TCEQ WATER CURTAILMENT RULES
How Meaningful is the Priority System?

by Michael J. Booth
Booth Ahrens & Werkenthin, P.C.

Presented at 2013 TRWA/TWCA Water Law Seminar
January 24, 2013, Austin Texas

I. INTRODUCTION

The "first in time, first in right" doctrine[1] is the foundation of the Texas water appropriation model, and is based on the priority of water access given to senior over junior water rights holders. Drought and emergency water shortage laws in the Texas Water Code have protected the priority doctrine since its creation, and are relied upon by decision makers and those holding water rights. The computer models used to determine whether new water rights can be granted and the reliability of existing water rights are also based on the priority system. In response to the severe drought Texas was experiencing (and continues to experience), the 82nd Legislature in 2011 passed House Bill 2694[2] which added Section 11.053 to the Texas Water Code. Section 11.053 required the Texas Commission on Environmental Quality ("TCEQ" or "Commission") to adopt rules to implement curtailment procedures during "a period of drought or other emergency shortage of water…in accordance with the priority of water rights established by Section 11.027 [of the Texas Water Code]."[3]

The rules adopted by TCEQ in Texas Administrative Code Title 30, Chapter 36, to implement Section 11.053 of the Texas Water Code are arguably inconsistent with the priority doctrine, as they allow the Commission to consider public health, safety, and welfare concerns

[1] Tex. Water Code § 11.027 ("As between appropriators, the first in time is the first in right.").
[2] Act of May 28, 2011, 82nd Leg., R.S., ch. 1021, § 5.03, 2011 Tex. Gen. Laws 2579, 2593.
[3] Tex. Water Code § 11.053(a).

instead of priority rights when deciding which water right to curtail during water shortages. This and other implications of the new rules pose significant threats to the priority doctrine and could call into question many assumptions upon which the Texas surface water allocation system is based. Ironically, the curtailment rules essentially reenact the controversial but likely constitutional provisions of the Wagstaff Act,[4] which was repealed in 1997 because of a concern that it devalued vested water rights. This paper will discuss the background of Texas water rights, House Bill 2694, the TCEQ's adopted curtailment rules, and the legal and practical implications these pose on the enforcement of the priority doctrine.

II. WATER RIGHTS BACKGROUND

A. Spanish and Mexican Civil Law Water Rights

Because Texas was originally part of Spain and then later Mexico, many land grants were controlled by the civil law of Spain and Mexico. As it turned out, Texas courts did not consistently interpret what the actual civil law was with regard to grants of water rights. In *Motl v. Boyd*,[5] the Texas Supreme Court protected the terms of rights granted riparians when land grants were made during Mexican civil law, recognizing a riparian right of reasonable water use for property owners adjacent to a watercourse. Later, in *State v. Valmont Plantations*,[6] the San Antonio court, after an extensive analysis of civil law, determined that there was no such thing as a Spanish or Mexican riparian right to irrigate. In order to have an irrigation water right, the land grant must have expressly granted such a right.[7] There were, in fact, some grants expressly providing for water rights.[8]

[4] Act of May 18, 1931, 42nd Leg., R.S., ch. 128, 1931 Tex. Gen. Laws 217 ("Wagstaff Act").
[5] 116 Tex. 82, 286 S.W. 458 (1926).
[6] 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).
[7] *Id*. at 856.
[8] *Id*.

A later case, *In re Contests of City of Laredo*,[9] followed the *Valmont Plantations* reasoning and determined that although it was a pueblo (the highest form of town in Colonial Spain), the City of Laredo must have an express grant of a water right in order to have a right to divert water. This occurred despite the fact that the courts of California and New Mexico had long ago recognized in a pueblo an implied right to use as much water as was necessary for municipal purposes, which could be expanded as the need for water increased. Civil law rights, to the extent recognized, were incorporated into the Texas appropriative system during the adjudication process (discussed further below).

