



Water Law and Agriculture

Water is Texas's most valuable natural resource and an essential part of production agriculture. As the state continues to grow, the demand for and conflicts over water will likely increase between thirsty industries (i.e. agriculture and energy) and municipalities. This guide provides a basic overview of Texas water law and current case law that is shaping the field.

Surface Water vs. Groundwater: Surface water and groundwater sources are governed by two separate legal regimes in Texas. Surface water comes from over 180 reservoirs and numerous river diversions across the state. It is owned by the State of

Texas, and governed by the Texas Commission on Environmental Quality ("TCEQ"). Groundwater in Texas comes from 9 major and 21 minor aquifers located across the state. Unlike surface water, private landowners own the groundwater beneath their land. The use of groundwater is subject to the Rule of Capture and governed by groundwater conservation districts ("GCDs"). The rules regarding each water source are discussed in more detail below.

Surface Water

Statistics:

Texas uses about 5 million acre-feet of surface water per year (65% by municipalities and industry / 25% by agriculture)



Prior Appropriation

Surface water sources (i.e. rivers or reservoirs), are owned by the state and held in trust for the public. In order to use water from a surface source, a person must first obtain a permit from the TCEQ. TCEQ's permitting system follows the doctrine of prior appropriation. Prior appropriation, which is followed by almost every state west of the Mississippi River, is defined as "first in time, first in right." The first person to receive a permit to put surface water to beneficial use has a senior right to all water rights holders who receive permits after he or she did. This can be important, as in times of shortage, a senior water rights holder will receive all of the water he or she is entitled to under his or her permit before any junior water rights holders will get any water.

Exempt Diversions

- There are no permit requirements for certain types of diversions on non-navigable¹ streams:
 - **Domestic or livestock purposes:** Can build a tank or reservoir if less than 200 acre-feet capacity and for a non-commercial purpose.
 - **Commercial or non-commercial wildlife management, including fishing, but not fish farming:** Can build a tank or reservoir if less than 200 acre-feet capacity.

¹ Navigable means either (1) used as a "common highway for trade and travel," or (2) a watercourse that maintains an average width of 30 feet

Diffused Surface Water

This can be thought of as runoff of rain or snow before it gets into a watercourse. A watercourse is defined as having (1) a defined bed and banks, (2) a current of water, and (3) a permanent source and supply of water. In Texas, a landowner may capture this water while it is on his or her property, so long as they do so before it reaches a watercourse. Many stock tanks are built to capture and hold diffused surface water.

Stock Tanks

- If filled with state water:
 - Must be limited to a 200 acre-foot capacity
 - Measured by 12 month average
 - Limited in purpose: domestic use, livestock, wildlife management, fishing (excluding fish farming)
- If filled with diffused surface water:
 - No limitation on size- can be as big as you want
 - But- need to make sure it is diffused and not state owned water
- If filled with groundwater:
 - Must comply with local groundwater conservation district requirements
 - If well used to fill a pond is an exempt livestock well, likely okay

The Clean Water Act and Waters of the United States

The regulation of water continues to be a boiling hot topic in environmental and agricultural circles, especially as the administrations changed in 2017. Briefly, the Clean Water Act (“CWA”) allows the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) to have jurisdiction or authority over waters of the United States (“WOTUS”). This means that before anything is either discharged into or “dredged or filled” into a water body that is considered to be “waters of the United States,” an individual needs to first obtain a permit from either the EPA or Corps, and if they fail to do so they may face fines up to \$37,500 per day. Therefore, the definition of what can be considered a WOTUS is very important.



Photo by: Tave Doty

Under the Obama administration, the EPA and Corps issued a new rule in 2015 intended to clarify WOTUS and its protections over tributaries, streams, and wetlands. The true impact of the new rule was to expand the subjective “significant nexus” test from the earlier Supreme Court’s *Rapanos v. United States* decision, and in so doing, put forth a broad expansion of jurisdictional waters under the CWA while maintaining significant agency discretion in determining what can constitute a jurisdictional water under the Act. Specifically, the new rule included new definitions that greatly enlarged the number of water bodies that were covered under the CWA, to include intermittent streams and adjacent waters that, while not “jurisdictional” waters themselves, were connected by other water segments to jurisdictional waters. This new rule’s inclusion of all waters adjacent to jurisdictional waters poses a significant threat to agriculture, as agricultural producers stand to lose usable land as well as face impacts on their ability to farm, build, dig, disturb and move dirt. Numerous states and industry groups filed suits to challenge the rule and prevent its implementation. In February of 2017, the new WOTUS rule came under scrutiny by an Executive Order issued by President Trump. In the Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, President Trump set for a new policy on clean water that emphasizes economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the States. The President ordered the EPA and Corps to review the WOTUS rule, and encouraged the agencies to interpret the term “navigable waters” in a manner consistent with Justice Antonin Scalia’s opinion in *Rapanos v. United States*, which focused on the “hydrologic connection” of the waters and found that non-navigable waters become jurisdictional only if they exhibit a relatively permanent flow, such as a river, lake, or stream. It remains to be seen whether the EPA and Corps will adopt a narrower definition of WOTUS; unfortunately, the uncertainty over the scope of WOTUS will likely continue for the foreseeable future.

