

BASICS OF TEXAS WATER LAW

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Water law is one of the most contentious and frequent legal issues Texas landowners face. As the adage goes, “Whiskey is for drinkin’ and water is for fightin’.” Texas property owners need to understand the basics of Texas water law as well as their rights and legal limitations related to the use of water on their property.

Texas water law divides water into two broad categories: groundwater and surface water. Different legal frameworks and regulatory structures apply to each category, making Texas water law more complex than other states that follow a single legal approach for all waters.

GROUNDWATER

The Texas Water Code defines groundwater as “water percolating below the surface of the earth” (*Texas Water Code Section 36.001[5]*). Nine major aquifers hold much of this groundwater: Cenozoic Pecos Alluvium, Seymour, Gulf Coast, Carrizo-Wilcox, Huaco-Mesilla Bolson, Ogallala, Edwards-Trinity Plateau, Edwards BFZ, and Trinity.

Ownership

Absent an agreement otherwise, Texas landowners own the groundwater beneath their property (*Texas Water Code Section 36.002*). Texas courts are clear that a landowner has a vested property right in groundwater. Although a landowner has the right to capture water from beneath his or her property, this right does not ensure the right to capture a specific amount of groundwater.

Like other estates such as minerals, the groundwater estate may be severed from the surface estate of the property. The severed groundwater estate can then be reserved (the seller of the property retains the groundwater ownership and sells his or her remaining interest) or conveyed (a property owner sells or otherwise transfers the groundwater ownership but retains ownership of the rest of the property). If a property owner sells his or her property but retains the groundwater rights, the new purchaser owns the surface estate but not the groundwater. The seller who reserved that interest still owns the groundwater.

In 2016, the Texas Supreme Court ruled that a severed groundwater estate—like a severed mineral estate—is dominant over the surface estate (*Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 [Tex. 2016]). This ruling is crucial for anyone owning or considering purchasing property with severed groundwater rights. The result of this ruling is that absent an express agreement to the contrary, an owner of a severed groundwater right has the automatic, implied right to use as much of the surface of the land as is reasonably necessary to produce the severed groundwater. This right is limited by the accommodation doctrine, which requires a dominant estate holder to accommodate an existing surface owner if the surface owner can prove:

- ▶ Mineral production substantially interferes with an existing surface use,
- ▶ Minerals can be produced another way, and
- ▶ Existing surface use cannot be conducted in another way.

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Water ditch between rice fields.
Source: Kathleen Phillips, Texas A&M AgriLife.

Applicable law

The Rule of Capture governs groundwater law and provides that a landowner has the right to pump water from beneath his or her property, even at the expense of his or her neighbor. The Texas Supreme Court established this rule in 1904 when it found that a landowner had no legal remedy when a railroad company moved in next door, drilled a bigger, deeper well, and made the landowner's well go dry (*Houston & T.C. Ry. V. East, 81 S.W.279 [1904]*). The landowner's remedy, explained the Court, was to drill his own bigger, deeper well.

But particular limitations on the Rule of Capture apply—Groundwater Conservation Districts and common law rules. Groundwater Conservation Districts (GCDs) are the “preferred method of groundwater management in Texas” (*Texas Water Code Section 36.0015[b]*). Although the Texas Constitution tasks the Texas Legislature with managing the State's natural resources, the Legislature determined that allowing local control through GCDs would be a better approach to groundwater management. Thus, there are 98 GCDs across the state (see map on page 5). These districts manage groundwater within their bounds by developing plans and implementing rules related to groundwater production. The rules differ by GCD but often include a permitting process for most groundwater wells, some form of reporting requirement, and production rules such as spacing rules, pump size limits, or production limits.