B. Riparian Rights

A riparian water right is a right of water use recognized under the English common law that allows the property owner of each bank of a watercourse the right to make reasonable use of the water flowing in a watercourse.[10] The right came into being in Texas in 1840 when the Republic of Texas adopted the English common law and existed through July 1, 1895. The 1913 and 1917 Irrigation Acts made it clear that land grants after July 1, 1895, did not carry with them riparian rights.[11] In the past, there were several important distinctions between riparian and appropriative rights in Texas. Unlike appropriative water rights, riparian water rights were not lost with nonuse.[12] Moreover, riparian rights were treated with priority over appropriative water rights.[13] Unlike riparian rights recognized in other states, a riparian landowner could even sell water for off-site use provided the use did not create prejudice against other riparian water right

[9] 675 S.W.2d 257 (Tex. Civ. App.—Austin 1984, writ ref'd. n.r.e).
[10] *In re Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin,* 625 S.W.2d 353, 358 (Tex. Civ. App.—San Antonio 1981), *aff'd*, 642 S.W.2d 438 (Tex. 1982).
[11] *Id*. at 359.
[12] *Fleming v. Davis*, 37 Tex.173 (1872).
[13] *Matagorda Canal Co. v. Markham Irrigation Co*., 154 S.W. 1176, 1180 (Tex. Civ. App—Galveston 1913, no writ).

holders. However, with the advent of the Water Rights Adjudication Act[14] (discussed further below), Texas has merged riparian rights within the appropriative system, creating little, if any, distinction between riparian and appropriative rights for most practical purposes.

C. The Prior Appropriation System

The appropriative water right that is held under a prior appropriation system is a right of private property in the nature of real property.[15] The prior appropriation doctrine generally provides for priority of water use to the water user with the earliest water right. The "first in time, first in right" doctrine applies to allocate water between appropriators during times of shortage. The Texas Water Code also provides for preferences for certain uses.[16] However, the preferences only apply with certain limitations in determining which competing new uses should be granted permits.[17] Texas, as with most Western States, has incorporated the prior appropriation doctrine for water rights administration.

III. DEVELOPMENT OF PRIOR APPROPRIATION DOCTRINE IN TEXAS

A. Early Irrigation Acts

Unlike many Western States, the prior appropriation doctrine in Texas is the product of legislation. Under the 1889 Irrigation Act,[18] appropriative rights could be obtained by diverting water from a stream, applying the water to a beneficial use and filing an affidavit with the clerk of the county in which the land is situated.[19] The 1895 Irrigation Act,[20] besides including a greater area of the State to be covered by the Irrigation Acts, required considerably more

[14] Act of April 6, 1967, 60th Leg., R.S., ch. 45, 1967 Tex. Gen. Laws 86; *see also In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982).
[15] W. Hutchins, *The Texas Law of Water Rights* (1961) at 221 (citing *Lakeside Irrigation Co. v. Markham Irrigation Co*., 116 Tex. 65, 74-75, 285 S.W. 593 (1926)).
[16] *See* Tex. Water Code § 11.024.
[17] *Id.* § 11.123.
[18] Act of Mar. 19, 1889, 21st Leg., R.S., ch. 88, 1889 Tex. Gen. Laws 100.
[19] *See State v. Hidalgo County Water Control Improvement Dist. No. 18*, 443 S.W.2d 728, 737 (Tex. Civ. App.—Corpus Christi, 1969, writ ref'd n.r.e.).
[20] Act of Mar. 9, 1895, 24th Leg. R.S., ch. 21, 1895 Tex. Gen. Laws 25.

information to be provided to the county clerk regarding the appropriation. The Burges-Glasscock Irrigation Act of 1913[21] set up the Board of Water Engineers (a predecessor agency of the Texas Water Commission), provided statewide coverage of the Act by declaring all unappropriated waters in the state to be the property of the state, and established a permit system that required the affidavits to be sent to the Board of Water Engineers.[22]

The 1913 Irrigation Act was repealed and replaced by the Irrigation Act of 1917,[23] but the only significant substantive change was to adopt a water right adjudication procedure to provide for the quantification of previously unquantified certified filings and riparian rights. In *Board of Water Engineers v. McKnight*,[24] the Supreme Court declared that the 1917 Irrigation Act water right adjudication process was unconstitutional, holding that the adjudication of property rights was a judicial function and a violation of the separation of powers doctrine.

