MIXING OIL AND GAS WITH TEXAS WATER LAW*

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I. INTRODUCTION

A. Purpose

Oil and water may not mix in the chemistry sense of creating a solution; however, water is an essential component of the production of oil and gas in the field. Accordingly, a working knowledge of Texas water law and, in particular, the issues those laws pose in the development of Texas's most valuable natural resource is imperative for the oil and gas practitioner of the twenty-first century.

In addition to providing an overview of Texas law pertaining to surface water and groundwater, this Article will look at issues relating to the acquisition and permitting of these two distinct water resources. Issues related to dealings with governmental entities responsible for the regulation of these two distinct water resources, including ethical considerations related to dealing with and practicing before those entities, such as ex parte communications and multiple party representation, will be discussed.

B. Setting

In December 2010, Governor Rick Perry issued an "Emergency Disaster Proclamation" related to extreme fire hazards that posed a "threat of imminent

disaster" in certain Texas counties identified in that proclamation.[1] On October 31, 2011, Governor Perry issued a separate proclamation renewing those "fire hazard" conditions and expanding the proclamation to certify that all of the 254 counties in Texas were experiencing "exceptional drought conditions" that had "reached historic levels."[2] The proclamation goes on to declare that these unprecedented conditions pose "an imminent threat to public health, property and the economy" of the State of Texas and its citizens.[3] The Governor signed a renewal of that disaster declaration effective December 27, 2011.[4]

Writing in the adjudication of the upper segment of the Guadalupe River Basin, Justice Jack Pope wrote that "[t]he story of water law in Texas is also the story of its droughts."[5] In his January 5, 2012 transmittal letter to the "People of Texas," Texas Water Development Board (TWDB) Chairman Edward Vaughan announced the adoption of the 2012 State Water Plan, noting that "Texas is currently experiencing what has been described as the worst one-year drought in the state's history."[6] Chairman Vaughan used this fact to emphasize the need for the long-range planning reflected in the State Water Plan in order to meet Texas's water needs.[7] According to Chairman Vaughan, "**[t]he primary message of the 2012 State Water Plan is a simple one: In serious drought conditions, Texas does not and will not have enough water to meet the needs of its people, its businesses, and its agricultural enterprises.**"[8] The reality of these statements, as documented by Governor Perry's Disaster Proclamation, coupled with the projected dramatic growth of Texas's population and water demands over the next fifty years,[9] make the topic of water, whether for human consumption or application in connection with the production of oil and gas, a very emotionally charged one.

Our current supply of developed water resources, approximately 17 million acre-feet, will not keep up with the projected 2060 demand of 22 million acre-feet.[10] The TWDB, the state agency charged with the development of the State Water Plan, has predicted that unless new water supply sources are

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1. *See* Office of the Governor, Gov. Perry Renews Proclamation Extending Wildfire and Drought Emergency (Oct. 31, 2011), *available at* http://governor.state.tx.us/news/proclamation/16723/ (reciting the underlying facts of the December 2010 Proclamation and presenting a copy of the Governor's Proclamation as attested to by the Secretary of State).

2. *Id.*

3. *Id.*

4. *Id.*; *see* Office of the Governor, Gov. Perry Again Renews Proclamation Extending Wildfire and Drought Emergency (Dec. 27, 2011), *available at* http://governor.state.tx.us/news/proclamation/16820.

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

6. TEX. WATER DEV. BD., 2012 WATER FOR TEXAS 5 (Jan. 2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf [hereinafter 2012 WATER PLAN].

7. *See id.*

8. *Id.*

9. *Id.* at 16.

10. *Id.* at 17.

developed by the year 2060, the state will have an approximate 9 million acre-feet *shortfall* in the amount of water required to meet then-current demands.[11]

