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# Decoding Water Law: Ten Areas of Texas Water Law Every Ag Lawyer Should Know

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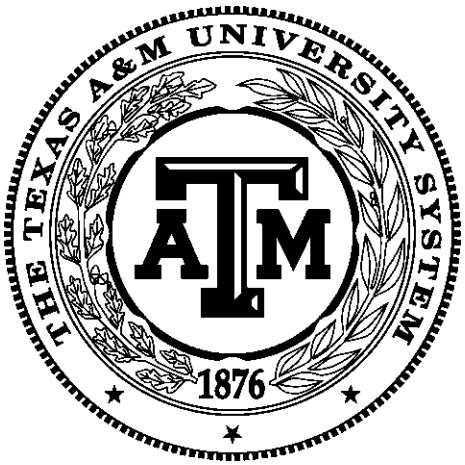


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# RURAL DEVELOPMENT

# DECODING WATER LAW: TEN AREAS OF TEXAS WATER LAW EVERY AG LAWYER SHOULD KNOW

*Jason T. Hill† & Victoria Rose Whitehead‡*



## I. INTRODUCTION[1]

Texas water law is not a model of clarity. As a body of law, it is riddled with jargon, double-meaning, and esoteric context that can

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1. The groundwater law analysis and opinions included in this paper are solely for educational purposes and do not reflect the views of the High Plains Underground Water Conservation District. Please email Victoria Whitehead at victoria.whitehead @hpwd.org with any questions in regards to this paper.

sometimes read and work like a Rube Goldberg device. Landowners not trained in the dark arts of Texas water rights and regulation are often (rightfully) frustrated with attempts to understand, exercise, market, and simply explain one of the most important property rights in Texas agriculture.

Fear not. While not a categorical truth, much of Texas' water law can be translated into a language that is helpful to those involved in Texas agriculture. The authors give no guarantee that this Article will be a precise decoder ring for growers, ranchers, lenders, brokers, and the like, but hopefully it will be useful to these important groups, nonetheless.

This Article will include quick tips for ag practitioners dealing with water law issues in Texas. While each one of these topics could be a paper in itself, the topics will conclude with links/resources for additional information.

### A. *Surface Water Rights*

Texas law recognizes two types of surface water. Surface water is considered water that has migrated into creeks, streams, rivers, and lakes.[2] When the term *surface water* is used, it is typically in reference to this type of water—*i.e.*, water in a watercourse. The term can also mean water that flows over land before it makes its way into creeks, streams, rivers, and lakes.[3] Courts routinely (but not always) differentiate the latter by referring to it as *diffuse water*.

Most associate the term *watercourse* with flowing creeks and large lakes. Texas courts define the term as a feature that has a defined bed and banks, a current of water, and a permanent supply source.[4] However, applying this test can be a challenge. Courts have determined that the bed and banks of a watercourse can be slight, imperceptible, or even absent in some circumstances. The current flow does not have to be continuous, and the stream can even be dry for extensive periods of time and still be considered a watercourse.[5] Diffuse surface water belongs to the landowner until the point where the water collects or enters into a watercourse.[6]

With only limited exceptions, water in a watercourse is the state's property and is subject to the permitting requirements of the Texas

2. Citizens Against Landfill Loc. v. Tex. Comm'n on Envtl. Quality, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).

3. Hoefs v. Short, 190 S.W. 802, 804 (Tex. Civ. App.—El Paso 1916), *aff'd*, 273 S.W. 785 (Tex. 1925).

4. Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 752 (Tex. App.—San Antonio 2008), *aff'd*, 369 S.W.3d 814 (Tex. 2012); Domel v. City of Georgetown, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied).

5. *Edwards Aquifer*, 274 S.W.3d at 752–53.

6. Watts v. State, 140 S.W.3d 860, 865 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

Commission on Environmental Quality ("TCEQ").[7] State water is the ordinary flow, underflow, and tides of all flowing rivers, natural streams and lakes, and bays or arms of the Gulf of Mexico. Storm water, floodwater, and rainwater in rivers, natural streams, canyons, ravines, depressions, and watersheds fall within the scope of the definition.[8] The TCEQ regulates state water. No person may take, divert, or use state water without complying with the primary surface water statute in Texas—Chapter 11 of the Water Code—and the implementing rules of the TCEQ.[9]

Surface water rights in Texas are broken down into two broad groups—riparian rights and appropriative rights. Both rights can be important sources of water supply and value for landowners.