B. Water Rights Adjudication Act of 1967

In 1967, the legislature passed the Water Rights Adjudication Act of 1967[25] to replace the earlier 1917 Irrigation Act found to be unconstitutional in *Board of Water Engineers v. McKnight*. The 1967 Act is codified in Chapter 11 of the Texas Water Code (§§ 11.301-.341). The Act allows the Commission to quantify, incorporate, and limit the variety of water rights that existed in Texas at the time of its passage. The 1967 Act was designed to extinguish unused riparian water rights to provide more certainty to water availability in the future. Since its passage, all of the river basins in Texas have been adjudicated and all water rights now are based upon the prior appropriation doctrine except for domestic and livestock uses.[26] The Water

[21] Act of April 9, 1913, 33rd Leg., R.S., ch. 171, 1913 Tex. Gen. Laws 358.
[22] *See State v. Hidalgo County Water Control and Improvement Dist. No. 18*, 443 S.W.2d 728, 738 (Tex. Civ. App.—Corpus Christi, 1969, writ ref'd n.r.e.).
[23] Act of 1917, 35th Leg., R.S., ch. 88, 1917 Tex. Gen. Laws 211.
[24] 3 Tex. 82, 229 S.W. 301 (1921).
[25] Act of April 6, 1967, 60th Leg., R.S., ch. 45, 1967 Tex. Gen. Laws 86.
[26] Tex. Water Code § 11.024.

Rights Adjudication Act of 1967 was challenged and its constitutionality sustained in 1982.[27]

C. The Wagstaff Act

The Wagstaff Act was passed in 1931 in response to a permit application dispute for the Brownwood Reservoir on Pecan Bayou[28] in which a need for upstream water was threatened by downstream senior appropriations for hydroelectric and irrigation purposes. The Board of Engineers resolved the dispute, but the Wagstaff Act was drafted to address the broader problem this dispute represented, that is, not enough unappropriated water in some river basins to grant new water rights for municipal use. The Wagstaff Act, which was eventually codified in Section 11.028 of the Texas Water Code, made all non-domestic and non-municipal appropriations after May 17, 1931, subject to the right of a municipality to appropriate the water without the necessity of condemnation or compensation for the water.[29] This provision was repealed by Senate Bill 1, effective September 1, 1997.[30] The basis for the repeal was the Act's limited use and the substitution of new provisions that allow for an emergency authorization to take water from certain water rights holders and allow another to use them after payment.

D. Existing Emergency Shortage Provisions

The 65th Legislature in 1977 passed Senate Bill 1139[31] enacting Section 11.139 of the Texas Water Code, authorizing the Commission to grant an emergency permit for a period of not more than 30 days if it found that conditions exist which threaten public health, safety, and welfare. Senate Bill 1 amended Section 11.139 on September 1, 1997, enhancing the Commission's ability to grant emergency authorizations if specific criteria were met and

[27] *See In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982).
[28] *McInnis v. Brown Cnty. Water Improvement Dist. No. 1*, 41 S.W.2d 741 (Tex. Civ. App.—Austin 1931, writ ref'd).
[29] Wagstaff Act at 218.
[30] Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 9.01, 1997 Tex. Gen. Laws 3610, 3682.
[31] Act of May 8, 1977, 65th Leg., R.S. ch. 870, § 1, sec. 11.139, 1977. Tex. Gen. Laws 2207, 2231.

significantly providing for compensation and damages to parties who may incur a loss as a result of an emergency authorization.[32] These changes to Section 11.139 directly corresponded to the repeal of the Wagstaff Act that was also a part of Senate Bill 1.

Section 11.139 of the Texas Water Code now, after Senate Bill 1, allows the TCEQ to grant an emergency authorization if "the commission finds that emergency conditions exist which present an imminent threat to the public health and safety."[33] The TCEQ may grant an emergency authorization "for the temporary transfer and use of all or part" of a water right that is authorized for uses other than domestic or municipal use "to a retail or wholesale water supplier for public health and safety purposes."[34] Most importantly, unlike the repealed Wagstaff Act, this temporary transfer or use of another's water right must be compensated:

> The person granted an emergency authorization under Subsection (h) of this section is liable to the owner and the owner's agent or lessee for whom the use is transferred **for the fair market value of the water transferred as well as for any damages caused by the transfer of use**.[35]

Another provision of the Water Code, Section 11.039 further provides rules regarding the distribution of water during shortages by wholesale water suppliers, and must be read in conjunction with Section 11.139. The language of Section 11.039 was originally part of section 58 of the 1913 Irrigation Act[36] (discussed above), which stated that "[i]n case of shortage of water from drought, accident or other cause, all water to be distributed shall be divided among all customers pro rata, according to the amount he or they may be entitled to, to the end that all shall suffer alike, and preference be given to none." Section 11.039 was later amended by House Bill

[32] Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 3.03, 1997 Tex. Gen. Laws 3610, 3629.
[33] Tex. Water Code § 11.139(a).
[34] *Id*. § 11.139(h).
[35] *Id*. § 11.039(j) (emphasis added).
[36] Act of April 9, 1913, 33rd Leg., R.S., ch. 171, § 58, 1913 Tex. Gen. Laws 358, 372.

