

STEWARDSHIP AND THE REUSE OF TEXAS WATER

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I. INTRODUCTORY CONSIDERATIONS

A. *A Not So Hypothetical*

After several decades of a busy law practice, Alice and her husband acquired a large rural tract of land in Central Texas with a sizable cabin and a seasonably wet creek-type bed running through it. During frequent visits to the new place, Alice's grandkids loved to run and play on the land, and had a special fascination for what they called the "cool river" when it was wet. Otherwise, they did not pay much attention to the area when it was dry.

Then one day, much to the delight of the small children, the intermittently wet surface area became a consistent, flowing current. While the kids were happy, Alice could not help herself. Assuming her former intense legal mode, she investigated and determined the source of the change was an increase in effluent discharge from an up-gradient wastewater treatment plant. The facility had an appropriate Texas Pollutant Discharge Elimination System (TPDES) discharge permit and operated according to permit terms and conditions, including proper treatment before discharge. Nevertheless, and despite the arguably more scenic view from the cabin and the smiling faces floating by in the makeshift boat, the discharge seemed like a nuisance to Alice.

While this hypothetical is not technically about reuse of water as most people think of it, it concerns reuse in a big-picture sense because it involves important nonconsumptive reutilization of water for, among other things, recreational and aesthetic purposes. Additionally, some of the return flow could potentially be available for reuse in the more traditional, consumptive sense further down stream. Just who might have legal access for such reuse of these return flows, however, is a debated issue. For example: Is reuse available as state water for anyone to legally appropriate, or just for the discharger and certain others in privity with the discharger? This and related matters are noted further below.

B. *Reality vs. Stigma*

Alice's situation is reminiscent of *Domel v. City of Georgetown*.¹ Briefly, plaintiff landowners sued a city asserting tort causes of action after a substantial increase in permitted effluent discharge from the city's treatment plant resulted in water flowing through plaintiffs' property.² The opinion is a good primer on certain aspects of Texas water law, focusing in large part on whether there was a watercourse running through the property.³

1. *Domel v. City of Georgetown*, 6 S.W.3d 349, 350–52 (Tex. App.—Austin 1999, pet. denied).

2. *Id.*

3. *Id.* at 353–57.

The court determined that it was a watercourse, that the state had authority to utilize it for valuable state water, and that the plaintiffs had no valid claim against the city.⁴ In short, the State of Texas did not need permission from the Domels, or any other landowner, to authorize the increased return flows in the watercourse.⁵

Alice's grandkids loved the abundant water in the stream. It was a treasure for them. With treated effluent, however, one person's treasure is another's . . . well, let's just say, opposite of treasure. Alice's situation, the *Domel* case, and similar circumstances highlight the "hang-ups" for many associated with the reutilization of treated, formerly impacted water—even in nonconsumptive circumstances. Not surprisingly, the level of discomfort increases with the contemplation of consumption. In reality, as in the hypothetical, despite the potential stigma, there will be a lack of sufficient water to use for recreation, to simply enjoy, to support the natural environment, and to use for other beneficial concerns, without effluent discharges and other return flows. Now, and perhaps more so for future generations, there might be a paucity of water to satisfy consumptive needs, including drinking water.

C. Policy Considerations: Stewardship

Reuse is an excellent, hard-to-argue-with policy. It has strong roots not only in Texas but regionally, nationally, and beyond.

I. NEPA

At the federal level, Congress enacted the National Environmental Policy Act (NEPA) at the end of the environmentally formative decade of the 1960s.⁶ Effective at the outset of 1970, and what can be characterized as the start of the modern era of environmental and natural resource protection law, NEPA declares federal environmental policies and, as interpreted, imposes judicially enforceable requirements on all federal agencies to take a hard look at the environmental effects of proposed actions.⁷ While not technically applicable to states, the primary policy expression of stewardship is compelling in our country's first modern natural resource protection law.⁸ This occurred at the outset of a decade in which Congress and states enacted

4. *Id.* at 357–62.

5. *Id.* at 361–62.

6. *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852, 852 (codified as amended at 42 U.S.C. § 4321).

7. *See, e.g.,* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 332–33 (1989); *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n.*, 449 F.2d 1109, 1111–12 (D.C. Cir. 1971).

8. *See* 42 U.S.C. § 4321 (2012).

numerous laws oriented toward a cooperative federalism approach to environmental quality.⁹

Congress described the continuing responsibility of coordination by the federal government in an initial section of NEPA by referring to “the responsibilities of each generation as trustee of the environment for succeeding generations.”¹⁰ We have a time-honored stewardship model of environmental and natural resource protection and related use in the United States.

2. Public Trust Doctrine

Where could the high calling of holding water in trust as a fiduciary for future generations be more significant than in arid regions like much of Texas and states to the west? This is especially important in Texas because we have had information and projections of future generational shortages for decades.¹¹ The trustee model for water is much older than NEPA’s recognition.¹² The Supreme Court of the United States announced the public trust doctrine as a legal maxim in the 1892 *Illinois Central Railroad Co. v. Illinois* case.¹³ Detailed consideration of the public trust doctrine is beyond the scope of this Article, but this important doctrine is relevant to water and its conservation, including its reuse.

In *Illinois Central*, the Court effectively prohibited the State of Illinois from alienating land under Lake Michigan because of the supreme importance of state ownership of the water and bed in trust for the benefit of citizens.¹⁴ The public trust is a strong, time-honored doctrine. Per the Court in *Illinois Central*, “The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . , than it can abdicate its police powers in the administration of government and the preservation of the peace.”¹⁵

Regarding trusts connected with public property, the Court stated that “they cannot be placed entirely beyond the direction and control of the

9. See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 719–21 (2006). In recent years, the relationship between some states and the federal government has been less than cooperative. *Id.* at 801–03. For example, many states are challenging the scope of federal jurisdiction under the Clean Water Act and the EPA’s recent rulemakings related to curbing greenhouse gas emissions from power plants. See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2438 (2014); *Ohio v. U.S. Army Corps of Eng’rs (In re EPA)*, 803 F.3d 804, 805–06 (6th Cir. 2015).

10. 42 U.S.C. § 4331(b)(1) (emphasis added).

11. See, e.g., TEX. WATER DEV. BD., WATER FOR TEXAS: TODAY AND TOMORROW 3-51 (1990), http://www.twdb.texas.gov/publications/State_Water_Plan/1990/1990%20State%20Water%20Plan.pdf.

12. See generally *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892).

13. *Id.* at 452–59.

14. *Id.* at 455–56.