### 1. Riparian Rights

Riparian water rights are common law rights that attach to land abutting a watercourse. They are inherent to ownership of the riparian property.[10] However, not every riparian property in the state has riparian rights. Texas law only recognizes riparian rights for lands granted by the sovereign between 1840 and 1895.[11] Where it exists, a riparian right entitles the landowner to the reasonable use of normal flows of a watercourse, taken through direct diversions, and used only for domestic or livestock watering purposes.[12] Riparian rights are correlative because they are enforceable against other water rights owners by the courts based on a court's assessment of the competing uses between the contesting parties. The right to use state water through the exercise of a riparian right, however, is still subject to regulation by the TCEQ. Importantly, a riparian right entitles the owner only to the use of the ordinary flows of a watercourse, not flood flows or stormwater runoff.[13] Riparian rights predate the Legislature's creation of appropriative rights in Texas. As a result, vested riparian rights are protected from impairment from the exercise of appropriative rights in the same basin.[14]

7. While groundwater is privately owned, it can lose its character as groundwater if it becomes commingled with state water. If the owner maintains dominion and control over groundwater—as an example, by transporting it under the authority of a TCEQ-issued bed and banks permit—the water can maintain its legal character as groundwater from the point of discharge into a watercourse to the point of diversion. See *Edwards Aquifer*, 369 S.W.3d at 822–23.

8. TEX. WATER CODE § 11.021 (West 2019).

9. TEX. WATER CODE § 11.081 (West 2019); 30 TEX. ADMIN. CODE §§ 295, 297 (2019).

10. Flemming v. Davis, 37 Tex. 173, 187 (1872).

11. TEX. WATER CODE § 11.001(b) (West 2019).

12. 30 ADMIN. § 297.21(a).

13. *Id.*

14. TEX. WATER CODE § 11.001(a) (West 2019).

### 2. Paper Rights

Appropriative rights are not common law rights. They are creatures of statute—*i.e.*, products of the Legislature—recognized, issued, and regulated under the doctrine of prior appropriation.[15] Appropriative rights are not correlative like their riparian counterparts, nor are they inherent in riparian land ownership. They are enforced against other appropriative rights by time priority and are manifested in the form of a state-issued permit. Thus, appropriative rights are often referred to as *paper rights*. Paper rights typically specify how much water the owner can divert in a year and the authorized rate of diversion, place of diversion, and place of use. Where paper rights authorize the creation and maintenance of an impoundment, they will typically specify the centerline of the permitted dam.

Appropriative rights are based on the state's adoption of the prior appropriation doctrine for non-riparian rights, which is summarized as first in time, first in right. This important aspect of paper rights makes the priority date of each right a major component of the use and value of the right itself. The priority date for historical rights is the date that the state first recognized the owner or his or her predecessor put the water to beneficial use. In more modern times, it reflects the date that an application for a water use permit was administratively complete. When there are insufficient flows in a watercourse to satisfy all existing water rights in the basin, the water right in a river basin that was issued first—*i.e.*, has the oldest priority date—has the right to water before anyone else.[16]

### 3. Competing Claims

The older the priority date of an appropriative right, the more senior in time it is considered. Because they are first in line, senior rights are typically more dependable in dry conditions than rights with more recent priority dates. Senior rights are therefore typically considered more valuable in utility and monetarily than junior rights. However, vested riparian rights are protected from impairment by the exercise of appropriative rights. Consequently, riparian rights are considered superior to all appropriative rights in the river basin. Appropriative rights are therefore issued with the caveat that the particular right is *subject to senior and superior rights* in the river basin.

### 4. Permitting Exclusions & Exemptions

While all uses of surface water in Texas require compliance with Chapter 11 of the Texas Water Code, not all uses require a permit. As court-created incidences of ownership, riparian rights in Texas are ex-

15. In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438, 441-42 (Tex. 1982).

16. TEX. WATER CODE § 11.027 (West 2019).

cluded from the prior appropriation doctrine outright but only for water diversions made for domestic and livestock purposes.[17] Therefore, qualifying diversions made through the exercise of the limited riparian rights do not require a permit from the state.[18]

In addition to the riparian exclusion from the Texas permitting system, the Legislature created several statutory exemptions to permit requirements for certain uses. The 200-acre-foot impoundment exemption is perhaps the most widely recognized exemption for growers and ranchers. The statutory exemption authorizes the construction of a dam across a watercourse to capture state water, but only if: (1) the watercourse is a non-navigable stream;[19] (2) the dam does not create a reservoir that floods any part of a neighbor's property; (3) the reservoir can impound no more than 200 acre-feet of water;[20] and (4) the captured water is used only for domestic or livestock purposes.[21] The Legislature created other more limited permitting exemptions as well. Some examples of the several permitting exemptions include: a permitting exemption for 200 acre-foot-or-less reservoirs used for certain wildlife management and fishing purposes,[22] the use of state water for fire suppression or other emergency purposes,[23] and the use of state water for the irrigation of historic cemeteries under limited conditions.[24]

### B. *GCD Authority & Rules*

Currently, there are one hundred groundwater conservation districts ("GCD") in the State of Texas with one pending election confirmation. A GCD is a legislatively created political subdivision, and its powers are "limited by the terms of applicable statutes authorizing its creation."[25] While many GCDs within aquifer regions have similar regulatory schemes, most GCDs are subject to enabling legislation provisions that take into consideration local factors. This generally includes regional economic drivers, current and proposed use of groundwater, and political influences.