2588[37] in 2001 to allow water suppliers to take into account the degree to which customers have complied with the applicable water conservation and drought contingency plans when addressing water shortages.

After House Bill 2588, during water shortages that may result from drought, accident, mechanical failure, or other causes, Section 11.039 of the Texas Water Code authorizes water suppliers to implement pro rata reductions for distribution of water, although some customers can be penalized for not conserving according the applicable water conservation plan.[38] This rationing of water supplies occurs with no preference to any particular use. Section 11.039 also specifically provides that nothing in the rule may "[preclude] the person, association of persons, or corporation owning or controlling the water from supplying water to a person who has a prior vested right to the water under the laws of the state," which serves to protect priority water rights holders from loss of rights during times of drought.[39] Section 11.039 further states that water shall be distributed according to "the amount of water to which each customer *may be entitled*."[40]

Further existing emergency provisions can also be found in Texas Water Code to allow for emergency orders to be issued. Texas Water Code Section 5.501 allows the TCEQ to issue a temporary, emergency mandatory, prohibitory or permissive order during emergencies.[41] It may also issue a temporary permit or suspend or amend a permit condition temporarily.[42] The emergency order is to be issued after providing notice and an opportunity for hearing or without any notice or hearing if the Commission considers it practicable.[43] However, if the order is issued without hearing or notice, a hearing to must be scheduled to "affirm, modify, or set aside

[37] Act of May 23, 2001, 77th Leg., R.S. ch. 1126, § 1, 2001 Tex. Gen. Laws 2510.
[38] *Id*. § 11.039.
[39] *Id*. § 11.039(c).
[40] *Id*. § 11.039(b)(1). (emphasis added).
[41] Tex. Water Code § 5.501(a)(1).
[42] Tex. Water Code § 5.501(a)(2).
[43] Tex. Water Code. § 5.501(b).

the emergency order."[44] There is also a procedure in the Water Code for a person other than the Executive Director to apply for an emergency order.[45] Lastly, the rules state that emergency orders may not exceed 180 days, and can only be renewed for one additional 180-day period.[46]

These two laws (Sections 11.139 and 11.039 of the Texas Water Code), along with the laws governing watermasters[47] and enforcement,[48] protect and implement the priority doctrine by providing an emergency drought strategy consistent with the prior appropriations system upon which Texas water rights were founded, while prescribing a very specific method for water distribution. With all the existing provisions pertaining to emergency orders, it is unclear why the adoption of additional curtailment rules is helpful or necessary.

IV. HOUSE BILL 2694 AND ADOPTION OF CURTAILMENT RULES

A. House Bill 2694

The 82nd Legislature passed House Bill 2694[49] in 2011, also known as the "TCEQ Sunset Bill." The TCEQ Sunset Bill included a provision that added Section 11.053 to the Texas Water Code,[50] which provides that the executive director of the TCEQ may temporarily suspend or adjust water rights during times of drought or other emergency shortage of water. It requires the TCEQ to adopt rules to define "drought" or "other emergency shortage of water" for purposes of this section.[51] Most importantly, the statute specifically mandates that the Commission develop these curtailment rules "in accordance with the ***priority of water rights*** established by Section 11.027."[52]

---

[44] Tex. Water Code. § 5.501(b).
[45] Tex. Water Code § 5.502.
[46] Tex. Water Code § 5.505.
[47] *Id*. § 11.326.
[48] *Id*. §§ 11.082, 11.0841-.0842.
[49] Act of May 28, 2011, 82nd Leg. R.S., ch. 1021, 2011 Tex. Gen. Laws 2579.
[50] *Id*. § 5.03.
[51] *Id*.
[52] Tex. Water Code § 11.053(a) (emphasis added).