15. *Id.* at 453.

state.”¹⁶ As a matter of precedent and principle, trust “property is held by the state, by virtue of its sovereignty, in trust for the public.”¹⁷ More particularly related to water, “[t]he ownership of the navigable waters . . . is a subject of public concern to the whole people of the state.”¹⁸

Public trust purposes evolved to include a multiplicity of benefits, including ecological, aesthetic, and recreational priorities.¹⁹ The Court in *Illinois Central* recognized three key public interests related to the title to lands under navigable waters held in trust: “It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”²⁰

Since then, states have expanded legitimate trust-related uses and purposes. In a prominent Supreme Court of California opinion involving Mono Lake ecological concerns and historic water rights of Los Angeles, the court recognized the state’s “duty to exercise continued supervision over the trust.”²¹ Importantly, the court also addressed evolving public trust purposes.²² Particularly, the court emphasized that “[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways.”²³ Citing its own precedent, the Supreme Court of California then gave examples of purposes beyond “the traditional triad of uses—navigation, commerce and fishing.”²⁴ Examples included swimming, boating, recreation, ecological purposes, and preservation.²⁵

In recent years, the U.S. Supreme Court has revisited the doctrine and emphasized that it is an aspect of state law.²⁶ Per the Court, “the public trust doctrine remains a matter of state law.”²⁷ Further, “the States retain residual power to determine the scope of the public trust over waters within their borders.”²⁸

3. *In the Beginning*

The trustee model announced by the Court in the late nineteenth century was a recognition of an existing and respected truth. Its specific origin(s),

16. *Id.* at 454.

17. *Id.* at 455.

18. *Id.*

19. *See, e.g.,* Nat’l Audubon Soc’y v. Superior Court of Alpine Cty. (*The Mono Lake Case*), 658 P.2d 709, 732 (Cal. 1983) (en banc).

20. *Ill. Cent. R.*, 146 U.S. at 452.

21. *The Mono Lake Case*, 658 P.2d at 721.

22. *Id.* at 719.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1235 (2012).

27. *Id.*

28. *Id.*

however, is a bit elusive. It is perhaps more accurate to think in terms of its recognition in various contexts, including English and Roman law. According to the Court, “The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law . . . and in the state laws of this country.”²⁹ How about further back—as in truly ancient and *way* further back? In the Jewish–Christian tradition, mankind is entrusted with the oversight of creation, including natural resources such as water and critters, and certainly over other people and their needs.³⁰ In the tradition’s first chapter of scripture, for example, the creation account involves six steps that started in large part with water and culminated in the creation of humankind in God’s image and as stewards of creation.³¹ Within a few generations, people are reminded that they are indeed one another’s keepers.³²

Thus, Jewish and Christian tradition indicates that the Earth started with a lot of water and people in a creative image with a responsibility over all of creation and each other.³³ What then should we do about water?

D. Stewardship in Texas

We have a strong tradition for natural resource stewardship as a matter of federal policy as well as a judicially recognized public trust at the state level. Arguably, environmental stewardship has an integral link to the very beginning of mankind’s association with nature. What about Texas? With particular applicability to the reuse of Texas water, three historical milestones are especially noteworthy for context.

1. Public Trust Doctrine

As the Supreme Court articulated in *Illinois Central* and fleshed out in later cases such as *PPL Montana, LLC v. Montana*, there is a public trust doctrine in each state.³⁴ While federally recognized, it is a matter of state law and can therefore vary in terms of its scope and purpose from state to state.³⁵ Texas courts recognize the public trust.³⁶

The public trust doctrine is particularly applicable to state waters. As the Austin Court of Appeals expressed in *Cummins v. Travis County Water Control & Improvement District No. 17*, “[T]he State, as trustee, is entitled

29. *Id.* at 1234.

30. *See Genesis* 1:26.

31. *See id.* at 1:1–28.

32. *See id.* at 4:1–9 (account of Cain and Abel).

33. *See id.* at 1:1–28, 4:1–10.

34. *See PPL Mont.*, 132 S. Ct. at 1234–35; *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

35. *See PPL Mont.*, 132 S. Ct. at 1235.

36. *See, e.g., Dolan v. Walker*, 49 S.W.2d 695, 697–98 (Tex. 1932). The public trust over state water is also provided in TEX. WATER CODE ANN. § 11.0235(a).

to regulate . . . waters and submerged lands to protect its citizens' health and safety and to conserve its natural resources."³⁷ The trust is so broad that even privately owned waterfront land "is still subject to regulation under the State's police powers."³⁸ Interestingly, the Texas Commission on Environmental Quality (TCEQ), in at least one instance, argued unsuccessfully that the trust is inapplicable to air, but did not question its fundamental link to surface water.³⁹ Indeed, when the Supreme Court initially recognized the doctrine in 1892, it was in the context of surface water and the bed beneath it.⁴⁰ The public trust doctrine should be broader and richer in applicability than simply to surface water, but there is no question of its pertinence to state-owned surface water.

2. Conservation Amendment

What do many important Texas water law opinions have in common? The answer is a historic, foundational, and formative reference to Texas's Conservation Amendment of 1917.⁴¹ Similar to other water-related legal milestones in Texas, this important amendment was adopted on the heels of a drought.⁴² As the Supreme Court of Texas so aptly stated, "The story of water law in Texas is also the story of its droughts."⁴³ More particularly related to this important constitutional amendment, "The droughts in 1910 and 1917 prompted the citizens of Texas to adopt the 'Conservation Amendment' to the Texas Constitution, *mandating the conservation of public waters.*"⁴⁴

The Conservation Amendment declares:

The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of [surface water and other] natural resources of the State are each and all hereby declared public

37. *Cummins v. Travis Cty. Water Control & Improvement Dist.* No. 17, 175 S.W.3d 34, 49 (Tex. App.—Austin 2005, pet. denied).

38. *Id.* (involving Lake Travis and related waterfront land).

39. *See* Tex. Comm'n on Envtl. Quality v. Bonser-Lain, 438 S.W.3d 887, 889–90 (Tex. App.—Austin 2014, no pet.).

40. *See* Ill. Cent. R. Co. v. Illinois, 146 U.S. 387, 454 (1892).

41. TEX. CONST. art. XVI, § 59(a). A cite check in November 2015 noted sixty Texas cases citing the Conservation Amendment. *See, e.g.,* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 833 (Tex. 2012); Barshop v. Medina Cty. Underground Water Conservation Dist., 925 S.W.2d 618, 633 (Tex. 1996); *In re Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 440 (Tex. 1982); *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955); *Motl v. Boyd*, 286 S.W. 458, 473 (Tex. 1926).

42. *In re Adjudication of Water Rights*, 642 S.W.2d at 440.

43. *Id.* at 441.

44. *Id.* at 440 (emphasis added); *see also* Day, 369 S.W.3d at 833.

rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.⁴⁵

The Amendment itself refers to, among other things, “[t]he conservation and development of all of the natural resources” and to the “preservation and conservation” of water.⁴⁶ The Amendment’s nickname, like so much of the Amendment itself, singularly highlights conservation.⁴⁷ What is conservation? Conservation is a defined term in some water law contexts, such as Chapter 11 of the Texas Water Code relating to surface water rights in Texas.⁴⁸ More commonly, conservation relates to preserving something natural and implies protection, safeguarding, and management.⁴⁹ This understanding seems logically consistent with the concerns of citizens following severe drought.