17. TEX. WATER CODE § 11.303(*l*) (West 2019).

18. 30 TEX. ADMIN. CODE § 297.21(a) (2019).

19. *See infra* part 5.

20. In certain instances, the reservoir can be capable of storing more than 200 acre-feet if it holds no more than 200 acre-feet on a rolling average over the course of a 12-month period. TEX. WATER CODE § 11.142 (West 2019).

21. TEX. WATER CODE § 11.142 (West 2019); 30 TEX. ADMIN. CODE § 297.21 (2019).

22. 30 TEX. ADMIN. CODE § 297.21(e) (2019).

23. 30 TEX. ADMIN. CODE § 297.26 (2019).

24. 30 TEX. ADMIN. CODE § 297.27(a)(1)(B) (2019).

25. TEX. WATER CODE § 36.001(15) (West 2019); S. Plains Lamesa R.R., Ltd v. High Plains Underground Water Conservation Dist., 52 S.W.3d 770, 776 (Tex. App.—Amarillo 2001, no pet.) (citing Tri-City Fresh Water Supply Dist. v. Mann, 142 S.W.2d 945, 948 (Tex. 1940)).

When evaluating a district's authority to adopt or enforce certain rules, it is pertinent to look at both Chapter 36 and the district's enabling legislation. One recent interpretation of a district's ability to implement rules pertaining to agriculture arose when Mid-East Texas GCD enacted rules for permitting fees associated with an "agricultural crop." Texas Senator, Bob Hall, submitted a request for opinion to the Attorney General to see if a "groundwater conservation district may define 'agricultural crop' specifically as 'food or fiber commodities grown for resale of commercial purposes that provide food, clothing, or animal feed' and 'utilize that definition to determine the applicable fee rate for 'irrigating agricultural crops.'"[26]

A local landowner, subject to the district's rules, objected to the definition of an "agricultural crop." His production, a turf farm, would fall outside of that definition and be subject to different production fee rates.

In the Attorney General's opinion, the district's enabling legislation:

> does not authorize a district to choose whose agricultural uses will receive the statutory irrigation rate by defining 'agricultural crop' more narrowly than section 36.001 of the Water Code allows. Therefore, a court would likely conclude that a groundwater conservation district does not have the authority to define 'agricultural crop' as 'food or fiber commodities grown for resale of commercial purposes that provide food, clothing, or animal feed' to the extent that it excludes other products that constitute an agricultural crop under section 36.001 of the Water Code.[27]

Many GCDs have provisions within their enabling legislation for local agriculture use. When working with a district on a groundwater permit for agriculture production, it is best to keep an eye out for the following provisions within the district rules:

- Agriculture Production Exemptions
- Irrigation Reporting Requirements
- Irrigation Production Fees

### C. *Watermasters & Priority Calls*

In most river basins in Texas, enforcement of water right priority and protection of superior riparian rights is driven in large part by oversight through the honor system and through priority calls. This can sometimes pit neighbor against neighbor in water rights owner's efforts to ensure that superior and senior rights are honored during times of below-average flows in a river basin.

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26. Letter from Senator Bob Hall to Attorney General Ken Paxton (February 14, 2019), RQ-0274-KP, https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2019/pdf/RQ0274KP.pdf.

27. Tex. Att'y Gen. Op. KP-0247.

To enforce water rights, a concerned downstream water right owner may complain to the TCEQ of an alleged illegal diversion, which often results in a site visit by a TCEQ field inspector. Illegal diversions can result in field citations and civil penalties up to $5,000 per day, and they may even expose the alleged malefactor to private lawsuits from affected water rights owners.[28]

In some circumstances, an affected water right holder may make a priority call to the TCEQ. Priority calls are formal requests to the TCEQ to enforce priority basin-wide. When the agency receives a priority call, the staff conducts an investigation of hydrologic conditions of the basin that is the subject of the call. The agency can then either order a suspension of diversion and storage activities of junior rights in the basin or decide to not honor the call at that time.