In addition to the rules for each district, a state statute, which is applicable across Texas, makes specified wells exempt from the GCD permitting process. Wells that are exempt under this statute are not required to obtain a permit to drill from the local GCD, but may need to register and follow other district requirements. Exempt well categories in Texas include (*Texas Water Code Section 36.117*):

- ▶ Wells drilled for domestic use or for providing water for livestock or poultry if the well is:
 - Located on a tract of land 10 acres or larger; and
 - Drilled, completed, or equipped to be incapable of producing more than 25,000 gallons per day;
- ▶ Wells used solely to supply water for a rig actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; or
- ▶ Wells authorized by the Railroad Commission of Texas or for production from the well to the extent mining activities require withdrawals.

GCDs may not narrow any of these statutory exceptions but can broaden them. For example, a GCD could have a rule that all domestic and livestock wells are exempt from permitting, regardless of the size of the tract or the pump involved. Each GCD has its own set of rules that address these issues.

Before pumping groundwater, a Texas landowner should determine whether his or her property is located within a GCD and, if so, obtain a copy of the GCD local rules to ensure compliance when drilling a well and producing groundwater. If a landowner is not in the bounds of a GCD, he or she need not worry about these types of regulations.

Some common-law exceptions have developed through court cases. These limitations, which apply statewide, regardless of whether a GCD is in place in an area,



Irrigated corn. Source: Kay Ledbetter, Texas A&M AgriLife.



Cattle resting and eating in the Texas Panhandle after rains left green grass and full ponds. Source: Kay Ledbetter, Texas A&M AgriLife.

prohibit a landowner from (see *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 [Tex. 1999]):

- ▶ Maliciously taking water for the sole purpose of injuring his or her neighbor,
- ▶ Willfully or wantonly wasting groundwater,
- ▶ Negligently drilling or pumping from a well in a manner that causes subsidence,
- ▶ Pumping from a contaminated well, or
- ▶ Trespassing in order to pump groundwater.

SURFACE WATER

Surface water includes all water “under ordinary flow, underflow and tides of every flowing river, stream, lake, bay, arm of the Gulf of Mexico, and stormwater, floodwater or rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state” (*Texas Water Code Section 11.021*). A subcategory of surface water is diffused surface water, also known as storm runoff or rain or snow.

The key difference between surface water and diffused surface water is whether a “defined watercourse” exists. Under Texas case law, a defined watercourse is made up of three elements: (1) bed and banks, (2) current, and (3) permanent source and supply (*Hoefs v. Short*, 273 S.W. 785 [Tex. 1925]).

The application of this test has been extremely broad, with the Texas Supreme Court holding that a defined watercourse existed where the bed and banks were “slight, imperceptible or absent,” the current of water was not “continuous and the stream may be dry for long periods of time” (*Hoefs v. Short*, 273 S.W. 785 [Tex. 1925]). Landowners should carefully consider whether runoff on their property is truly diffused surface water or if it meets the liberal definition of surface water.

Ownership

The State of Texas owns surface water, held in trust for the citizens (*Texas Water Code Section 11.021*). The Texas Commission on Environmental Quality (TCEQ) manages it. In most cases, to use surface water, a landowner must obtain a permit from the TCEQ allowing them to use a designated amount of water for a designated purpose. TCEQ will consider a number of issues, including whether there is unappropriated water available in the basin, how the proposed diversion will impact other surface water permit holders, and whether the proposed diversion will be put to beneficial use.

Diffused surface water, however, is the property of the landowner as long as it remains on the landowner’s property and may be used how he or she wishes until it reaches the defined watercourse, at which time it becomes state-owned water (*Domel v. City of Georgetown*, 6 S.W.3d 349 [Tex. Ct. App. – Austin 1999]).

Applicable law

The legal doctrine of prior appropriation governs the use of surface water, following the principle of “first in time, first in right” (*Texas Water Code Section 11.027*). Essentially, prior appropriation means “first come, first served.” When a person obtains a permit from the TCEQ, that permit has a “priority date.” The TCEQ maintains a database of all water rights. In times of shortage, senior water users—those with the oldest priority date—receive all of the water to which they are entitled before junior users receive any. A water rights holder concerned that there will not be enough water to allow his or her permitted withdrawal may contact TCEQ and request a priority call, which is an order from TCEQ to junior water rights holders to stop diverting water.