In part, the Conservation Amendment is a powerful expression of several aspects of the public trust doctrine. Essentially, it appears to be a constitutional codification of the public trust doctrine in Texas. As the Supreme Court of Texas noted, “The Conservation Amendment recognizes that preserving and conserving natural resources are public rights and duties.”⁵⁰ Further, as Texas’s highest state civil court articulated long ago in the context of flood control,

The protection of the public against floods by levees and storage reservoirs by the state and its agencies is of ancient origin, universal in its extent, and a practice of modern times. The principle and practice not only find expression in our statutes, but in the various states of the United States. . . . Not only is it authorized under the police power inherent in the state as a government, but the principle finds expression . . . in broad, comprehensive, and emphatic terms, in the conservation amendment to the Constitution adopted in 1917⁵¹

Importantly, the Conservation Amendment specifies a fundamental role for the Texas Legislature.⁵² Per the Supreme Court of Texas, “Naming waters specifically, the amendment declared that the conservation and preservation

45. TEX. CONST. art. XVI, § 59(a).

46. *Id.*

47. *In re Adjudication of Water Rights*, 642 S.W.2d at 440.

48. TEX. WATER CODE ANN. § 11.002(8)(A)–(B) (West, Westlaw through 2015 Reg. Legis. Sess.) (defining “conservation” as “development of water resources” and practices “that will reduce the consumption of water” as well as its “loss or waste”).

49. *Conserve*, BLACK’S LAW DICTIONARY (8th ed. 2004).

50. *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996); *see also City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955) (stating the Conservation Amendment declares “the state’s natural resources, including water, to be a public right and duty”).

51. *Motl v. Boyd*, 286 S.W. 458, 470 (Tex. 1926).

52. *See Tex. Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971).

of natural resources are public rights and duties. It then ordered that ‘the Legislature shall pass all such laws as may be appropriate thereto.’⁵³

Thus, the Texas Legislature is a key to the implementation of the rights and duties inherent in the Amendment.⁵⁴ As the Austin Court of Appeals described,

All of our water appropriation laws were passed subsequently to the 1917 constitutional amendment. That is, they were either re-enacted by being carried forward into the 1925 codification, or were enacted subsequently thereto. . . .

*All of our water appropriation laws having been passed subsequently to the adoption of this amendment they must be construed in the light of it and of its objectives, both expressed and implied.*⁵⁵

3. Senate Bill 1

Acting pursuant to its role under the Conservation Amendment, the legislature enacted Senate Bill 1 (SB 1) in 1997, again, in response to a drought.⁵⁶ SB 1 was an important water-related bill. The Supreme Court of Texas highlighted its significance two years later in the 1999 opinion *Sipriano v. Great Spring Waters of America, Inc.*⁵⁷ *Sipriano* presented facts which, at the time, tempted some on the Court to seriously consider overruling the rule of capture as it applies to groundwater in Texas.⁵⁸ Expressing its discontent with the rule of capture but acting consistently with the prominent role of the Texas Legislature dictated through the Conservation Amendment, the Court deferred to SB 1’s prioritization of control by groundwater conservation districts as the preferred way of managing groundwater.⁵⁹

Of special significance to the reuse issue, the legislature in SB 1 amended §§ 11.042 and 11.046(c) of the Texas Water Code.⁶⁰ These

53. *Id.*

54. *Id.*

55. *Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674, 680 (Tex. Civ. App.—Austin 1947, writ dismissed) (emphasis added).

56. See Martin Hubert & Bob Bullock, *Senate Bill 1, the First Big and Bold Step Toward Meeting Texas’s Future Water Needs*, 30 TEX. TECH. L. REV. 53, 55–56 (1999) (explaining that SB 1 was a response to drought, population growth, and insufficient planning).

57. *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 79–80 (Tex. 1999).

58. *Id.* at 80. Details of the rule of capture are beyond the scope of this Article. Briefly, it is a rule of non-liability in tort and means the fee simple owner of the surface estate can put in wells and produce groundwater from a common aquifer without liability to neighbors, subject to a few exceptions, such as permitting and well-spacing regulation by groundwater conservation districts. *Id.* at 75. Notably, subsequent to *Sipriano*, the Court re-embraced and arguably enhanced the rule of capture from a private property ownership perspective in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 831–33 (Tex. 2012).

59. *Sipriano*, 1 S.W.3d at 79–80.

60. TEX. WATER CODE ANN. §§ 11.042, 11.046(c) (West 1997).

provisions are discussed below after consideration of reuse generally in the western United States.

II. WHAT IS WATER REUSE?

Water reuse is just what it sounds like. Reuse of anything implies prior use. The same is true with water. Reuse is what happens to the leftovers of water that has already been used, or more precisely, been beneficially used in a consumptive sense.

Related more particularly to Texas, the Texas Water Development Board (TWDB or the Board) posted an excellent white paper titled *Water Reuse* (TWDB Paper) in October 2015 that is brief and instructive.⁶¹ The TWDB Paper defines reuse as “the practice of using water that has already been used” and notes that reclaimed and recycled water are essentially interchangeable in their common usage.⁶² Further, reuse is typically categorized as either direct, without first being returned to a watercourse, or indirect, retrieved after first being returned to a watercourse.⁶³ Either type can be potable—which means it is suitable for drinking—or non-potable.⁶⁴ The TWDB Paper also outlines important applicable federal and Texas statutes and regulations, some of which are noted in this Article.⁶⁵

III. REUSE IN THE WESTERN UNITED STATES

Not surprisingly, water reuse is important in all areas where water is scarce, including the western United States. Detailed consideration of reuse in other states is beyond the scope of this Article, but examples of a few provisions and aspects from some western states are illustrative of the importance of reuse.

Utah enacted the Wastewater Reuse Act in 2006.⁶⁶ The Act allows public agencies owning or operating a treatment plant to reuse treated wastewater with the approval of the state engineer.⁶⁷ The state engineer will only approve an application to reuse wastewater if the reuse is consistent with the underlying water right.⁶⁸ For a reuse to be consistent with an underlying water right, the reuse of water cannot enlarge the underlying water right, and any return flow obligation of the underlying water right must be satisfied.⁶⁹

61. TEX. WATER DEV. BD., *WATER FOR TEXAS: WATER REUSE* (2015), www.twdb.texas.gov/publications/shells/WaterReuse.pdf.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. UTAH CODE ANN. § 73-3c-201 (West, Westlaw through 2015 1st Special Sess.).

67. *Id.* § 73-3c-201(1)(a).