Watermasters are alternative mechanisms for regulating surface water diversions, storage, management, and uses within a watermaster area. Watermasters are a formal, structured regulatory replacement to the honor system. Watermasters have powerful roles in their respective basins.[29] Instead of reacting to water flow conditions and complaints, watermasters are designed to get ahead of water availability problems in the basin.[30] Among other things, watermasters require that most water rights owners seek permission to exercise their water rights by filing declarations of intent ("DOIs") before diverting surface water.[31] The watermaster will then determine whether, when, and to what extent the requested diversion may take place. This depends on whether water is available given the priority date of the requestor's diversion permit. Once an authorized diversion has been completed, the water rights owner must then submit a report of the amount of water diverted, the dates of diversion, and the record of inflows if the request was to transport or divert water from storage.[32]

Watermasters are understandably controversial, which is a substantial reason why not all river segments in Texas are subject to a watermaster program. Currently, there are four watermaster programs in Texas: (1) the Brazos Watermaster (which covers only the portion of the Brazos basin at and below Possum Kingdom Lake); (2) the Concho River Watermaster (the only watermaster in the Colorado River basin); (3) the Rio Grande Watermaster (which governs water rights administration on the Rio Grande below Fort Quitman); and (4) the South Texas Watermaster (which covers all of the Guadalupe, Lavaca, Nueces, and the San Antonio basins).

28. TEX. WATER CODE §§ 11.0841–11.0842 (West 2019).
29. 30 TEX. ADMIN. CODE §§ 303–304 (2019).
30. TEX. WATER CODE § 11.327 (West 2019).
31. 30 TEX. ADMIN. CODE § 304.15 (2019).
32. 30 TEX. ADMIN. CODE § 304.16 (2019).

A watermaster can be created in multiple ways. The TCEQ Commissioners can create watermaster-administered water divisions.[33] The agency can also create a watermaster on its own or in response to a petition of at least twenty-five water rights holders in a basin if the agency determines that water rights have been threatened.[34] In the case of the Rio Grande Watermaster, a district court created it after taking jurisdiction of water rights administration in the Middle and Lower parts of the basin.[35] Watermasters can also be created by statute.[36] TCEQ is required to conduct an assessment of each non-watermaster basin or portion of the basin every five years to determine whether a watermaster should be created.

### D. *Surface Protections & Accommodations for Groundwater Production*

Natural resources present on a tract of land are only as valuable as the ability to access and produce said resources. Many land tracts in rural Texas are experiencing compounding financial growth with the development of multiple natural resources and energy drivers such as wind, solar, oil, gas, and groundwater, all on the same piece of property. While the dominant estate principles (implied rights of access) in general property law are at hand, severance and sale of groundwater without reasonable access and accommodations can lead to a less valuable transaction for all parties.[37]

It has been almost four years since the Texas Supreme Court held in *Coyote Lake Ranch, LLC v. City of Lubbock* that the accommodation doctrine extends to groundwater estates. It has been seven years since the court held in *EAA v. Day* that groundwater is owned in place.[38] While these extensions of oil and gas law help groundwater owners in protecting and accessing the natural resource, the Court has not specifically applied the "reasonably necessary" access principle to groundwater. Agriculture attorneys should be proactive to mitigate potential surface use issues by drafting provisions in the governing ownership, and severance documents. The following considerations, whether your client is the surface owner or groundwater owner, could provide contractual assistance in protecting and accommodating the groundwater production:

33. TEX. WATER CODE §§ 11.325–11.326 (West 2019).

34. TEX. WATER CODE § 11.451 (West 2019).

35. State v. Hidalgo Cnty. Water Control & Improvement Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

36. *E.g.*, TEX. WATER CODE § 11.552 (West 2019).

37. Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967).

38. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 831–32 (Tex. 2012).

### 1. Well Location Decisions

The farther an end user is from the water source, the greater the cost of producing and using that resource. Well location considerations should be evaluated based on current and proposed use. The well location decision is generally subject to GCD rules, but permitees working with GCDs can have a strong influence on where the well is located. The water production sites must also be accessible, so developing rights of ingress and egress are a must.

### 2. Water Production for Oil & Gas

If a tract of land is leased for oil and gas operations, the Texas Water Code allows for the exemption of a permit for drilling a water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas.[39] GCDs do not have a consistent approach with whether or not they require a permit for the production of groundwater for fracking purposes.

### 3. Navigating Multiple Severed Estates

A surface owner looking to purchase a piece of property for agricultural production needs to pay attention to the number of "estates" burdening the use of the surface and whether existing severance deeds explicitly or impliedly burden the surface use.

### 4. Environmental Liabilities

All wells have life cycles. At some point the well will not produce an amount that justifies the expenses of production. Groundwater leases need to take into consideration what happens to a well when it is no longer in use. Chapter 36 requires in the permitting considerations that "the applicant has agreed that reasonable diligence will be used to protect groundwater quality and that the applicant will follow well plugging guidelines at the time of well closure."[40] While these provisions provide the notice on the front end of a permit, similar problems arise in groundwater as those found with abandoned wells in the oil and gas industry.

## E. *Navigability Versus Non-Navigability Implications*

While the water flowing within a discernible bed and banks is owned by the state, ownership of the bed between those discernible banks of the watercourse depends on whether the watercourse is considered navigable. Determining the navigable character of any particular watercourse is an extremely fact-based assessment and is

39. TEX. WATER CODE § 36.117(b)(2) (West 2019).
40. TEX. WATER CODE § 36.113(d)(7) (West 2019).

ultimately a question reserved for the courts in each case to determine.

