

John Hall, Chairman
B. J. Wynne, III, Commissioner
John E. Birdwell, Commissioner



11/13/83
MS

TEXAS WATER COMMISSION

PROTECTING TEXANS' HEALTH AND SAFETY BY PREVENTING AND REDUCING POLLUTION

RO-177

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

The Honorable Daniel Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

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SEP 13 91

Opinion Committee

Attention: Director, Opinions Committee

Re: Request for expedited opinion; §28.011 Texas Water Code

Dear General Morales:

This is to request your office to render an expedited opinion as to the scope of the Texas Water Commission's authority and actions pursuant to §28.011 of the Texas Water Code. This statute authorizes the Commission to "make and enforce rules and regulations for conserving, protecting, preserving, and distributing underground, subterranean, and percolating water located in this state and shall do all things necessary for these purposes."

Currently, there exists controversy regarding what conditions may lawfully be imposed by the Commission on withdrawals of water from the Edwards Aquifer. The Edwards Aquifer is the only sole source aquifer in the State of Texas. As such, it is the only source of water relied upon by the citizens of San Antonio. Likewise, the commercial and economic stability of that region depend on a dependable supply of water. Whereas there is established the Edwards Underground Water District, which has some authority to regulate pumpage from the Edwards Aquifer in drought conditions, there is truly a need for longer term management of pumpage from this important water supply source.

Section 28.011 of the Texas Water Code arguably provides the vehicle necessary to effect such management. Although the common law "rule of capture" is no doubt the general rule regarding the right to develop groundwater resources, rules of statutory construction dictate that section 28.011 must be presumed to have valid meaning. It appears that in circumstances such as those that exist in the region which is dependent upon the Edwards Aquifer for water, a limited application of section 28.011 would not be in direct

**ACCOMPANIED BY ENCLOSURES —
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conflict with the "rule of capture", and would be very appropriate. Such a construction of section 28.011 probably gains support from the law pertinent to protection of correlative rights. That is, it is important to assure that the resource upon which so many depend is not wasted.

In the opinion, the Commission simply wishes to know whether it may regulate pumpage of the Edwards Aquifer in order to ensure that use of the water from the Edwards Aquifer is for beneficial purposes and is non-wasteful.

There have been two previous Attorney General opinions on the construction and applicability of the language contained in this statute. The first, AG Op. 0-3205 (1941), opined that the Commission's predecessor agency, the State Board of Water Engineers, could regulate the withdrawal and use of groundwater. Five weeks later, AG Op. 0-3205-A (1941) withdrew the answer of the previous opinion and stated that the statute was unconstitutionally vague in that it failed to provide adequate primary standards to guide the Board. Consequently, the Board and its successor agencies have never adopted rules pursuant to this statute. The Commission requests that the Attorney General re-examine its position in light of subsequent court decisions relating to the delegation doctrine. Attached for your review is a brief prepared by the Environmental Protection Division of the Office of Attorney General suggesting that a reversal of AG Op. 0-3205-A would be appropriate based on this argument.

There is no pending litigation with regard to the Commission's authority under this statute. However, it should be noted that on June 19, 1989, the Guadalupe-Blanco River Authority (GBRA) filed suit in state district court in Hays County seeking a declaratory judgment regarding the ownership of the water in the Edwards Aquifer. Specifically, GBRA requested the court to declare that the waters in the Edwards Aquifer are contained in an underground stream and, thus, are owned by the State of Texas in trust for the benefit of the public. Such water would be subject to regulation as state water by the Texas Water Commission pursuant to Chapter 11 of the Texas Water Code in conjunction with the Commission's ongoing regulation of the Guadalupe River and its other tributaries. The Texas Water Commission and the Texas Parks and Wildlife Department are parties jointly represented in the suit but have taken no position as to whether the aquifer constitutes state water.

In its suit, GBRA claims that massive, unregulated pumping from the Edwards Aquifer is threatening to cause severe and irreparable harm to the Comal and San Marcos springs, the Guadalupe River Basin, the San Antonio Bay and Estuary, and the aquifer itself. GBRA further

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requests the court to make any water rights granted subject to conditions necessary to protect and maintain adequate and continuous flow of water from the Comal and San Marcos springs. A petition was filed by federal agencies who were named defendants in the suit to remove the matter to federal district court. The court denied the petition and an appeal was filed with the 5th Circuit Court of Appeals. On August 2, 1991, the appellate court upheld the federal district court action on other grounds and remanded the case back to state district court where the matter is presently pending.

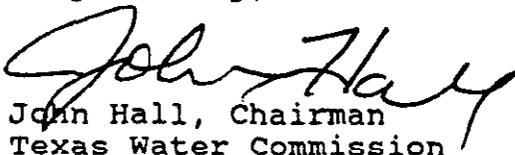
Additionally, the Sierra Club filed suit on May 21, 1991, in the federal district court in Midland against the Secretary of the Department of the Interior and the U.S. Fish and Wildlife Service alleging failure to carry out the mandates of the Endangered Species Act. The Sierra Club complaint requests that the defendants be enjoined to restrict withdrawals from the Edwards Aquifer at any time the instantaneous springflow from the Comal Springs is less than 350 cubic feet per second. The suit also requests that the defendants be ordered to develop and implement a recovery plan for the endangered and threatened species found in the aquifer and the Comal Springs. Days later, the GBRA filed to intervene in the suit on the side of the Sierra Club. Both the Texas Water Commission and the Texas Parks and Wildlife Department have asked the Attorney General to represent them in these proceedings.

I would like to emphasize that the question of the application of Water Code Section 28.011 is not an issue in any of the pending litigation.

A majority of the Texas Water Commission agrees that this question is sufficiently important to request that you render this opinion on an expedited basis.

Thank you for your attention to this matter. If you have any questions, please contact Mark Jordan, Senior Attorney, Legal Division, or James Kowis, Water Rights and Uses Division, at 463-8069 and 371-6373, respectively.

Respectfully,


John Hall, Chairman
Texas Water Commission

Attachments

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cc: John J. Vay, General Counsel, Texas Water Commission
Jim Haley, Director, Legal Division, TWC
Mark Jordan, Senior Attorney, Legal Division, TWC
James Kowis, Water Rights & Uses Division, TWC