68. *Id.* § 73-3c-302(6)(a).

69. *Id.* § 73-3c-302(5)(a)–(b).

Washington simplifies the reuse process by exempting wastewater treatment facilities from obtaining appropriation permits.⁷⁰ However, these reclaiming facilities “shall not impair any existing water right downstream from any . . . discharge points of such facilities unless compensation or mitigation for such impairment is agreed to by the holder of the affected water right.”⁷¹

Nevada has a two-step application for water reclamation permits.⁷² Before approving the applications, the division of water services determines if the project will impair the rights of downstream users.⁷³ This process is helpful to reusers because of its apparently easy notice requirements, but it also protects the rights of downstream users by considering any potential impairments to their rights.⁷⁴

Reusers in Oregon are not required to apply for a permit to appropriate water for reuse if they meet certain environmental quality standards.⁷⁵ Instead, reusers must file a registration for appropriation containing information about the water supply and the reuse project.⁷⁶ Because this is a registration and not an application, it appears the water resources department may not necessarily consider the effect of reuse on existing water.⁷⁷

Reuse is also significant in Arizona,⁷⁸ California,⁷⁹ and New Mexico.⁸⁰ In sum, reuse is a growing priority in arid regions. Texas is not alone in dealing with a host of parties interested in reuse issues and struggling with ambiguities in not-yet-adequately-developed legal provisions.

IV. REUSE IN TEXAS

A. Texas Water Code Chapter 11

The provisions governing the reuse of water in Texas are found in Chapter 11 of the Texas Water Code (Chapter 11). Generally, Chapter 11 relates to water rights, including the permitting of such rights.⁸¹ More

70. WASH. REV. CODE ANN. § 90.46.120(1) (West 2004 & Supp. 2014).

71. *Id.* § 90.46.130(1).

72. *See* NEV. REV. STAT. § 533.440 (2013).

73. ADAM SCHEMP, ENVTL. LAW INST., WATER RIGHT IMPAIRMENT IN RECLAMATION AND REUSE: HOW OTHER WESTERN STATES CAN INFORM WASHINGTON LAW 9 (2007), <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/reclaim/PSImpairmentPaperdraft.pdf>.

74. *See id.* at 9–10.

75. OR. REV. STAT. ANN. § 537.132(1) (West, Westlaw through 2015 Reg. Sess.).

76. *See id.* § 537.132(2).

77. *See* SCHEMP, *supra* note 73, at 12.

78. *See, e.g.,* Ariz. Pub. Serv. Co. v. Long, 773 P.2d 988, 992–95 (Ariz. 1989) (en banc).

79. *See, e.g.,* CAL. WATER CODE §§ 1202(d), 1210 (West 2009 & Supp. 2016); David B. Dornak, *A New Generation is Teeing Off: Is Tiger Woods Making Divots on Environmentally Sound Golf Courses?*, 23 COLUM. J. ENVTL. L. 299, 332 (1998).

80. *See, e.g.,* Reynolds v. City of Roswell, 654 P.2d 537, 541 (N.M. 1982).

81. *See* TEX. WATER CODE ANN. § 11.022 (West, Westlaw through 2015 Reg. Legis. Sess.).

particularly, Chapter 11 concerns various parties' rights and claims to the state's waters.⁸² "State Water" is "[t]he 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."⁸³

Such water is the property of the state and also includes "water imported from any source outside . . . the state and which is transported through the beds and banks of any navigable stream within the state" or through state-owned infrastructure.⁸⁴ In a nutshell, surface water owned by the State of Texas includes water in lakes, the Gulf of Mexico, rivers, and other watercourses.⁸⁵

Under Chapter 11, "The right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter. When the right to use state water is lawfully acquired, it may be taken or diverted from its natural channel."⁸⁶

Otherwise, "No person may willfully take, divert, or appropriate any state water for any purpose without first complying with all applicable requirements of this chapter."⁸⁷ Thus, the legal appropriation and use of state water in Texas is determined solely by Chapter 11.⁸⁸ The Texas Commission on Environmental Quality (TCEQ) administers Chapter 11's provisions.⁸⁹ Pursuant to the "constitutional duty to conserve water as a precious resource" found in the Conservation Amendment, the legislature created the TCEQ and its predecessor agency to "regulate and control this precious resource."⁹⁰

Chapter 11, and indeed any state's system of recognizing and effectuating rights of use in state-owned water, is best understood as an aspect of the public trust doctrine.⁹¹ One of the key ways a state acts as fiduciary for its citizens in the context of water is by faithfully administering

82. *Id.* § 11.021.

83. *Id.* § 11.021(a).

84. *Id.* § 11.021(a)–(b).

85. *Id.* § 11.021. Criteria for a watercourse include defined bed and banks, a current of water, and permanent source of supply. *Hoefs v. Short*, 273 S.W. 785, 786–87 (Tex. 1925). These criteria generally have low thresholds and are easily satisfied. *See, e.g., Domel v. City of Georgetown*, 6 S.W.3d 349, 353–54 (Tex. App.—Austin 1999, pet. denied). For context, surface water is generally divided into diffuse or diffused surface water—before it is in a lake, the Gulf, or a watercourse and owned by the surface landowner—and state water owned by the State of Texas pursuant to § 11.021 of the Texas Water Code. *See, e.g., id.* at 353.

86. TEX. WATER CODE § 11.022.

87. *Id.* § 11.081.

88. *See id.*

89. *Id.* § 5.013(a)(1) ("The commission has general jurisdiction over . . . water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.")

90. TEX. CONST. art. XVI, § 59(a); *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554, 557 (Tex. App.—Eastland 2013, no pet.).

91. *See, e.g., TEX. WATER CODE* § 11.0235.

the legal water rights system.⁹² In Texas, Chapter 11 also follows directly from the Conservation Amendment and its charge to the legislature.⁹³ As the Supreme Court of Texas stated with reference to the Conservation Amendment, “The State, in administering its water resources, is under a constitutional duty to conserve water as a precious resource and that duty is also inherent in the grant of a water permit.”⁹⁴

Regarding permitting, Chapter 11 states that subject to certain exceptions, including a bed and banks authorization under § 11.042 (discussed below), “no person may appropriate any state water . . . without first obtaining a permit from the [TCEQ] to make the appropriation.”⁹⁵ The TCEQ must make certain findings before granting an appropriation permit, including, but not limited to, the availability of unappropriated water; a proposed beneficial use; the non-impairment of existing water rights; the consideration of bays, estuaries, and instream uses; and the achievement of conservation.⁹⁶ Texas has a rich history of water law that included aspects of riparian as well as prior appropriation rights before transitioning to a prior appropriation scheme per the 1967 Water Rights Adjudication Act.⁹⁷ Thus, under the codified mantra of prior appropriation that “the first in time is the first in right,”⁹⁸ the timing of a water rights application is critically important.⁹⁹

It is important to recognize that, generally, a water right under Chapter 11 is a *qualified* right.¹⁰⁰ In construing and discussing the landmark Water Rights Adjudication Act of 1967, the Supreme Court of Texas emphasized that Texas modeled the Act after Oregon’s statutes.¹⁰¹ The Texas Court included language from a 1914 Oregon Supreme Court case, some of which aptly described water rights in general:

92. See *Ward Timber*, 411 S.W.3d at 557.

93. See TEX. CONST. art. XVI, § 59(a); see TEX. WATER CODE § 11.0235.

94. *Tex. Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971).