B. Development of Proposed Curtailment Rules

On October 18, 2011, The TCEQ approved formal draft rules to implement Section 11.053 of the Texas Water Code. The corresponding memo[53] stated that the purpose of the rulemaking was "to mitigate the impact on priority water rights caused by drought or an emergency shortage of water, based on the priority doctrine." The TCEQ's memo to the Commissioners also predicted the rulemaking would "be very controversial on all issues."[54] A public comment period on the proposed rulemaking occurred on November 2 through December 5, 2011, and included a public hearing on December 1, 2011. This included extensive commentary and criticism of the proposed rules claiming that the rules should be withdrawn, primarily because of the negative impact on the priority doctrine. Other criticisms focused on the broad definitions of when the rules would apply, specifically the threat that any dry spell could be defined as a drought or emergency. These issues and many other criticized provisions went largely unaddressed in the final rules adopted in Texas Administrative Code Title 30, Chapter 36, effective May 3, 2012.

Under the existing provisions in the Texas Water Code regarding emergency authorizations or distributions of water during shortage (Sections 11.039 and 11.139 of the Texas Water Code, previously discussed), senior water right holders may call upon all junior water rights, regardless of purpose of use, if they could not access all the water they were authorized. However, under the newly adopted curtailment rules, the Commission is able to consider the type or purpose of use when deciding from which junior right to call water. The curtailment rules

[53] Memorandum from Tex. Comm'n on Envtl. Quality on Chapter 36 – Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, Rule Project No. 2011-033-036-LS (Oct. 10, 2011) at 8, available at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/proposals/11033036_pro.pdf.

[54] Memorandum from Stephanie Bergeron Perdue, Deputy Dir., Office of Legal Services, Tex. Comm'n on Envtl. Quality to Commissioners, Tex. Comm'n on Envtl. Quality (Sept. 29, 2011), available at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/adoptions/11033036_aex.pdf

allow some junior water right holders, such as municipalities, to continue to take water under their water rights as needed for human health, welfare, and safety concerns.[55]

V. LEGAL ISSUES WITH THE CURTAILMENT RULES

A. Curtailment Rules Violate the Priority Doctrine

Texas prior appropriation law has been built on the maxim that senior water rights have priority over junior water rights in times of water shortage. Section 11.027 of the Texas Water Code states that "[a]s between appropriators, the first in time is the first in right."[56] The Texas Legislature, in House Bill 2694, seemed to continue to adhere to this maxim by specifically requiring the drought curtailment procedures in Section 11.053 of the Texas Water Code to be implemented "in accordance with the ***priority of water rights*** established by Section 11.027."[57] However, the curtailment procedures adopted by the TCEQ in Chapter 36 to implement Section 11.053 of the Texas Water Code directly contradict the priority doctrine, allowing the TCEQ's executive director to "…determine not to suspend a junior water right based on public health, safety, and welfare concerns."[58] This provision allows the Commission, during a senior water right call, to not suspend certain junior water rights (which may not have priority over other water rights also subject to the senior call) to avoid threatening the water supply to a junior municipal or power generation user based on public health, safety, or welfare concerns.

The TCEQ has stated that "[a]llowing municipal and power generation water rights to take water under a senior call is not a taking of, or transfer of water from, a non-municipal or power water right that was suspended under the call."[59] but otherwise senior to the water rights

[55] 30 Tex. Admin. Code § 36.5(c).
[56] Tex. Water Code § 11.027.
[57] *Id*. § 11.053(a) (emphasis added).
[58] 30 Tex. Admin. Code § 36.5(c).
[59] Memorandum from Stephanie Bergeron Perdue, Deputy Dir., Office of Legal Services, Tex. Comm'n on Envtl. Quality to Commissioners, Tex. Comm'n on Envtl. Quality (April 17, 2012) at 25, available at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/adoptions/11033036_ado_clean.pdf

that were not suspended. The TCEQ takes the myopic position that priority is being upheld because the senior water right that makes the call is being satisfied. However, this position focuses only on the priority of the senior water right making the call, but ignores the priority that junior water rights have over each other. For example, assume three water rights A, B, and C. A has priority over B, which has priority over C. Assume that A makes a senior call, and full suspension of C (which is junior to B) could completely satisfy the call, but C is a municipal water right with public health, safety, and welfare concerns. Suspension of B to satisfy A's senior call, when A's senior call could have been satisfied by full suspension of the most junior water right C, ignores the priority that B has over C under the prior appropriation doctrine. Therefore, the provisions in Texas Administrative Code, Title 30, Chapter 36, allowing the TCEQ the ability to not suspend certain junior water rights based on public health, safety, or welfare concerns directly violate the priority doctrine.