C. Oil and Gas Implications

The projected demands reported in the 2012 State Water Plan, however, do not necessarily reflect the demands and impacts of the dramatic increase in natural gas production from shale reserves around the state in the last decade.[12] On average, the hydraulic fracturing (a.k.a. a "frac job") of a vertical well completed in the Barnett Shale can require 1.2 million gallons (28,000 barrels or 3.7 acre-feet) of water,[13] and 3.5 million gallons (83,000 gallons or 10.8 acre-feet) for a horizontal well.[14] In the Eagle Ford Shale in South Texas, the Railroad Commission of Texas reports that the average frac job consumes approximately 11 acre-feet (3.6 million gallons or 28,000 barrels) of water.[15] This estimate is down from 15 acre-feet (approximately 4.9 million gallons or 117,000 barrels) of water for each plugged completion that requires hydraulic fracturing to enhance oil and gas recovery.[16] With horizontally drilled wells frequently having multiple plugs placed in a single well bore (each of which can require a separate frac job to produce the separate zone), each well can be responsible for the consumption of 100 million gallons of water or more.[17]

In addition to the raised eyebrows caused by the quantities of groundwater being consumed by the demands associated with increased oil and gas production across the state, concerns over potential impacts to water quality and the potential pollution of groundwater have also been associated with the fracing process.[18] Opponents fear that anywhere from thirty to sixty percent of the frac fluid, which is usually a mixture of water and one or more additives, will remain in the ground, flowing through the new fractures into aquifers and water-bearing sands relied upon for human consumption.[19]

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11. *See* TEX. WATER CODE ANN. § 16.051 (West 2008 & Supp. 2011); 2012 WATER PLAN, *supra* note 6, at 17-18.

12. *See generally* 2012 WATER PLAN, *supra* note 6, at ch. 6 (addressing the TWDB). In 2010, almost 2,000 billion cubic feet (BCF) of gas was produced from the Barnett Shale with a total of 9,000 trillion cubic feet (TCF) having been produced since 1993. *See Barnett Shale Information*, R.R. COMM'N OF TEX. (Feb. 17, 2012), http://www.rrc.state.tx.us/barnettshale/index.php.

13. *See Hydraulic Fracturing Frequently Asked Questions*, R.R. COMM'N OF TEX. (Feb. 1, 2012), http://www.rrc.state.tx.us/about/faqs/hydraulicfracturing.php (last visited Apr. 27, 2012).

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.*

18. *See infra* note 19 and accompanying text.

19. *See* Thomas E. Kurth et al., *Law Applicable to Hydraulic Fracturing in the Shale States*, THE OIL, GAS & ENERGY RES. L.J., 12 n.43 (State Bar of Texas June 2010), *available at* http://www.haynesboone.com/files/Publication/13b38836-cf13-44fa-b781-f366943021fa/Presentation/PublicationAttachment/fea83e1a-3d59-4fb6-88fe-8caf7138979f/FRAC_Report.pdf; Robert E. Beck, *Current Issues in Oil and Gas Development and Production: Will Water Control What Energy We Have?*, 49 WASHBURN L.J. 423, 425 (2010).

II. OVERVIEW OF TEXAS WATER LAW

A. Classification of "Water"

Water in Texas is classified into one of four types: (i) "surface water," (ii) "groundwater," (iii) "diffused water," or (iv) "developed water."[20] In Texas, both the ownership of and the regulatory scheme governing the various types of water are dependent upon its classification.[21]

Although groundwater is privately owned and subject to the Rule of Capture,[22] surface water is owned by the state and held in trust for the benefit of all of the people of the state.[23] Diffused water is an oddity under Texas law because it is neither surface water nor groundwater from a regulatory perspective.[24] In its diffused state, the water is the property of the landowner who may capture and beneficially use it without obtaining authorization from the state.[25] Once it enters into a defined watercourse, however, diffused water becomes surface water owned by the state.[26] Less well-developed in Texas jurisprudence is developed water, which can originate as either surface or groundwater, but constitutes new water to the affected watercourse because it is introduced by some man-made or artificial activity.[27] A summary description of each of the four classes of water is set forth below.

1. "State Surface Water"

State water is defined very broadly by statute:

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20. *See infra* Parts II.A.1-4.

21. *See infra* Parts II.A.1-4.

22. Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *4 (Tex. Feb. 24, 2012); *see, e.g.*, TEX. WATER CODE ANN. §§ 26.002, 35.003, 36.002 (West 2008 & Supp. 2011); Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 75-76 (Tex. 1999); Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 625-26 (Tex. 1996); Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 26 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 800-01 (Tex. 1955); Tex. Co. v. Burkett, 296 S.W. 273, 277-78 (Tex. 1927); Hous. & T.C. Ry. Co. v. East, 81 S.W. 279, 281 (Tex. 1904). *See generally* Dylan O. Drummond et al., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (2005) (discussing the development of the Rule of Capture and groundwater ownership in Texas).