95. TEX. WATER CODE § 11.121.

96. *Id.*; see *id.* § 11.024 (discussing prioritization of beneficial uses in the interest of conservation and public policy).

97. *Id.* §§ 11.301–341.

98. *Id.* § 11.027.

99. *Id.* § 11.141 (stating that priority of a permitted appropriation dates from the date the application is filed).

100. *Id.* § 11.022. Water rights are sometimes referred to as “usufructuary rights.” See, e.g., *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 445 (Tex. 1982); see also *The Mono Lake Case*, 658 P.2d 709, 712 (Cal. 1983) (en banc) (“The state must have the power to grant nonvested usufructuary rights to appropriate water . . .”). Black’s Law Dictionary defines the Latin root *Usus Fructus*—with the parallel in Roman law as “usufruct” or “usufructuary right or possession”—as “[a] right for a certain period to use and enjoy the fruits of another’s property without damaging or diminishing it, but allowing for any natural deterioration . . . over time.” *Usufruct*, BLACK’S LAW DICTIONARY (9th ed. 2009).

101. *In re Adjudication of Water Rights*, 642 S.W.2d at 445.

Water rights . . . are subject to such reasonable regulations, as are essential to the general welfare, peace, and good order of the citizens of the state, to the end that the use of water by one . . . shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.¹⁰²

In a nutshell, surface water rights are qualified in a number of ways, such as in other provisions in Chapter 11, the public trust doctrine, the Conservation Amendment, and, in some circumstances, federal laws like the Endangered Species Act.¹⁰³

Before turning to particular water reuse provisions in Chapter 11, there is one more important feature to add for context: Texas water planning.

B. Texas Water Development Board

1. Planning and Reuse

A constitutional amendment created the TWDB in 1957 following the worst drought of record to date at that time.¹⁰⁴ The amendment charged the TWDB with developing a state water plan then, and periodically going forward.¹⁰⁵ SB 1 revamped water planning in 1997 to a regional initiative with sixteen regional planning groups.¹⁰⁶ As characterized by the Eastland Court of Appeals in *Texas Water Development Board v. Ward Timber, Ltd.*, “In 1997, the legislature changed the way Texas plans for its water future. Instead of the ‘top-down’ approach previously used, the legislature passed [SB 1] to build the state water plan through a ‘bottom-up’ process. This new process relies, to a large degree, on regional planning.”¹⁰⁷ Regional plans feed into a comprehensive state plan adopted by the TWDB every five years.¹⁰⁸

Water reuse has become an increasingly important theme in Texas’s statewide water planning. Reuse has been considered in water planning since at least 1968, when it was briefly mentioned in the summary of the Texas Water Plan.¹⁰⁹

102. *Id.* (quoting *In re Willow Creek*, 144 P. 505, 514 (Or. 1914)).

103. 16 U.S.C. §§ 1531–48 (2012).

104. TEX. CONST. art. III, § 49-c; John Burnett, *How One Drought Changed Texas Agriculture Forever*, NPR (July 7, 2012, 6:08 AM), www.npr.org/2012/07/155995881/how-one-drought-changed-texas-agriculture-forever.

105. TEX. CONST. art. III, § 49-c; *State Water Planning*, TEX. WATER DEV. BOARD, www.twdb.texas.gov/waterplanning/swp/index.asp (last visited Mar. 26, 2016).

106. TEX. WATER CODE ANN. § 16.053 (West, Westlaw through 2015 Reg. Legis. Sess.).

107. *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554, 557 (Tex. App.—Eastland 2013, no pet.).

108. TEX. WATER CODE §§ 16.051(a), 16.053(i).

109. TEX. WATER DEV. BD., *THE TEXAS WATER PLAN: SUMMARY 5*, 12 (1968), http://www.twdb.texas.gov/publications/State_Water_Plan/1968/1968_Water_Plan.pdf.

By 1990, reuse was becoming more popular. The TWDB projected that “with modest, conventional reuse practices, another 300,000 acre-feet of effluent could be reused by 2020, and reuse could exceed 1.4 million acre-feet per year by 2040 under the Board’s most optimistic predictions.”¹¹⁰ The Board expressed concern in its 1990 plan that “[e]xtensive reuse and consumption of water during reuse could remove water from Texas water bodies that were previously present as return flows,” but ultimately found that reuse might “benefit the downstream environment by not drawing on higher quality water supplies still in the river or stream.”¹¹¹ The Board projected that expanded water reuse and use of return flows would provide 630,000 acre-feet of the Texas water supply in 2040.¹¹² The Board, in 1990, suggested that the legislature “adopt an official policy to guide State water reuse and recycling programs” that favors reuse when available.¹¹³

The TWDB published its 1997 water plan the same year SB 1 was enacted.¹¹⁴ In its 1997 plan, the Board discussed the effects of SB 1 and § 11.042 of the Texas Water Code on water reuse.¹¹⁵ The Board noted that SB 1 did not fully solve the problem of how indirect reuse affects downstream water users.¹¹⁶

In 2002, the Board expected water supplies from wastewater reuse to decrease by 18%, from 340,000 acre-feet in 2000 to 280,000 acre-feet in 2050.¹¹⁷ In 2007, however, the Board increased its reuse estimate to 370,000 acre-feet in 2060.¹¹⁸ The Board’s planning groups identified water reuse strategies that would result in 1.3 million acre-feet by 2060.¹¹⁹ This estimate includes approximately 416,000 acre-feet from direct reuse and 846,000 acre-feet from indirect reuse.¹²⁰ The Board included a paper on reuse in its 2007 plan.¹²¹

110. TEX. WATER DEV. BD., WATER FOR TEXAS: TODAY AND TOMORROW 2-13 (1990), http://www.twdb.texas.gov/publications/State_Water_Plan/1990/1990%20State%20Water%20Plan.pdf. An acre-foot of water is approximately 325,851 gallons. *What is an Acre-Foot?*, TEX. WATER DEV. BOARD, www.twdb.texas.gov/conservation/education/doc/Acre-Foot_flyer.pdf (last visited Mar. 29, 2016).

111. TEX. WATER DEV. BD., *supra* note 110.

112. *Id.* at 3-5.

