supposed to be. We are currently developing water "master operations" across the state which will be part of the enforcement programs. These opera-

tions will consist of monitoring, surveillance, and management, so that the state will have more water rights in particular basins. We are looking to start these operations in the next fiscal year in the Nueces water river area, and then on the San Antonio, Brazos, Trinity, and other rivers all across Texas. This will be one aspect of our enforcement of water rights law. It cannot be the only one, and I challenge each of you and your respective interest to help us develop a meaningful water rights enforcement program in this state—not only to protect rights, but to ensure that the state's interests are found to be beneficial, available, and that new, quality water is there.

As I stated initially, I encourage and challenge you to openly discuss and to continue to think about how we can make the water rights and water rights laws of this state better. Most of these new programs and these new endeavors will arise from and be debated in the Texas legal community; therefore, it is incumbent upon us as attorneys and those of us who work with attorneys, and through attorneys, to ensure that the water rights laws in this state do what they are supposed to do—that is to ensure that the very vital resource that we have—water—is available in abundant quantities for beneficial use and high quality.

I appreciate very much on behalf of the Texas Water Commission the opportunity to appear before you today at the St. Mary's Law Journal Water Rights Law Conference, and to give you a brief introduction and overview of where we are in the state. I know that through your discussions today and your future endeavors, that you will work with us to address many of these issues and to find those answers to questions we still have.