23. *See* TEX. WATER CODE ANN. § 11.021 (West 2008). *See generally* Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281, 1294-95 (1986) (analyzing groundwater law in Texas); Edmond R. McCarthy Jr., *Environmental Flows: Water Development Perspective*, 34 ST. B. TEX. ENVTL. L.J. 248, 250-51 (Summer 2004) (discussing surface water and its public trust characteristic).

24. *See* Dietrich v. Goodman, 123 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

25. *See id.*; Raburn v. KJI Bluechip Invs., 50 S.W.3d 699, 704 (Tex. App.—Fort Worth 2001, no pet.). *See generally* ESSENTIALS OF TEXAS WATER RESOURCES 14 (Mary K. Sahs ed., 2009).

26. *See Dietrich*, 123 S.W.3d at 417.

27. *See* Frank R. Booth, *Ownership of Developed Water Rights in Texas: A Property Right Threatened*, 17 ST. MARY'S L.J. 1181, 1189 (1986).

> [W]ater of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.[28]

Based upon the broad statutory language, there is very little water flowing in a watercourse that is not presumptively owned by the state.[29] The Texas Commission on Environmental Quality (TCEQ) and its predecessor agencies have been designated as the state's agent for water rights matters.[30]

2. "Groundwater"

It is important to note that the sale or lease of groundwater produced at the wellhead and groundwater rights in place are to be distinguished. The latter is a sale of real property, and the former is the sale of personal property.[31] The sale of groundwater rights involves the sale of the groundwater in place, or *in situ*, i.e., beneath the surface of the property.[32] The groundwater in place belongs to the owner of the surface of the property or surface estate.[33] In a conventional real estate transaction involving the sale of surface acreage, the conveyance also includes the groundwater in place, together with all the oil, gas, and other minerals, unless the same are expressly excepted from the conveyance.[34] The groundwater estate, however, like oil and gas, can be severed from the surface and sold separately.[35]

3."Diffused Water"

Diffused water, sometimes referred to as occasional water,[36] is generally recognized as the sheet flow of water that occurs across the surface of the land

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28. *See* § 11.021; Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *18-19 (Tex. Feb. 24, 2012).

29. *See* § 11.021.

30. *See id.* §§ 5.012-.013.

31. *Day*, 2012 Tex. LEXIS 161, at *4. *See generally* Drummond, *supra* note 22, at 80-82 (discussing the ownership of groundwater in Texas).

32. *See infra* notes 36-37 and accompanying text.

33. Tex. Co. v. Burkett, 296 S.W.2d 273, 277-78 (Tex. 1927); Pecos Cnty. WCID No. 1 v. Williams, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.); *see* Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff'd*, 2012 Tex. LEXIS 161 (citing Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied)).

34. *See* Pfluger v. Clack, 897 S.W.2d 956, 959 (Tex. Civ. App.—Eastland 1995, writ denied) (noting that water, surface or subsurface, that has not been severed by express conveyance or reservation remains part of surface estate). *See generally* TEX. PROP. CODE ANN. § 5.001 (West 2004) (discussing the fee simple estate).

35. *See Del Rio*, 269 S.W.3d at 617; *Pfluger*, 897 S.W.2d at 959.

36. Also known as "occasional waters," these are the waters that flow across an individual's property generated by rainfall. These flows can be captured and stored before they become part of the flow of the ordinary watercourse without the necessity of obtaining a permit from the state.

during rainfall events.[37] In its natural state, diffused water is the property of the owner of the surface of land.[38] The landowner is free to capture and use such diffused waters on his property without the need to obtain a permit from the state.[39] Once the diffused waters flow into a watercourse, however, the character of the water, although physically unaltered, is legally changed to surface water.[40] As surface water, it is now owned by the state.[41] The landowner or anyone else must now obtain a permit or other appropriate authorization from the state prior to diverting and using the water from a watercourse.[42]

4. "Developed Water"