A watercourse can be navigable-in-fact or navigable-in-law. A stream or river is generally considered navigable-in-fact if the water is useful to facilitating commerce.[41] In addition, regardless of whether it has utility as a conduit for moving commerce, a watercourse is also considered navigable if it retains an average width of thirty feet from the mouth up.[42] Until recently, there was not thought to be a single acceptable methodology for calculating the average width of a stream bed for purposes of determining navigability.[43] In a recent decision of the Supreme Court of Texas, however, the court suggests that bed width is measured between the gradient boundaries of a streambed.[44] A gradient boundary is a point on a streambed "located midway between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank."[45]

The beds of navigable (either in-fact or in-law) watercourses are owned by the state, in the same fashion as the water it conveys. By contrast, the beds of watercourses that are not navigable (either in-fact or in-law) are often—*but not always*—privately owned.[46] Privately owned stream beds give the landowner the ability to exclude access to the bed of the watercourse. However, many original land grants misidentified watercourses as non-navigable when in fact the beds had the characteristics of a statutorily navigable stream. Questions arose across the state regarding whether any particular landowner owned the bed of a stream that a survey identified as non-navigable, which was nevertheless navigable in-law or in-fact.[47] The Legislature passed a law in the late 1920s commonly referred to as the "Small Bill" to address this issue, among others.[48] The Small Bill relinquished certain rights in navigable watercourses to the affected landowners, but it did not impair public access rights to the water or beds of the watercourse.[49] Accordingly, even if the landowner's deed shows private ownership of the bed of a stream, the bed might never-

41. Welder v. State, 196 S.W. 868, 873 (Tex. App.—Austin 1917, writ ref'd).

42. TEX. NAT. RES. CODE § 21.001 (West 2019).

43. Hix v. Robertson, 211 S.W.3d 423, 427 (Tex. App.—Waco 2006, pet. denied).

44. Bush v. Lone Oak Club, LLC, 18-0264, 2020 WL 1966931, at *15 (Tex. Apr. 24, 2020).

45. Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 447 (1935).

46. To complicate the analysis even further, the state owns the beds of streams that are perennial, meaning they consistently flow throughout the year—irrespective of whether they meet either definition of navigability—if the original land grant was made before December 14, 1837. *See* Heard v. Town of Refugio, 103 S.W.2d 728, 729–31 (Tex. 1937) (finding a stream to be perennial and thus owned by the state).

47. Bush v. Lone Oak Club, LLC, 18-0264, 2020 WL 1966931, at *8 (Tex. Apr. 24, 2020).

48. *Id.*

49. State v. Bradford, 50 S.W.2d 1065, 1076 (Tex. 1932).

theless be encumbered with public access rights if it is a "Small Bill" navigable stream.[50] The question can have significant implications on a landowner's ability to exclude members of the public from and construct exempt impoundments on what would seem to be private property.[51]

### F. *Regulatory Considerations When Purchasing Groundwater Rights*

If determining a good market value for groundwater in a water rights purchase transaction was not hard enough, those looking to purchase groundwater for agricultural production must remember to look into the regulatory factors that will emerge once the water title is transferred. Regulatory considerations when severing or transferring groundwater ownership include:

#### 1. What is the Regulatory History of the Groundwater Estate?

As a best practice, groundwater subject to a transaction should be assessed for its known qualities. The more information a groundwater owner has about his resource, the better position they are in for severance and sale negotiations. GCDs, Texas Water Development Board, and TCEQ all maintain easily accessible websites on aquifers and current or historic well sites.

Many GCDs host maps and interactive websites to assist groundwater producers with well data and information. These websites show multiple resources such as well location, permit/spacing planning, well history, and even interactive wellbores that could show potential well information on a particular tract.[52] If a GCD does not have an interactive website, the local district office can facilitate providing the same information in person. The Texas Water Development Board maintains the Water Data Interactive website that can assist the identification of wells on a property, as well as the historic well logs associated with those sites. This website can also show the location of aquifers and groundwater planning process zones.[53] Finally, the TCEQ maintains a Groundwater Contamination Viewer that can help in the as-

50. Tex. Att'y Gen. Op. No. S-208 (1956).

51. *See* Garrison v. Bexar Medina Atascosa Ctys. Water Improvement Dist., 404 S.W.2d 376 (Tex. Civ. App.—Austin 1966), writ ref'd, n.r.e., 407 S.W.2d 771 (Tex. 1966).

52. High Plains Water District is one of many GCDs that host interactive web maps: *Underground Water District*, HIGH PLAINS, https://data.hpwd.org/map [https://perma.cc/7TX3-SMWR].