Certain diversions of water are exempt from the TCEQ permitting process, meaning that landowners

may make these diversions of surface water without obtaining a TCEQ permit. These exemptions apply only on a non-navigable stream (30 Texas Admin. Code 297.21[c]). For any navigable stream, all diversions require a permit from the TCEQ. Under Texas law, there are two alternative tests for navigability. To be deemed navigable, a watercourse need satisfy only one. First, a watercourse can be “navigable in fact”—it can be used as a “highway for commerce” (*Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 [Tex. Ct. App. – Waco 1935]). Courts have stated that waterways capable of floating logs and travel by any boat are “navigable in fact,” despite “occasional difficulties in navigation” (*Orange Lumber Co. v. Thompson*, 126 S.W. 604 [Tex. Ct. App. – 1910]). Second, a watercourse can be “navigable in law”—it maintains an average width of 30 feet from gradient boundary line to gradient boundary line (*Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 [Tex. Ct. App. – Waco 1935]).

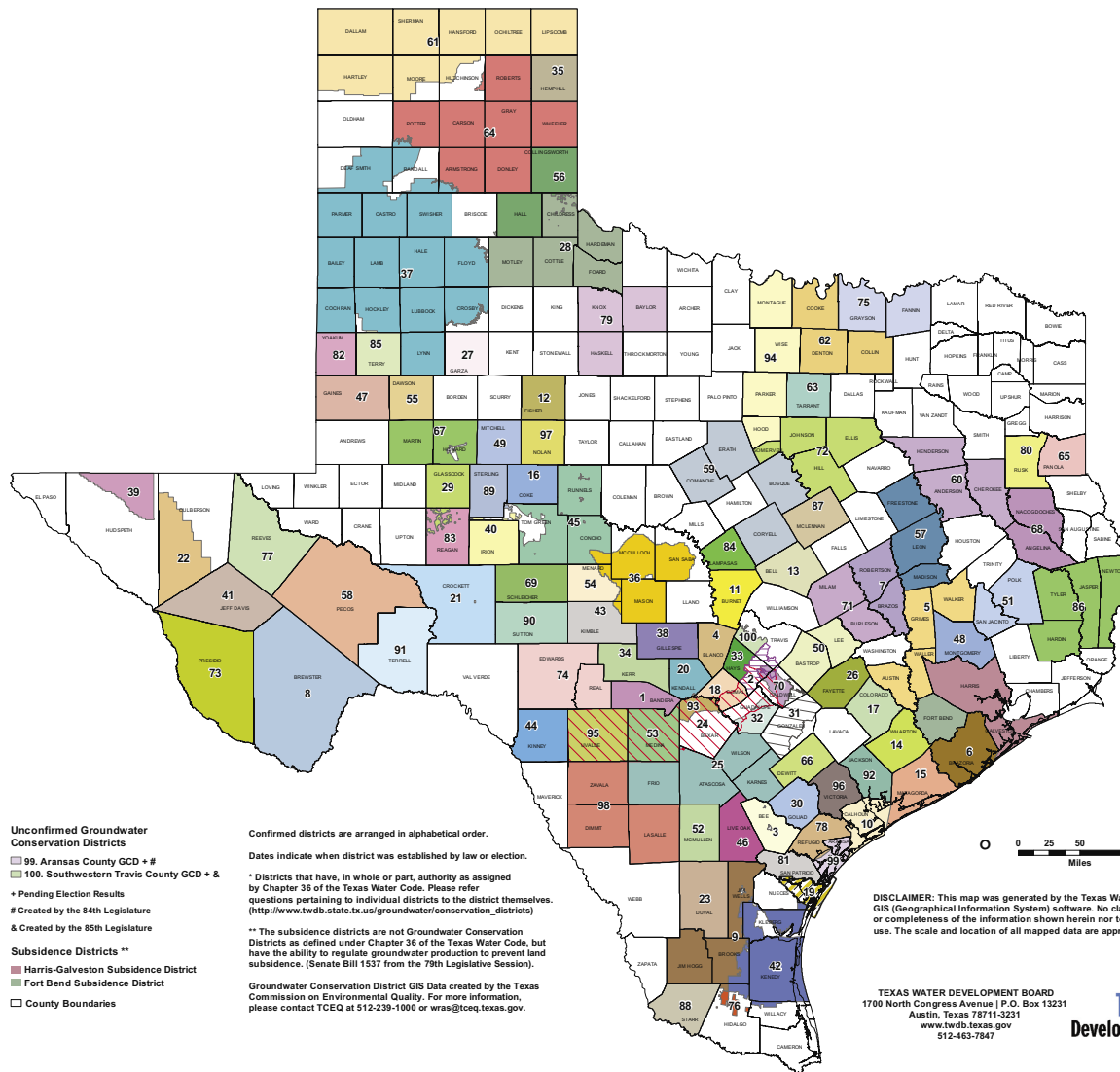
Assuming a stream is non-navigable, the following diversions do not require a permit:

- ▶ Domestic or livestock uses can build a tank or reservoir of fewer than 200 acre-feet capacity for a noncommercial purpose.
- ▶ Commercial or noncommercial wildlife management, including fishing, is allowed if a tank or reservoir is less than 200 acre-feet in capacity.

- ▶ Diversions used for drilling or producing petroleum may take water from the Gulf of Mexico and adjacent bays and arms of the Gulf of Mexico.
- ▶ Reservoirs may be constructed as part of a surface coal mining operation if they are used for sediment control and are in compliance with applicable laws related to dust suppression.

SUMMARY

Because legal issues surrounding water will not go away anytime soon, landowners should educate themselves on the laws and their rights related to water use. The first step in analyzing water law issues in Texas is to understand the different categories of water and the legal approaches to each. In Texas, the landowner owns the groundwater, subject in many areas to rules created by Groundwater Conservation Districts (GCD). Landowners should determine whether they are in a GCD and, if so, review and understand the rules of that district. When buying or selling property, all Texas landowners should be careful to determine whether groundwater rights have been severed. The State of Texas owns surface water and a permit from the TCEQ is generally required to divert state-owned surface water. Diffused surface water is storm runoff and may be captured and used by a landowner before it reaches a defined watercourse and becomes state-owned water.



Confirmed Groundwater Conservation Districts*

- 1. Bandera County River Authority
- 2. Barton Springs/Edwards Aquifer CD - 8/13/1987
- 3. Bee GCD - 1/20/2001
- 4. Blanco-Pedernales GCD - 1/23/2001
- 5. Bluebonnet GCD - 11/5/2002
- 6. Brazoria County GCD - 11/8/2005
- 7. Brazos Valley GCD - 11/5/2002
- 8. Brewster County GCD - 11/6/2001
- 9. Brush Country GCD - 11/3/2009
- 10. Calhoun County GCD - 11/4/2014
- 11. Central Texas GCD - 9/24/2005
- 12. Clear Fork GCD - 11/5/2002
- 13. Clearwater UWCD - 8/21/1999
- 14. Coastal Bend GCD - 11/6/2001
- 15. Coastal Plains GCD - 11/6/2001
- 16. Coke County UWCD - 11/4/1998
- 17. Colorado County GCD - 11/6/2007
- 18. Comal Trinity GCD - 6/17/2015
- 19. Corpus Christi ASRCD - 6/17/2005
- 20. Cow Creek GCD - 11/5/2002
- 21. Crockett County GCD - 1/26/1991
- 22. Culberson County GCD - 5/2/1998
- 23. Duval County GCD - 7/25/2009
- 24. Edwards Aquifer Authority - 7/28/1996
- 25. Evergreen UWCD - 8/30/1965