Developed water is generally considered to be new water because it has been artificially introduced into the watercourse, i.e., it is water that would not be part of the normal flow of the watercourse but for the activities of the developer.[43] Developed water can include drainage, return water, groundwater delivered to a watercourse, and surface water that is returned to a watercourse other than the originating watercourse or river basin.[44] In the context of surface water owned by the state,[45] so long as the owner of the developed water retains physical control over it, he has the right to its continued beneficial use for the purpose(s) authorized by his water right, e.g., permit, certificate of adjudication, or certified filing.[46] Like diffused water, once physical control of the developed water is either lost or abandoned and it is allowed to flow into a watercourse

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37. *See* Domel v. Georgetown, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied); HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 515-16 (1961). *See generally* Douglas G. Caroom & Lynn R. Sherman, *Water Development and Water Rights*, § 13.3(a), 491-92, *in* 45 TEX. PRACTICE (Jeff Civins et al. eds., 1997).

38. *See* Turner v. Big Lake Oil Co., 96 S.W.2d 221, 228 (Tex. 1936); Motl v. Boyd, 286 S.W. 458, 473 (Tex. 1926); Dietrich v. Goodman, 123 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003, no pet.); Raburn v. KJI Bluechip Invs., 50 S.W.3d 699, 704 (Tex. App.—Fort Worth 2001, no pet.). *See generally* HUTCHINS, *supra* note 37, at 515-19 (discussing diffused water); Caroom & Sherman, *supra* note 37, at 491-92; ESSENTIALS OF TEXAS WATER RESOURCES, *supra* note 25, at 14 (same).

39. *See Domel*, 6 S.W.3d at 353.

40. *See* ESSENTIALS OF TEXAS WATER RESOURCES, *supra* note 25, at 14.

41. *See* TEX. WATER CODE ANN. § 11.021 (West 2008).

42. *Id.*; *see Big Lake Oil Co.*, 96 S.W.2d at 228; *Motl*, 286 S.W. at 473; *Domel*, 6 S.W.3d at 353; HUTCHINS, *supra* note 37, at 518-19; Caroom & Sherman, *supra* note 37, at 492.

43. *See generally* HUTCHINS, *supra* note 37, at 541 (discussing developed water); Booth, *supra* note 27, at 1182; Caroom & Sherman, *supra* note 37, at 492-93 (same).

44. *See* Guelker v. Hidalgo Cnty. WCID No. 6, 269 S.W.2d 551, 551 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.); HUTCHINS, *supra* note 37, at 541; FRANK F. SKILLERN, TEXAS WATER LAW 84-85 (1988); Caroom & Sherman, *supra* note 37, at 493 (citing Harrell v. F.H. Vahlsing, Inc., 248 S.W.2d 762 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.)); Booth, *supra* note 27, at 1196-1201.

45. *See* S. Tex. Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.). *See generally* HUTCHINS, *supra* note 37, at 77-78, 545-46.

46. *See* Caroom & Sherman, *supra* note 37, at 492-93; Booth, *supra* note 27, at 1196; *cf.* TEX. WATER CODE ANN. §11.042 (West 2008) (authorizing the use of the state-owned bed and banks of watercourses to transport treated wastewater effluent for indirect reuse). *But see* TEX. WATER CODE ANN. § 11.046 (West 2008) (requiring surplus surface water to be returned to the originating watercourse if it can be accomplished by gravity flow).

and again become part of the ordinary flow, it loses its character as developed water and reverts to state owned surface water.[47] Additionally, once the water right holder has beneficially used the surface water, it cannot be claimed as developed water if by the terms and conditions of the authorization it must be returned to a watercourse.[48]

B. Overview of Surface Water Law

The continued development of new water supplies and the expansion, modification, and reprioritization of existing water resources is critical to Texas's future. The reallocation of existing water supplies through purchases and/or leases of the same is one means of meeting future demands. If the source of supply sought to be purchased or leased is surface water, whether diverted from a river, an existing reservoir, or a proposed reservoir project, a working knowledge of Texas regulatory permitting process for surface water rights is an essential element of the water resource planning and development process.