B. Takings Issues

Once granted by the state, a water right has long been recognized as a vested right of the holder that once granted cannot be further restricted, so long as the holder's use is beneficial and non-wasteful.[60] The Texas Constitution states that "[n]o person's property may be taken, damaged, or destroyed for public use without adequate compensation."[61] During the comment period, several entities inquired as to the takings impact of the new curtailment rules. In addressing this issue, the Commission staff stated the following:

> The executive director may decide not to suspend junior municipal and power water rights when issuing an order to protect senior water rights based on public health and welfare concerns. TWC, § 11.053 allows the executive director to consider other factors in making his determination. The commission believes that this action is part of its police powers to protect public health and welfare, and is

[60] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971).
[61] Tex. Const. art. I, § 17.

not subject to a takings claim.[62]

The TCEQ staff's position on this issue is that there can be no taking of vested surface water rights because the curtailment rules are a valid exercise of TCEQ's police power.

The Commission staff has misinterpreted the law with respect to property rights, takings claims, and the police power. When vested property rights, such as surface water rights, are taken either directly or indirectly from property owners through government regulations, the taking may be compensable; this includes cases where the government claims the regulation in question is a valid exercise of its police power.[63] The Texas Supreme Court has specifically stated that "this court has moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of the police powers."[64] Even though the TCEQ staff claims that the new curtailment rules are a valid exercise of the Commission's police power, these regulations of vested property rights could rise to the level of a compensable taking depending on the fact situation and applicable constitutional analysis.

C. Return of the Wagstaff Act?

As discussed above, the Wagstaff Act made all non-domestic and non-municipal appropriations after 1931 subject to the right of a municipality to appropriate the water without the necessity of condemnation or compensation for the water. The new drought curtailment rules are essentially a *de facto* return of the Wagstaff Act without the benefit of enabling legislation, except the application of the new curtailment rules are retroactive against all water rights. The Wagstaff Act applied only to non-municipal and domestic water rights obtained after its passage

[62] Memorandum from Stephanie Bergeron Perdue, Deputy Dir., Office of Legal Services, Tex. Comm'n on Envtl. Quality to Commissioners, Tex. Comm'n on Envtl. Quality (April 17, 2012) at 31, available at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/adoptions/11033036_ado_clean.pdf
[63] *See Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004); *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006); *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012).
[64] *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980).

and represented a constitutional restriction on the state's grant of the water right.

D. Pending Litigation Against TCEQ

In December 2012, the Texas Farm Bureau filed a petition for injunctive relief against the TCEQ in the District Court of Travis County. *Texas Farm Bureau, et al. v. Texas Comm'n on Envtl. Quality*, No. D-1-GN-12-003937 (98th Dist. Ct., Travis County, Tex., filed Dec. 14, 2012). A priority call made by Dow Chemical Company ("DOW") in November 2012 resulted in a TCEQ Executive Order suspending water use for all water users below Possum Kingdom Reservoir on the Brazos River having a priority date junior to February 14, 1942. However, pursuant to Texas Administrative Code Title 30, Chapter 36 (Suspension or Adjustment of Water Rights During a Drought or Emergency Water Shortage), the TCEQ excused all power generators and municipal water users from the curtailment order. The order identified 854 water rights to be suspended, 716 of which are designated for irrigation use. Among the listed water rights, sixty-six were identified for municipal and power generation use and therefore exempt from curtailment. The authorized annual use under the remaining curtailed users amounts to 141,090 acre-feet per year, while the non-suspended junior power generation and municipal users amount to 3,076,056 acre-feet per year.

The nature of the case involves both a general challenge of the validity of the TCEQ curtailment rules as well as a petition for declaratory judgment against the specific curtailment order. Plaintiffs argue that the irrigation users would bear the brunt of Dow's priority call. Moreover, the call would be making water available for power generation and municipal uses that far exceed the amount authorized for irrigation and other suspended uses. The petition alleges that the effect of the TCEQ suspension order and Curtailment Rules is the cut-off of irrigation water rights to satisfy the needs of not only a senior appropriator, but also of junior

municipal and power generator users. Plaintiffs seek declaratory judgment that the Curtailment Rules in general are invalid and exceed TCEQ's statutory authority to deviate from the priority system, declaratory judgment suspending the specific curtailment order, declaratory judgment that suspending senior water rights without compensation is unconstitutional, and declaratory judgment that Texas Water Code § 11.139 is the only mechanism authorized to take water from senior water rights users.