113. *Id.* at 4-6.

114. *Regional Water Plans/Planning Group Grants*, TEX. WATER DEV. BOARD, <http://www.twdb.texas.gov/financial/programs/RWPG/index.asp> (last visited Mar. 29, 2016).

115. TEX. WATER DEV. BD., WATER FOR TEXAS TODAY AND TOMORROW: A CONSENSUS-BASED UPDATE TO THE STATE WATER PLAN 2-32 (1997), www.twdb.texas.gov/publications/State_Water_Plan/1997/Ch_2.pdf.

116. *Id.* at 2-33.

117. TEX. WATER DEV. BD., WATER FOR TEXAS 56 (2002), http://www.twdb.texas.gov/publications/State_Water_Plan/2002/WP%20Ch%205.pdf.

118. 1 TEX. WATER DEV. BD., WATER FOR TEXAS 5 (2007), http://www.twdb.texas.gov/publications/State_Water_Plan/2007/2007StateWaterPlan/vol%201_FINAL%20113006.pdf.

119. *Id.* at 6.

120. *Id.* at 25.

121. *Id.* at 25, 29–38. An earlier version of this paper was prepared by the Reuse Committee of the Texas Water Conservation Association. *Id.* at 29.

The 2012 water plan expected an increase from 482,000 acre-feet per year in 2010 to approximately 614,000 acre-feet per year by 2060.¹²² This estimate represented a 65% increase in the 2060 reuse supplies in comparison to the 2007 water plan.¹²³ In 2012, the Board's regional water planning groups recommended reuse as a water management strategy for nine regions in Texas.¹²⁴ Water management strategies involving reuse are expected to represent more than 10% of the volume of water produced by all strategies by the year 2060.¹²⁵

2. Planning and Implementation

Water planning, including reuse initiatives, is one thing. What about implementation? Will the TWDB's reuse suggestions in planning materialize the intended benefits by 2060?

Planning is not an end in itself. Procrastination or changed circumstances sometimes follow good planning. The objectives of good planning might not be attained without taking timely, necessary steps toward implementation. Historically in Texas, key components of TWDB water plans have not always been completed. For example, in the 1980s, additional reservoirs were a key component of water planning for future needs.¹²⁶ The 1984 water plan recommended forty-four new reservoirs in the state,¹²⁷ but only eight have actually been constructed since that plan.¹²⁸ According to the TWDB, "The slowdown in reservoir construction is due, in part, to the fact that there remain very few viable sites for new major reservoirs, permits are much more difficult to obtain due primarily to environmental concerns, and the cost of construction has gone up faster than the rate of inflation."¹²⁹

Reuse priorities and initiatives reflected in TWDB planning could also change in future years, depending, for example, on the addition of reuse facilities and the clarification of ambiguities in related legal provisions. After a more specific consideration of the types of reuse in Texas, some examples of controversial statutory provisions are considered below.

122. TEX. WATER DEV. BD., WATER FOR TEXAS: 2012 STATE WATER PLAN 4 (2012), http://www.twdb.texas.gov/publications/state_water_plan/2012/2012_SWP.pdf.

123. *Id.*

124. *Id.* at 283.

125. *Id.* at 194.

126. See 1 TEX. DEP'T WATER RES., WATER FOR TEXAS: A COMPREHENSIVE PLAN FOR THE FUTURE 42 (1984), http://www.twdb.texas.gov/publications/State_Water_Plan/1984/Water%20for%20Texas%20Volume%201.pdf.

127. *Id.*

128. See *Texas Reservoirs*, WATER DATA FOR TEX., <http://www.waterdatafortexas.org/reservoirs/statewide> (last visited Mar. 29, 2016).

129. *Texas Lakes & Reservoirs: History of Reservoir Construction in Texas*, TEX. WATER DEV. BOARD, <http://www.twdb.texas.gov/surfacewater/rivers/reservoirs/> (last visited Mar. 29, 2016).

C. Types of Reuse in Texas

Water reuse is either direct or indirect.¹³⁰ Both types of water reuse occur after authorized appropriation and initial beneficial use of state water under Chapter 11.¹³¹ Direct reuse occurs before the appropriated water returns to a watercourse, whereas indirect reuse occurs after the initially appropriated water returns to a watercourse.¹³² Thus, direct reuse is more immediate and occurs before the legally diverted and beneficially used water potentially becomes state water again.¹³³

It is noteworthy that direct and indirect reuse implicate water quality concerns, including, but not necessarily limited to, authorization to discharge effluent under Chapter 26 of the Texas Water Code—detailing Texas Pollutant Discharge Elimination System (TPDES) permitting¹³⁴—and the federal Clean Water Act, in which a discharge of any pollutant from a point source to waters of the United States is involved.¹³⁵ Direct reuse of “reclaimed water”¹³⁶ generally does not require acquisition of a new water right,¹³⁷ but does require a reclaimed water use authorization and may require a water quality authorization.¹³⁸

The Texas Water Code gives the TCEQ the authority to issue permits for the discharge of waste into or adjacent to water in the state.¹³⁹ The Water Code also allows the TCEQ to “authorize a wastewater treatment facility to contribute treated . . . wastewater . . . as reclaimed water to a reuse water system if the commission has approved the use of reclaimed water from the wastewater treatment facility.”¹⁴⁰ Thus, before a wastewater treatment facility may discharge reclaimed water, the facility must first obtain permission to use the reclaimed water.¹⁴¹ A facility can obtain a permit from the TCEQ authorizing the facility to use reclaimed water by complying with the permit application requirements found in Title 30, Chapter 305 of the Texas Administrative Code (relating to Consolidated Permits).¹⁴²

130. See TEX. WATER DEV. BD., *supra* note 61 (describing direct and indirect reuse).

131. See *id.*

132. See *id.*

133. *Id.*

134. See TEX. WATER CODE ANN. § 26.027 (West, Westlaw through 2015 Reg. Legis. Sess.).

135. See 33 U.S.C. §§ 1251–1388 (1987). Texas has received delegation of National Pollutant Discharge Elimination System permitting under the Clean Water Act. See 30 TEX. ADMIN. CODE § 305.1(b) (2015).

136. 30 TEX. ADMIN. CODE § 210.3(24) (Tex. Comm’n on Env’tl. Quality, Use of Reclaimed Water: Definitions) (defining “reclaimed water” as “[d]omestic or municipal wastewater which has been treated to a quality suitable for a beneficial use, pursuant to the provisions of [Title 30, Chapter 210 of the Texas Administrative Code] and other applicable rules and permits”).

137. TEX. WATER CODE § 11.046(c).

138. 30 TEX. ADMIN. CODE § 210.5.

139. TEX. WATER CODE § 26.027(a).

140. *Id.* § 26.0271(b).

141. *Id.*

142. 30 TEX. ADMIN. CODE § 210.5(a).