1. "Lawful Use" of State Water

To lawfully divert, store, or use the waters of the state for any purpose, a water right must first be obtained from the state, unless the use is authorized as an exempt use.[49] It is illegal to "take, divert, or appropriate" state water for any

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47. *See Domel*, 6 S.W.3d at 353; *S. Tex. Water Co.*, 247 S.W.2d at 272; *see also* HUTCHINS, *supra* note 37, at 551; SKILLERN, *supra* note 44, at 84-85; Caroom & Sherman, *supra* note 37, at 493. The issue of when a water right holder either loses control over the water or abandons it such that it reverts to state control subject to being re-appropriated is beyond the scope of this paper. Merely allowing the water to flow into a state watercourse, by itself, however, does not necessarily cause the water right holder to lose either control of or the right to use the water. *See* ESSENTIALS OF TEXAS WATER RESOURCES, *supra* note 25, at 14.

48. *See* § 11.046; *cf.* §11.042 (authorizing the use of the state-owned bed and banks of watercourses to transport treated wastewater effluent for indirect reuse). *See generally* SKILLERN, *supra* note 44, at 85; Caroom & Sherman, *supra* note 37, at 493; RG-141, A REGULATORY GUIDANCE DOCUMENT FOR APPLICATIONS TO DIVERT, STORE OR USE STATE WATER 6 (June 1995).

49. *See* Act of May 28, 2001, 77th Leg., R.S., ch. 966, § 2.09, 2001 Tex. Gen. Laws 1880, 1886-87 (SB 2 amending § 11.142 of the Texas Water Code to authorize the impoundment of up to 200 acre-feet of water for fish and wildlife use similar to the existing domestic and livestock exemption); TEX. WATER CODE ANN. §§ 11.121, 11.142, 11.1421, 11.1422, 11.303 (West 2008 & Supp. 2011); 30 TEX. ADMIN. CODE ANN. §§ 297.21-297.30 (2012). The exceptions include the right for a person to construct on his property a dam or reservoir that will impound less than 200 acre-feet of water to be used for domestic and livestock (including wildlife) purposes. *See* TEX. WATER CODE ANN. § 11.142 (noting SB 1 amended this section to authorize "temporary" impoundment of more than 200 acre-feet without obtaining a permit if the average storage over twelve months is 200 acre-feet or less). *See* Act of May 28, 2001, § 2.09, 2001 Tex. Gen. Laws at 1886-1887. Additionally, water may be diverted from the Gulf of Mexico at a rate not to exceed one acre-foot of water during a twenty-four hour period for purposes of facilitating drilling and producing oil and gas or conducting operations associated with such development and production. *See* TEX. WATER CODE ANN. § 11.142. Reservoirs may be constructed without a permit if their sole purpose is sediment control as part of a surface coal mining operation under the Texas Surface Coaling Reclamation Act. *See* TEX. REV. CIV. STAT. ANN. §§ 5920-11 (West 2010); TEX. WATER CODE ANN. § 11.142(c). Brackish or marine water may also be used without a permit for purposes of conducting mariculture activities. *See* TEX. WATER CODE ANN. § 11.1421.

purpose without authorization.[50] Unlawful use is subject to the imposition of civil penalties in the amount of up to $5,000 per day for each day the unlawful use continues.[51] It is also unlawful to sell a water right unless either the right (i) has been perfected, or (ii) the Commission, by permit, has authorized the sale.[52]

To be able to sell (or buy) a surface water right or to sell the right to use the water for a specific period of time, i.e., lease the right, the seller must hold a valid water right.[53] Authorization to use or to appropriate state water requires that one obtain a permit or hold a certificate of adjudication or a certified filing authorizing the use of the water.[54] Certificates of adjudication and, in particular, certified filings are historic evidences of the right to appropriate state water.[55]

In Texas, a water right is recognized as a vested property right.[56] The right can be bought and sold, and the water right holder's interest in and right to divert water pursuant to the right is greater than any other person's.[57] The right to divert and use the water for beneficial purposes, however, is considered a usufructuary right or a right of use.[58] The holder of a water rights permit does not hold title to the corpus of the water.[59] That title remains in the state.[60] As against all other persons, however, the water right holder would possess a superior property right.[61]

Because many watersheds in the state are considered fully appropriated,[62] acquiring an existing water right may be the most productive means of securing a water right that will satisfy the needs of the individual. Depending on the type of water right sought, whether for municipal, industrial, agriculture, or other use, limitations may be imposed on the water right that affects its value to

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Finally, a tax-exempt, non-profit corporation that owns a cemetery may divert up to 200 acre-feet of water a year from a river to irrigate the grounds of a cemetery, which borders the river and is more than 100 years old, and water may be impounded in sedimentation control ponds constructed in conjunction with surface coal mining operations. *See id.*; *see also* RG-141, *supra* note 48, at 10-11.