Plaintiffs also allege that the curtailment order demonstrates that senior rights holders like Dow can expect to have little benefit from making a call during times of drought, as TCEQ exempted 95% of the acre-feet of water available under this order. The Court in this matter recently denied a request for temporary restraining order against the TCEQ, but Plaintiffs are currently seeking a temporary injunction hearing for late January 2013.

V. PRACTICAL ISSUES WITH THE CURTAILMENT RULES

A. What if Strict Priority Enforcement Creates a Public Health, Safety, or Welfare Concern?

The TCEQ takes the position that its new curtailment rules enforce priority because the senior water right that makes the call will be satisfied even though the executive director can choose to not suspend certain junior municipal or power generation water rights due to public health, safety, or welfare concerns. This ignores a possible situation under 30 Tex. Admin. Code § 36.5(c) where a senior water right makes a call, and this call cannot be fully satisfied unless all junior water rights are suspended, including junior water rights with demands that the executive director determines have public health, safety, and welfare concerns. In other words, assume there is enough water available to satisfy a senior water right call, but there is not enough water available to satisfy the senior water right making the call and to allow a junior municipal water right holder to take water based on public health, safety, and welfare concerns. The TCEQ has

never addressed which water right will be left without water, the senior water right making the call or the junior municipal or power generation water right that needs the water for public health, safety, and welfare concerns.

B. Applicability of the Rules

Another issue with the new Chapter 36 rules is determining when they apply. The legislature specifically mandated that the Commission implement Section 11.053 of the Texas Water Code by adopting rules:

> (1) defining a drought or other emergency shortage of water for purposes of this section; and
> (2) specifying the:
> (A) conditions under which the executive director may issue an order under this section;[65]

The rules subsequently adopted by the Commission pursuant to this mandate maintain unclear and broad definitions of a drought or emergency shortage of water, making the conditions when emergency orders may be issued pursuant to Section 11.053 of the Texas Water Code unclear.

The Commission rules in Chapter 36 define a "drought" as occurring when any one of three criteria is met.[66] One criterion is when there is below normal precipitation in a watershed or a part of the watershed for three months, "a senior call is made, and the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call."[67] This criterion seems to be imprecise for defining a drought, as there are probably examples most years where a certain area of a watershed would experience below normal precipitation for three consecutive months. The Commission also defines an emergency shortage of water as the inability of a senior water right holder to take surface water under its water right during "emergency periods posing a hazard to public health and safety" or "conditions affecting

[65] Tex. Water Code § 11.053(c)(1), (c)(2)(A).
[66] 30 Tex. Admin. Code § 36.2(3).
[67] *Id*. § 36.2(3)(C).

hydraulic systems which impair or interfere with conveyance or delivery for authorized users."[68] This definition is extremely vague, and one could argue it applies almost any time there is a senior water right call.

The legislature intended the curtailment procedures in Texas Water Code § 11.053 to be applied only during times of drought or other *emergency* shortages of water. The Commission noted in its rule proposal memo that the definition of drought "includes times of drought that are not as extreme, but are still causing shortages that could adversely impact senior water rights."[69] This does not appear to be the same level of emergency contemplated by Section 11.053 of the Texas Water Code. If the Chapter 36 curtailment rules are applied, senior water rights holders must expect claims on their rights in non-emergency situations as Texas cycles in and out of droughts of varying degrees, or any time the "demand for surface water exceeds the available supply."

C. Harmonization With Existing Law and Practice

Other comments to the new curtailment rules further expanded the focus on the proposed rules' possible inconsistencies with existing Texas laws. Texas Water Code § 11.139, mentioned above, already addresses allocation of water in emergency situations. Section 11.326 of the Texas Water Code also mentions circumstances where a watermaster should be appointed to address issues of water shortages as related to vested water rights. Section 11.148 of the Texas Water Code provides for the emergency suspension of environmental permit conditions and set-asides when emergency conditions exist. Multiple comments on the rule proposal pointed out the need for clarity as to which rule takes precedence and when. There was also commentary

[68] 30 Tex. Admin Code § 36.2(3)(C)–(4)(B).
[69] Memorandum from Tex. Comm'n on Envtl. Quality on Chapter 36 – Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, Rule Project No. 2011-033-036-LS (Oct. 10, 2011) at 8, available at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/proposals/11033036_pro.pdf.

suggesting that the new rules should only be applied as a last resort once implementation of other water code provisions has failed, and if there is compensation to the water holder being curtailed.