53. *Data, Apps and Maps*, TEX. WATER DEV. BD., http://www.twdb.texas.gov/mapping/index.asp (last visited Feb. 9, 2020) [https://perma.cc/8HLH-6E62].

sessment of plugged or abandoned wells and whether any wells were subject to contamination issues.[54]

A very common occurrence on rural property is the presence of a water well that does not have a regulatory history. A groundwater rights owner who acquires such a well may be subject to liability for any issues that arise from the well after the transfer, and if the well is salvageable, the owner will likely be required to permit the well prior to use. It never hurts to explore the acreage before the purchase or sale to see if any historic wells are present.

### 2. Are the Existing Permits Transferable?

Transferring the ownership of a permit in most cases is an easy administrative process at a GCD. Depending on the rules of the District, a permit transfer may simply include amending the title of the permit. However, some GCDs will consider the transfer of the permit to be a new standalone permit. Thus, it may subject the new permittee to different production allocations or fees based on the proposed use.

Sometimes, permits for one specific use cannot be transferred to another proposed use. For example, the Edwards Aquifer Authority ("EAA") adopted rules in 2001 that allowed irrigation permits to be converted to other permit designations if the land is developed and no longer used for agricultural purposes. The Uvalde County Underground Water Conservation District ("Uvalde CUWCD") and two landowners filed a lawsuit against the EAA to invalidate its conversion rules in Uvalde County District Court.

The lawsuit states that the rules are unsupported by state law and violate the Texas Legislature's long-standing mandate that a landowner may sell 50% of his or her water, but the other 50% must remain with the land. Uvalde CUWCD further claims that implementation of the rule will greatly diminish the rural economy of Uvalde County within the next thirty years.

In November of 2018, the court issued a modified temporary injunction which allowed for the transfer applications to be processed but it restricted the EAA's ability to approve only the permanent transfer of water rights after they are converted within the county of origin. The injunction stayed the proceedings, and the parties agreed to solve the discrepancies with legislation. During the 86th Texas Legislature, House Bill 3656 provided that certain base irrigation rights are severable and change of use is allowed in some circumstances, while placing some limits on EAA's discretion to convert base irrigation water

54. *Ground Water Contamination Viewer*, TEX. COMM'N ON ENVTL. QUALITY (Sept. 4, 2019), https://www.tceq.texas.gov/gis/groundwater-contamination-viewer [https://perma.cc/95QS-FV7B].

rights. As a result of the passed legislation, the parties filed an agreed motion to dismiss with prejudice and the case was dismissed.

### 3. What Does the Neighboring Water Use Look Like?

Groundwater is a fugacious natural resource. As such, it is going to move throughout the aquifer at various rates towards active wells. While you may not have control over what a neighboring landowner does with their water, knowing what the proposed or current usage can help in valuing the resource for a sales transaction or helping the landowner permit to protect the longevity of the supply.

One of the more frequent topics that agriculture groundwater owners are faced with when evaluating their groundwater supply is the impact of municipality creep. A recent case involving a large municipality permit involved the City of Bryan in *Fazzino v. Brazos Valley Groundwater Conservation District*.[55]

While the Fazzinos were not agriculture producers, this case provides interesting insight into a situation where a landowner claimed that a municipality's permit might impact their neighboring water supply. Citing oil and gas allocation principles, Mr. Fazzino claimed that Brazos Valley GCD did not protect his property interest when they issued the permit to the City of Bryan for the continued production, even though he does not have a permitted well. The district claimed that they acted under their authority to establish and implement the current permitting framework as authorized under Chapter 36 of the Texas Water Code.

On December 4, 2018, the District Court for the Western District of Texas, Waco observed that while the Texas Supreme Court has used oil and gas law to resolve various groundwater disputes, it is not intended to solve all disputes. The court disposed of the case by granting the District's two motions to dismiss plaintiff's Equal Protection and First Amendment claims.[56] The plaintiffs appealed the case to the United States Court of Appeals for the Fifth Circuit. The parties have briefed and argued the case and now await the decision from the court.

## G. *Severance & Sales*

Surface water rights are considered interests in real property that can be severed and transferred to a subsequent purchaser or lessee in the same fashion as other species of real property.[57] As with any other real property transaction, there are several issues that should be

55. Brief of Appellants at 3, Stratta v. Roe, No. 18-50994, 2019 WL 1110078 at *1 (2019).

56. Stratta v. Roe, No. 6-18-CV-00114-ADA-JCM, at *1, (W.D. Tex. Dec. 4, 2018).

57. Pfluger v. Clack, 897 S.W.2d 956, 959 (Tex. App.—Eastland 1995, writ denied).

considered when contemplating the sale or reservation of surface water rights.