50. *See* TEX. WATER CODE ANN. §§ 11.081, 11.082, 11.084 (West 2008); *cf. id.* § 11.121 (requiring a permit be obtained to use state water).

51. *See id.* § 11.082.

52. *See id.* § 11.084.

53. *See id.* §§ 11.081, 11.082, 11.084, 11.121.

54. *Id.* §§ 11.307, 11.323 (West 2008).

55. *See id.* § 11.081.

56. *In re* Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438, 444-45 (Tex. 1982); *see* Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 646-47 (Tex. 1971).

57. *See* Booth, *supra* note 27, at 1184-85.

58. *See id.* at 1185, 1187-88.

59. *See id.* at 1187-88.

60. *See* S. Tex. Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App—Galveston 1952, writ ref'd n.r.e.).

61. *See id.*

62. *See* RG-141, *supra* note 48, at 24 (Table 8—"Fully Appropriated Stream Segments"); Myron Hess, *An Environmental Take on Environmental Flow Protection*, 34 ST. B. TEX. ENVTL. L.J. 265, 270 (Summer 2004).

the permittee.[63] Permits may be obtained for varying periods of time, e.g., in perpetuity, a term of years, or as a temporary permit.[64]

2. Change of Ownership, Permit Amendments, and Other Issues

Upon acquisition of a water right, whether through the purchase of a permit or possibly through a contract for the use of water authorized under a permit, you will likely need to file one or more applications with the TCEQ to amend the permit to tailor its use to specific needs, and/or to file an application for change of ownership of the permit itself if appropriate.

a. Change of Ownership

Upon conveyance of a water right, an application must be filed with the TCEQ requesting transfer of the water right to the new owner.[65] The TCEQ has a "Change of Ownership Form" available on its website.[66] This application is to be filed pursuant to TCEQ rules.[67] The application form must be accompanied by a fee of $100 payable to the TCEQ.[68] This form is to be used only for purposes of change of ownership and cannot be used for purposes of securing any other form of amendment to the water right.[69] If an amendment(s) regarding the place, purpose, or amount of water to be used, or the diversion point or the rate of diversion is needed, it must be the subject of a separate amendment application.[70]

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63. *See* 30 TEX. ADMIN. CODE §§ 297.41-.59 (2012) ("Issuance and Conditions of Water Rights").

64. *See* TEX. WATER CODE ANN. §§ 11.121, 11.138, 11.1381 (West 2008). Applicants can also apply for seasonal permits and emergency permits. *Id.* §§ 11.137, 11.139 (West 2008).

65. *See* 30 TEX. ADMIN. CODE §§ 297.81-.83 (2012); *Water Rights: Am I Regulated?*, TEX. COMM'N ON ENVTL. QUALITY, http://www.tceqtexas.gov/permitting/water_rights.html (last visited Feb. 28, 2012).

66. *Change of Ownership Form*, TEX. COMM'N ON ENVTL. QUALITY, www.tceq.texas.gov/assets/public/permitting/forms/10204.pdf (last visited Apr. 3, 2012); *see* TEX. WATER CODE ANN. ch. 11 (West 2008 & Supp. 2011); 30 TEX. ADMIN. CODE chs. 281 (applications processing), 288 (water conservation plans, drought contingency plans, guidelines, and requirements), 295 (water rights, procedural), 297 (water rights, substantive) (2012). *See generally* RG-141, *supra* note 48, at 13-15 (addressing application fees).

67. *See* 30 TEX. ADMIN. CODE §§ 297.81-.83.

68. *Change of Ownership Form*, TEX. COMM'N ON ENVTL. QUALITY, www.tceq.texas.gov/assets/public/permitting/forms/10204.pdf (last visited Apr. 3, 2012).