The new rules also pose an important implication on water availability models, which have been relied upon for strict enforcement of prior appropriation laws. If the Commission is moving away from strict enforcement, as it appears, this may significantly affect such modeling and the water rights investments based upon it. Water rights holders will no longer be able to determine the reliability of their water rights if water rights are granted based upon priority, but not enforced strictly by priority.

D. Treatment of Reservoirs

It is also unclear how TCEQ will handle the treatment of reservoirs during application of the new curtailment rules in Chapter 36. The TCEQ has stated that it would allow a reservoir with municipal or power generation water rights associated with it to impound inflows to maintain the reservoir level in existence on the date of a senior water right call. This implies that the reservoir owner will be allowed to impound inflows to refill empty storage resulting not only from releases for municipal or power generation, but also to offset evaporation. Some downstream senior water rights may take issue with junior reservoirs impounding inflows that could be passed to satisfy the downstream senior water rights simply to offset evaporation.

Further complications arise when the reservoir owner has a multipurpose water right, that is, a right that authorizes use for municipal, industrial, agriculture, hydroelectric, etc., or some combination. During a drought or emergency shortage under Chapter 36, it is not known whether the TCEQ will let a reservoir owner with a multipurpose water right divert out of storage for something other than municipal or power generation. If these diversions are allowed, can the resulting empty storage be refilled? In theory, a multipurpose water right might be able

to satisfy all its needs by using stored water for its non-municipal and non-power generation uses, but making out-of-priority diversions from inflows for its municipal and power generation uses. It is also unclear whether the multipurpose water right will be allowed to impound inflows to replace evaporation. If the TCEQ allows reservoir owners to maintain reservoirs at their current level, this would allow inflows to be impounded to offset not only the portion of the evaporation associated with the municipal and power generation uses, but also evaporation associated with all other uses.

E. Additional Policy Implications

Besides not applying to water already stored in a reservoir, the curtailment rules do not apply to areas of the state that have a watermaster employed, which appears to have created unintentional consequences on watermaster creation. After the adoption of the curtailment rules, the interest in creating watermasters in large areas of the state, which up to that time was fairly high, has waned. Funding for curtailment enforcement comes from the State's general fund as opposed to coming from individual water rights holders paying for the watermaster out of their own pockets. Additionally, municipal and steam electric power companies holding junior water rights see that they may not be cut off or as restricted under curtailment versus the alternative enforcement watermasters typically employ during shortages. This may have led to water rights holders coming to believe that enforcement under the curtailment rules may be a better approach to resolving water rights conflicts than with the appointment of a watermaster. Lastly and maybe most importantly, there is a concern that entities with insufficient water supplies will forgo acquiring expensive new water supplies believing that the State will make water available from others that have more senior water rights in times of shortage.

VI. CONCLUSION

House Bill 2694 added Section 11.053 to the Texas Water Code, requiring the TCEQ to adopt curtailment rules to be implemented during periods of drought or other emergency shortages of water. In developing the curtailment rules, the Commission created a stakeholder process where comments were submitted and hearings were held regarding the proposed rules. Although the comments cited numerous problems with the rules, primarily due to the inconsistencies with the priority doctrine, the TCEQ made only a few changes pursuant to the stakeholder comments and adopted the rules in Texas Administrative Code Title 30, Chapter 36, effective May 3, 2012. Because the adopted rules fail to address many of the criticisms made during the comment periods and stakeholder meetings regarding the proposed rules, it is unclear what the stakeholder process was intended to accomplish. Both legal and practical problems with the new curtailment rules remain abundant. It is recommended that the TCEQ create a new advisory committee of stakeholders including water managers, water conservation experts, hydrologists, environmentalists, and attorneys to work with the Commission to develop amended rules which address the issues raised by the new law, while taking into consideration existing law and the vested rights they affect.