Water rights that authorize agricultural irrigation typically specify the specific tract of land that can be irrigated with the authorized diversions. Irrigation rights are considered appurtenant to the authorized irrigated acres. While rights can be severed and sold on their own, the portion of the right associated with the sale of land acres transfers with the land unless the right has been expressly reserved.[58] Non-irrigation surface water rights—*e.g.*, rights authorizing municipal, industrial, and commercial uses—are generally not appurtenant to specific tracts of land. Therefore, a written conveyance is necessary to transfer ownership of the right.[59]

When a surface water right is transferred, the new owner must promptly file a change of ownership notice with the TCEQ.[60] A deed evidencing new ownership, or any other instrument that conveys a water right to a new owner, is recordable in the same fashion as the transfer of ownership of land.[61] Therefore, it is important to record the assignment deed or other transferring instrument in the real property records of the appropriate county.[62] If the new owner contemplates changing the place of use, purpose of use, place of diversion, or any other component of the right, he or she must first secure an amendment to the water right. Until amended, the new owner is only authorized to exercise the right under the terms and conditions as they existed at the time of the assignment.[63]

In addition to conveying the water right itself, a water right owner may contract to supply a specific volume of water diverted under the right.[64] Such water supply contracts must be submitted to the TCEQ before diversion or deliveries under the contract. In many instances, the underlying water right will need to be amended to authorize a new place or purpose of use or diversion point.

### H. *Agriculture's Role in the Texas State Water Plan*

If you have ever had a conversation with someone about the State Water Plan process, you likely were bombarded with a myriad of acronyms. GCD, GMA, DFC, MAG, RWPG . . . the list goes on and on. While the State Water Plan process is a long and laborious map of the future water needs and planning strategies for the state, agriculture producers (and those who represent them) should pay attention to and play a role in the development of the State Water Plan.

58. 30 TEX. ADMIN. CODE § 297.81(a) (2019).
59. 30 TEX. ADMIN. CODE § 297.81(b) (2019).
60. 30 TEX. ADMIN. CODE § 297.82 (2019).
61. § 297.81(b).
62. § 297.82.
63. TEX. WATER CODE § 11.040(b) (West 2019).
64. 30 TEX. ADMIN. CODE § 297.83 (2019).

Texas' population is nearing 27.8 million residents, yet one of the largest users of water in the latest version of the State Water Plan is agriculture irrigation (Strategy 5.2.7). Irrigation water demand includes "water used in irrigated field crops, vineyards, orchards, and self-supplied golf courses." The second agricultural focused demand is "Livestock Demand" which includes water used in the production of various types of livestock, including cattle (beef and dairy), hogs, poultry, horses, sheep, and goats.[65] While "Livestock Demand" is very minute compared to "Irrigation Water Demand," it does play a large economic role for the agriculture economy.

The State Water Plan, developed by a conglomerate of stakeholders working with the Texas Water Development Board ("TWDB") seeks "to ensure the ongoing vitality of our economy, Texas' citizens, water experts, and government agencies collaborate in a comprehensive water planning process." The TWDB website indicates the purpose of planning is "so that Texans will have enough water in the future to sustain our cities and rural communities, our farms and ranches, and our homes and businesses while also preserving the agricultural and natural resources that have defined Texas for generations."

Understandably speaking, if agriculture fails to speak up in this process, the projections and information included in the state water plan will paint the water future of agriculture in the manner that they determine is best. For example, the State Water Plan indicates that the "irrigation demand is expected to decline as a result of more efficient irrigation systems, reduced groundwater supplies, the economic difficulty of pumping water from increasingly greater depths, and the transfer of water rights from agricultural to municipal uses." Additionally, each planning cycle, the previous cycle's irrigation projections are adjusted by factors and trends including: (1) changes in the amount of crops under irrigation; (2) increases in irrigation application efficiency; (3) changes in canal losses for surface water diversions; and (4) changes in cropping patterns.[66]

The information in this plan is critical to ensure Texas has adequate and affordable water supplies for both now and in the future. Those involved in agriculture and rural communities truly need to recognize the importance of planning and participate in the process.

65. Livestock water use for each county is based on the average livestock water use between 2005 and 2009 and on the estimated "dry year" water use per animal unit. In most cases, it was predicted that livestock use would remain fairly constant over the 50-year planning horizon.

66. Projections for irrigation water demand were based on the rate of future change in demand and the previous projections used in developing the 2012 State Water Plan.

Resources:

- 2017 State Water Plan: http://www.twdb.texas.gov/waterplanning/swp/2017/index.asp
- State Water Plan Interactive Website: https://2017.texasstatewaterplan.org/statewide

## I. *Helpful Hints: Working With TCEQ*

The TCEQ organization can be broken down into two large categories—the headquarters in Austin and the field offices across the state. TCEQ organizes field operations into four areas, sixteen regions, and four watermaster divisions. To the extent growers and ranchers have complaints to file, are the subject of a complaint, or otherwise have interactions with TCEQ staff, chances are those communications will initiate with staff from one of the regional offices. The owners of water rights in watermaster areas—particularly paper rights owners—will have regular contact with their respective watermaster offices.