- 26. Fayette County GCD - 11/6/2001
- 27. Garza County UWCD - 11/5/1996
- 28. Gateway GCD - 5/3/2003
- 29. Glasscock GCD - 8/22/1981
- 30. Goliad County GCD - 11/6/2001
- 31. Gonzales County UWCD - 11/2/1994
- 32. Guadalupe County GCD - 11/4/1999
- 33. Hays Trinity GCD - 5/3/2003
- 34. Headwaters GCD - 11/5/1991
- 35. Hemphill County UWCD - 11/4/1997
- 36. Hickory UWCD No. 1 - 8/14/1982
- 37. High Plains UWCD No. 1 - 9/29/1951
- 38. Hill Country UWCD - 8/8/1987
- 39. Hudspeth County UWCD No. 1 - 10/5/1957
- 40. Irion County WCD - 8/2/1985
- 41. Jeff Davis County UWCD - 11/2/1993
- 42. Kennedy County GCD - 11/2/2004
- 43. Kinble County GCD - 5/3/2002
- 44. Kinney County GCD - 1/12/2002
- 45. Lipan-Kickapoo WCD - 11/3/1987
- 46. Live Oak UWCD - 11/7/1989
- 47. Llano Estacado UWCD - 11/3/1998
- 48. Lone Star GCD - 11/6/2001
- 49. Lone Wolf GCD - 2/2/2002
- 50. Lost Pines GCD - 11/5/2002

- 51. Lower Trinity GCD - 11/7/2006
- 52. McMullen GCD - 11/6/2001
- 53. Medina County GCD - 8/26/1991
- 54. Menard County UWD - 8/14/1999
- 55. Mesa UWCD - 1/20/1990
- 56. Mesquite GCD - 11/4/1986
- 57. Mid-East Texas GCD - 11/5/2002
- 58. Middle Pecos GCD - 11/5/2002
- 59. Middle Trinity GCD - 5/4/2002
- 60. Neches & Trinity Valleys GCD - 11/6/2001
- 61. North Plains GCD - 1/2/1955
- 62. North Texas GCD - 12/1/2009
- 63. Northern Trinity GCD - 5/15/2007
- 64. Panhandle GCD - 1/21/1956
- 65. Panola County GCD - 11/6/2007
- 66. Pecan Valley GCD - 11/6/2001
- 67. Permian Basin UWCD - 9/21/1985
- 68. Pinewoods GCD - 11/6/2001
- 69. Plateau UWC and Supply District - 3/4/1974
- 70. Plum Creek CD - 5/1/1993
- 71. Post Oak Savannah GCD - 11/5/2002
- 72. Prairielands GCD - 9/1/2009
- 73. Presidio County UWCD - 8/31/1999
- 74. Real-Edwards C and R District - 5/30/1959
- 75. Red River GCD - 9/1/2009

- 76. Red Sands GCD - 11/5/2002
- 77. Reeves County GCD - 11/3/2015
- 78. Refugio GCD - 11/6/2001
- 79. Rolling Plains GCD - 1/26/1999
- 80. Rusk County GCD - 6/5/2004
- 81. San Patricio County GCD - 5/12/2007
- 82. Sandy Land UWCD - 11/7/1989
- 83. Santa Rita UWCD - 8/19/1989
- 84. Saratoga UWCD - 11/7/1999
- 85. South Plains UWCD - 2/8/1992
- 86. Southeast Texas GCD - 11/2/2004
- 87. Southern Trinity GCD - 6/19/2009
- 88. Starr County GCD - 1/6/2007
- 89. Sterling County UWCD - 11/3/1987
- 90. Sutton County UWCD - 4/5/1986
- 91. Terrell County GCD - 11/6/2012
- 92. Texana GCD - 11/6/2001
- 93. Trinity Glen Rose GCD - 11/5/2002
- 94. Upper Trinity GCD - 11/6/2007
- 95. Uvalde County UWCD - 9/1/1993
- 96. Victoria County GCD - 8/5/2005
- 97. Wes-Tex GCD - 11/5/2002
- 98. Wintergarden GCD - 1/17/1998

Groundwater conservation districts. Source: Texas Water Development Board