Groundwater

Statistics:

Texas uses about 7 million acre-feet of groundwater per year (75% by agriculture (mostly irrigation) / 20% by municipalities)

Rule of Capture

Texas follows the Rule of Capture (Absolute Ownership) for managing groundwater resources. Under this rule, landowners have the absolute right to withdraw groundwater from beneath their property regardless of any negative consequences to neighboring landowners or extraordinary conditions (i.e. drought). In addition, landowners may use the groundwater for any purpose on or off their property, and they may sell, lease, or export the water. Because of the seemingly absolute nature of this right, the Rule of Capture is often considered the “law of the biggest pump.” However, Texas does recognize a few exceptions to the rule of capture. A landowner may not: (1) maliciously take water for the sole purpose of injuring his neighbor; (2) wantonly and willfully waste it; or (3) negligently proximately cause the subsidence of another’s land.

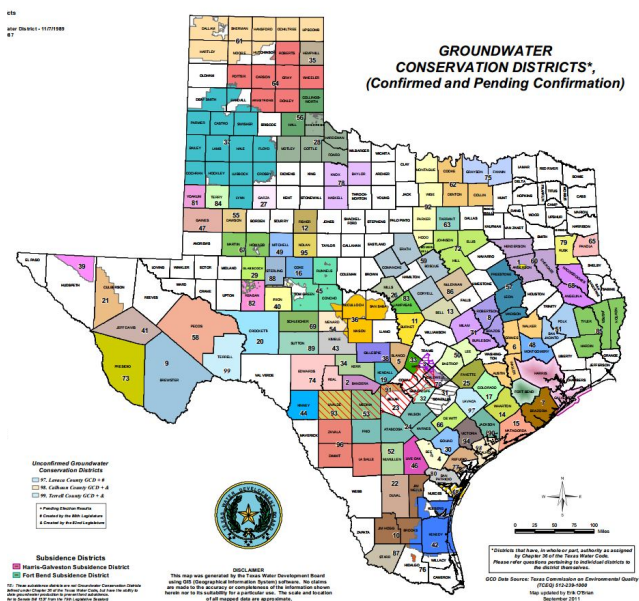
Groundwater Conservation Districts

While the Rule of Capture is still in place, the Texas Legislature has made some progress in regulating groundwater through the creation of groundwater conservation districts (“GCDs”). These districts generally have the authority to promulgate rules for conserving, protecting, recharging, and preventing waste of groundwater. However, not all of Texas is covered by a GCD, and even where GCDs exist, landowners are still deemed to own all of the groundwater under their land

GCD’s have three main powers: (1) create rules; (2) plan; and (3) issue permits. When GCDs consider a permit application, they analyze the: impact on existing users, beneficial use, waste/conservation plans, and ensure that the permit is consistent with the GCD’s overall plan.

Exempt Wells

If located in a GCD, no permit is necessary for the following types of wells: (1) wells used solely for domestic use or livestock and poultry if the well is located on 10 acres or more, and is not capable of producing more than 25,000 gallons a day; (2) wells used to



supply water for a rig actively engaged in drilling or exploration operations for oil and gas if located on the same lease; or (3) water used for some mining operations.

Lubbock v. Coyote Lake Ranch

This 2016 opinion from the Texas Supreme Court is an important ruling concerning groundwater law. The facts behind the lawsuit were: Coyote Lake Ranch (“Ranch”) sold its groundwater rights to the City of Lubbock back in the 1950s. In 2012, Lubbock attempted to drill water wells on the Ranch, but the current owners of the Ranch argued that the Accommodation Doctrine from oil and gas law applied in this case, which limited the locations and ability of the City in where it drilled its wells. In oil and gas law, when two different people own the mineral and surface rights, the mineral owner possesses the “dominant estate,” meaning that the surface owner’s right to the surface is “servient” to mineral owner. However, this powerful doctrine is restricted by the Accommodation Doctrine, which states that the mineral owner has the right to use as much of the surface as is reasonably necessary to produce oil and gas, but must accommodate existing surface uses if the surface owner can prove that (1) the mineral production substantially impacts the existing surface use, (2) minerals can be produced another way, and (3) the surface use cannot be conducted in any other way. In *Coyote Lake Ranch*, the Texas Supreme Court essentially applied oil and gas law to water law, holding (1) the groundwater estate (like the mineral estate in oil and gas) is dominant to the surface estate when severed, and (2) the Accommodation Doctrine applies to groundwater owners. This means that groundwater owners no have the right to use as much of the surface as reasonably necessary to produce groundwater, and landowners have the burden of proof to demonstrate that the accommodation doctrine applies.



Photo by: Tave Doty