To transfer reclaimed water to another user for reuse, a provider of reclaimed water must first notify and receive written approval from the TCEQ.¹⁴³ According to the TCEQ, after a provider obtains written approval, the provider must obtain a separate water-right authorization to convey the water via a state watercourse.¹⁴⁴ However, “[i]f the reclaimed water is transferred or piped directly to the user or to a holding pond or vessel and never enters a state watercourse, then it is not state water and is not subject to water-rights restrictions.”¹⁴⁵

D. Key Statutory Reuse Provisions

There are two key sections in Chapter 11 related to the reuse of Texas water: § 11.042 (Delivering Water Down Bed and Banks) and § 11.046 (Return Surplus Water).¹⁴⁶ Within each section, subsection (c) is especially significant.

1. Significant Issues

There are numerous reuse issues and opinions related to putting §§ 11.042 and 11.046 together. For example, the July 17, 2015 State Office of Administrative Hearing Proposal for Decision (PFD) regarding the Brazos River Authority (BRA) catalogues diverse viewpoints from the parties.¹⁴⁷ Further, the Reuse Committee of the Texas Water Conservation Association issued a helpful white paper noting certain issues and providing examples of differing viewpoints.¹⁴⁸ Contemporary Texas reuse issues are challenging as well as numerous. For example, at the outset of the discussion of reuse in the BRA matter, the PFD says such issues “arguably comprise the most complex portion of the most complex water right application ever filed with the TCEQ.”¹⁴⁹

The Reuse Committee’s TWCA Paper indicates that there were still many unsolved issues surrounding reuse at the time of the paper’s inclusion in the 2007 state water plan.¹⁵⁰ The questions and issues TWCA’s Reuse Committee targeted under current law at the time included:

143. *Id.* § 210.4(a).

144. *See Requirements for Reclaimed Water*, TEX. COMM’N ON ENVTL. QUALITY, https://www.tceq.texas.gov/assistance/water/reclaimed_water.html (last visited Mar. 29, 2016).

145. *Id.*

146. TEX. WATER CODE §§ 11.042, 11.046.

147. Concerning the Application by the Brazos River Authority for Water Use Permit No. 5851 and Related Filings 214–45, SOAH No. 582-10-4184, TCEQ No. 2005-1490-WR (July 17, 2015) (proposal for decision) [hereinafter Brazos River Authority Application]. On January 20, 2016, the TCEQ considered the PFD in a hearing and remanded the matter to SOAH by Interim Order on January 29, 2016.

148. TEX. WATER DEV. BD., *supra* note 118, at 29–38 (detailing the paper). The TWDB included this paper in its 2007 state water plan. *Id.*

149. Brazos River Authority Application, *supra* note 147, at 215.

150. TEX. WATER DEV. BD., *supra* note 118, at 29–38.

- (1) Is discharged effluent considered “state water” subject to Chapter 11’s prior appropriation permitting process, or is it subject to an alternative legal scheme?;
- (2) Is effluent treated differently depending on the source of the effluent?;
- (3) Is effluent derived from “future” return flows treated differently than effluent derived from “existing” return flows?;
- (4) Who can obtain indirect reuse rights?; and
- (5) To what extent should environmental protection play into reuse permitting and authorization?¹⁵¹

This is an excellent representative list of reuse issues of contemporary relevance in Texas.¹⁵² Although highlighted and discussed for more than a decade, these issues are still timely and largely unanswered.

The TWCA Paper and the portion of the BRA PFD noted above are good primers for the complexities, perspectives, stakeholders, and interest groups involved in related controversies and conversations. The TWCA Paper and BRA PFD also go well beyond the limited scope of consideration and ideas offered below, which focus on statutory construction and policy considerations to try and put §§ 11.042(c) and 11.046(c) together.

2. Interpretive Approach

Part of the problem in construing §§ 11.042 and 11.046 together is that there is a mixture of clarity and ambiguity in relevant subsections. There is also a host of persons with an interest in all Texas water, including water that is reused. Without enough water to satisfy all needs and priorities, the stakes in reuse determinations are high.

As a matter of interpretive posture, ambiguities should be considered in the context of the public trust doctrine and Conservation Amendment (intertwined in Texas), and flowing from this, with reference to the fundamental core provisions of Chapter 11. As noted above, the Austin Court of Appeals aptly stated that “[a]ll of our water appropriation laws . . . *must be construed* in the light of [the Conservation Amendment] and of its objectives, both expressed and implied.”¹⁵³ Thus, preservation and conservation of surface water as public rights and duties is of uppermost importance as a policy.

Chapter 11 and its prior appropriation system of recognizing qualified rights to the use of surface water is an aspect of the state’s fiduciary role as trustee of such waters.¹⁵⁴ As discussed above, Chapter 11 codifies acquisition

151. *Id.* at 29.

152. *See id.*

153. *Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674, 680 (Tex. Civ. App.—Austin 1947, writ dismissed) (emphasis added).

154. TEX. WATER CODE ANN. § 11.0235(a) (West, Westlaw through 2015 Reg. Legis. Sess.).

of state water, highlights the first in time and right principle, recognizes the contemporary importance of environmental flow standards, and prohibits the taking and diversion of water absent compliance with all of Chapter 11 requirements.¹⁵⁵

3. Section 11.042

Section 11.042 concerns TCEQ authorizations for utilizing watercourses as transportation conduits to downstream diversion points for beneficial use as “stored or conserved water under contract,” supply water imported from an out-of-state source, “privately owned groundwater,” and “water.”¹⁵⁶ Subsections (b) and (c) of § 11.042 are particularly noteworthy for reuse considerations. Subsection (b) relates to utilization of watercourses for the discharge, diversion, and reuse of “privately owned groundwater.”¹⁵⁷ Before the addition of subsection (b) in 1997 per SB 1, common law governed transportation of groundwater via watercourses.¹⁵⁸ Applying pre-SB 1 law to privately discharged effluent by the City of San Marcos, the Austin Court of Appeals held that the city abandoned its effluent, which was commingled with state water in the watercourse.¹⁵⁹

Under § 11.042(b), TCEQ may grant an authorization to use watercourse bed and banks for discharge and transport of groundwater and “for the diversion and the reuse of these return flows.”¹⁶⁰ Any person wishing to use a watercourse for such transport and reuse of groundwater derived return flows “*must* obtain prior authorization” from TCEQ.¹⁶¹ TCEQ may specify conditions for such authorization, as necessary, “to protect an existing water right that was granted based on the use or availability of these return flows” and “to help maintain instream uses and freshwater inflows to bays and estuaries.”¹⁶² Any future increases of return flows from groundwater must also be authorized.¹⁶³

In part, subsection (c) reads:

Except as otherwise provided in Subsection (a) [(related to supplying conserved or stored water under contract)] of this section, a person who

155. See *supra* Part IV.A.

156. TEX. WATER CODE § 11.042(a)–(c).

157. *Id.* § 11.042(b). In Texas, and in contrast to water owned in trust by the state, groundwater is privately owned in place (a vested interest) and as personal property post-well production. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831–32 (Tex. 2012).