### 1. Applications for New Water Use Permits or Amendments to Existing Permits

Although most river basins in Texas are fully appropriated, there still may be an occasion for operators to apply for a new diversion authorization in the form of a new water use permit. It is a much more common occurrence for a water rights owner to request an amendment to existing water use permits or certificates of adjudication.

The process to amend an existing water right, or to secure a new one, can be a daunting task. There are six general steps in the typical life cycle of an application for a new surface water right or a significant amendment to an existing right.

1. Pre-application
2. Application Submission / Administrative Review
3. Formal Filing / Technical Review
4. Draft Permit / Public Notice
5. Protest Review / Contested Case Hearing
6. Consideration / Final Decision

Each one of these steps can involve a myriad of additional steps along the way and will implicate legal and technical issues ranging from the *pro forma* to the extremely complex. In most instances, it is wise to secure legal and technical guidance before submitting any water right-related application to the TCEQ staff.

Additionally, an applicant should get comfortable with the idea that the process will not produce fruit in a time frame that most consider expeditious. On paper, TCEQ staff have ten working days to conduct

a review of the application for administrative completeness.[67] If the staff need additional information from the applicant to complete their administrative review, the applicant has thirty calendar days following a written request to provide the additional information or risk having the application returned. The staff has an additional eight working days to review the additional information.[68] Following completion of the administrative review, the rules give the staff seventy-five working days to conduct their technical review.[69]

The process under this timing creates an application review period of approximately five months. In practice, however, the process can take anywhere from twelve to fifteen months to several years before the application is potentially protested and subjected to a contested case hearing.[70] The applicant should be prepared for a long-term process.

### 2. Water Use Reports

Water rights owners—except for riparian diverters or permit-exempted domestic and livestock diverters—are required to submit a water use report to TCEQ on March 1 of each year.[71] TCEQ instructs that reports are due even if the water right owner did not divert under the specific water right during the year. Water rights owners in watermaster areas have different reporting and filing requirements that can vary from division to division.[72] It is important to coordinate with the applicable office to make sure the local filing requirements are satisfied. The failure for any water right owner to meet the filing obligations can subject the owner to civil penalties ranging from $100 per day to $500 per day.

Resources:

The links provided below lead to additional information that could be helpful to riparian diverters, the owners of permit-exempt impoundments, and paper rights holders alike.

- Pending water rights applications: https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr-pending-apps
- TCEQ organizational chart: https://www.tceq.texas.gov/agency/organization

67. 30 TEX. ADMIN. CODE § 281.3(a) (2019).
68. 30 TEX. ADMIN. CODE § 281.18(a) (2019).
69. 30 TEX. ADMIN. CODE § 281.19(a) (2019).
70. The contested case hearing process can be just as daunting as the application process itself. Contested cases are akin to bench trials in District Court, in most cases tried under the Texas Rules of Civil Procedure. Where a contested case can take 8 months to a year to complete, with the final agency decision still being subject to administrate appeal to Travis County District Court.
71. TEX. WATER CODE § 11.031 (West 2019).
72. 30 TEX. ADMIN. CODE §§ 295.202, 304.16(a) (2019).

- TCEQ Watermaster division information: https://www.tceq.texas.gov/permitting/water_rights/wmaster
- TCEQ regional offices: https://www.tceq.texas.gov/assets/public/comm_exec/pubs/gi/gi-002.pdf

J. *Helpful Hints: Working With & Getting to Know Your GCD*

Get to know the general manager and staff and learn how they implement the rules of the district. This will come in handy when you seek a permit, permit amendment, or have a desire to play a role in the permit of another groundwater user.

Be involved. Attend hearings and play a role in the decision-making process when needed. The old tale of "the rules belong to the people who show up" is very true for local government entities. In a time when urban Texas outnumbers rural Texas, it is vital that stakeholders for agriculture are present and have a seat at the table.

GCDs provide a variety of free resources to help groundwater users best manage and produce the groundwater below their land. This includes previously mentioned items such as flow tests, water quality testing, aquifer analysis pre and post irrigation season, and helping groundwater users implement best management practices for production and conservation. TWDB also facilitates grant and loan programs, which GCDs can apply for as a third-party facilitator for agricultural producers.

While there are many GCDs in the state, the Texas Alliance of Groundwater Districts ("TAGD") is an excellent resource for gaining access and understanding to your local regulatory entities. One feature of the TAGD website is the GCD index. The GCD Index is a fully interactive representation of the TAGD's GCD database. It includes detailed information about each TAGD-member GCD: https://texasgroundwater.org/resources/gcd-index.