158. *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 801–02 (Tex. 1955).

159. *City of San Marcos v. Tex. Comm’n on Env’tl. Quality*, 128 S.W.3d 264, 278 (Tex. App.—Austin 2004, pet. denied) (applying the common law but then requiring the city to subsequently reapply to the TCEQ under SB 1).

160. TEX. WATER CODE § 11.042(b).

161. *Id.* (emphasis added).

162. *Id.*

163. *Id.*

wishes to convey and subsequently divert *water* in a watercourse or stream must obtain the prior approval of the [TCEQ] through a bed and banks authorization. The authorization shall . . . [be] subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries.¹⁶⁴

What does “water” mean in § 11.042(c)? It is an undefined term.¹⁶⁵ Nevertheless, its context and apparent role in § 11.042 provide clues for its intended meaning.¹⁶⁶ Given the specificity of the types of water available for bed and banks authorizations in the preceding subsections, water in subsection (c) should not refer to an unspecified, separate, and additional category of water for a bed and banks authorization.¹⁶⁷ It should also not indicate all water.¹⁶⁸ Rather, it appears to refer to the foregoing categories of water subject to particular TCEQ bed and banks authorizations, namely, supply water imported from out of state per subsection (a-1) and privately owned groundwater per subsection (b).¹⁶⁹ Subsection (c) carves out subsection (a) because, unlike subsections (a-1) and (b), subsection (a) refers to “rules prescribed by” the TCEQ as opposed to a necessary “prior authorization” from TCEQ.¹⁷⁰ Further, subsection (c) both (1) reinforces the need for the TCEQ authorization with special quantitative and qualitative conditions before utilizing a watercourse for conveyance and subsequent diversion for reuse and (2) adds that bed and banks authorizations under the section—meaning subsections (a-1) and (b)—“and water quality authorizations may be approved in a consolidated permit proceeding.”¹⁷¹

Although § 11.042(c) is far from a model of clarity and reasonably subject to alternative interpretive viewpoints, the foregoing suggestion is consistent with the whole of § 11.042. It is also consistent with Chapter 11 generally, with the fact that water is an undefined term—the construction consistent with § 11.046(c) suggested below—and with the policies inherent in the public trust and related Conservation Amendment.

4. Section 11.046

Section 11.046 relates to the return of surplus water.¹⁷² Chapter 11 defines “surplus water” as “water in excess of the initial or continued

164. *Id.* § 11.042(c) (emphasis added).

165. *See id.* § 11.002.

166. *See id.* § 11.042(a-1)–(b).

167. *See id.* § 11.042(a-1)–(c).

168. *See id.*

169. *See id.* § 11.042(a-1)–(b).

170. *Id.* § 11.042(a)–(c).

171. *See id.* § 11.042(c).

172. *Id.* § 11.046.

beneficial use of the appropriator.”¹⁷³ Subsection (a) of § 11.046 mandates that persons who take water pursuant to Chapter 11 “conduct surplus water back to the watercourse or stream from which it was taken if . . . reasonably practicable to do so.”¹⁷⁴ Thus, § 11.046 codifies a strong policy of encouraging return flows and avoiding waste. Subsection (b) indicates that the TCEQ may include conditions in a water right for the return of surplus water for protection of downstream senior right holders or to provide for environmental flows.¹⁷⁵

In part, subsection (c) reads:

Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used and reused by the holder of [the water right]. Once water has been diverted under a [water right] and then *returned to a watercourse* or stream, however, it is considered *surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the [water right]*.¹⁷⁶

The first part of subsection (c) authorizes direct reuse.¹⁷⁷ The latter portion related to indirect reuse, however, is the subject of controversy, especially when considered in comparison to § 11.042(c).¹⁷⁸ Indirect reuse under § 11.046(c) seems fairly straightforward when § 11.042(c) is interpreted as suggested above to refer to bed and banks authorizations for water imported from out of state or privately owned groundwater, and not for indirect reuse of any other water. If § 11.042(c) is otherwise construed to create an additional category of streamlined TCEQ approval for reuse for a water right holder that is unspecified in that right, then § 11.042(c) and § 11.046 appear unnecessarily in conflict.

With the suggested understanding of § 11.042(c) above in mind, under § 11.046(c), once water diverted and beneficially used “under a permit, certified filing, or certificate of adjudication” returns to a watercourse, it is surplus water and subject to environmental flows “or to appropriation by others unless *expressly* provided otherwise in the [water right].”¹⁷⁹ As such, this returned surplus water is state water because it is in a watercourse.¹⁸⁰ Further, per the unambiguous language in subsection (c), the returned surplus water should be fully available “for instream uses or beneficial inflows” as

173. *Id.* § 11.002(10).

174. *Id.* § 11.046(a).

175. *Id.* § 11.046(b).

176. *Id.* § 11.046(c) (emphasis added).

177. *Id.*

178. *Id.*

179. *Id.* (emphasis added).

180. *Id.* § 11.021(a); *see also* Domel v. City of Georgetown, 6 S.W.3d 349, 360 (Tex. App.—Austin 1999, pet. denied) (describing water returned to the watercourse as state water).

well as appropriation by “others”—meaning anyone, pursuant to the prior appropriation permitting scheme of Chapter 11 for a new water right.¹⁸¹ Others is a broad term. It logically should mean anyone other than the water right holder and should not be taken implicitly to specify a limited group of persons, such as persons in privity with the water right holder.

V. CONCLUSION

Returning to the rural setting with Alice and her family at the outset of this Article, Alice got pretty worked up about the treated effluent in the stream running through her rural retirement home. She became even more distraught and stressed after acquainting herself with the numerous issues and complex problems related to reuse of water in Texas. Sensing Alice’s discomfort and unhappiness, her husband and grandchildren orchestrated an intervention. They emphasized the beauty and apparent safety of the water in the stream and how much they enjoyed it compared to the former dry bed. From local reports they heard, downstream neighbors and businesses were also pleased with greater availability of water. Further, Alice’s beloved Dachshund and Labrador regularly drank from and played in the stream. They were happier, had more energy, and even seemed to have shinier coats than before the consistent flow of water. Alice reconsidered her good fortune and concluded that reuse was indeed a good thing. She was glad there are so many gifted and well-intentioned attorneys involved in related legal proceedings. Finally, she was hopeful that, with the Conservation Amendment she discovered, the Texas Legislature might amend relevant parts of Chapter 11 to clarify some of the legal uncertainties.

181. TEX. WATER CODE § 11.046(c).