69. *See id.* There is a separate application for amendments. *See Application for Amendment to a Water Right*, TEX. COMM'N ON ENVTL. QUALITY, www.tceq.texas.gov/assets/public/permitting/forms/10201.pdf (last visited Apr. 10, 2012).

70. *See* TEX. WATER CODE ANN. § 11.122.

b. Permit Amendments

In order to "change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right," the water code requires that an amendment application be filed with the TCEQ.[71]

The application is to be filed on a form prepared by the TCEQ.[72] This form is available online from the TCEQ's website.[73] The application, however, is somewhat deceptive. Specifically, the limited information that appears to be required on the face of the application is not necessarily all of the information that may be required by TCEQ staff to secure the requested amendment(s).[74] Amendments are generally subject to all of the same statutory requirements, and applicable rules, as new water rights applications.[75] In other words, if the requested amendment would have some specific requirements prescribed for it if the same application was being filed for a new permit, those same conditions must be satisfied as part of the amendment application.[76] Accordingly, when filing an amendment application, the permit holder can expect to file multiple attachments along with the amendment application form provided by the TCEQ.[77] Depending upon the circumstances surrounding any requested amendment, the TCEQ may be required to process and issue the amendment without the need for publication of notice or opportunity for public hearing.[78]

In 2001, the Texas Legislature amended § 11.122 by codifying what are commonly known as (i) the "no injury rule" and (ii) the "Four Corners" Doctrine.[79] Subsection (b) was added to § 11.122 to mandate that the TCEQ issue a requested amendment that does not seek to increase either the amount of water authorized for diversion or the rate of diversion "if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the [water right] was fully exercised according to its terms and conditions as they existed before the requested amendment."[80]

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71. *See id. See generally* 30 TEX. ADMIN. CODE chs. 293 (water districts) and 297 (water rights, substantive) (2012).

72. *See* 30 TEX. ADMIN. CODE § 295.1 (2012).

73. *See Water Right Permit Applications*, TEX. COMM'N ON ENVTL. QUALITY, www.tceq.texas.gov/permitting/water_rights/wr/application.html (last visited Feb. 22, 2012) (providing the application forms for a new water right or amendment to an existing water right); TEX. WATER CODE ANN. ch. 11 (West 2008 & Supp. 2011); 30 TEX. ADMIN. CODE chs. 281, 288, 295, 297 (2012).

74. *See* TEX. WATER CODE ANN. §§ 11.216-.272, .129.

75. *See* § 11.122(b).

76. *See id.*

77. *See* § 11.129 ("The commission may require amendment of the application, maps, or other materials to achieve necessary compliance.").

78. *See id.* § 11.311.

79. Act of May 27, 2011, 77th Leg., R.S., ch. 966, § 2.07, 2001 Tex. Gen. Laws 1991, 1997 (current version at § 11.122(b) of the Texas Water Code).

80. *Id.*; *see* Lower Colo. River Auth. v. Tex. Dep't of Water Res. (*The Stacy Dam Case*), 689 S.W.2d 873, 875-76 (Tex. 1984).

According to the amended language (§ 11.122 (b)), if the proposed change in the base water right would have no greater impact than the impact on downstream water rights and the environment, e.g., riverine habitats, instream flows and uses, and freshwater inflows to the bays and estuaries, that would occur if one hundred percent of the water right reflected on the paper right issued by the TCEQ, then there is a presumption of no impact resulting from the requested change, and the TCEQ must issue the amendment.[81] Pursuant to the Texas Supreme Court's holding in what has become known as *The Stacy Dam Case*, the TCEQ is required to presume that each and every year, a water right holder uses one hundred percent of his authorized paper water right.[82] Based upon this presumption, if the change to the use of the water reflected in the amendment application could be accomplished as part of the base right, it is considered to be within the four corners of the existing right, and therefore, granting the amendment will have no injury on either downstream water rights or the environment.[83]

In *City of Marshall v. City of Uncertain*, the Texas Supreme Court addressed the issues of whether the TCEQ was required to approve, without a contested case hearing, an amendment of the City of Marshall's water rights permit filed under § 11.122(b).[84] In 2001, the City filed an amendment application seeking authorization to change the purpose of use to include industrial purposes.[85]

Although the TCEQ received multiple requests for a contested case hearing on the amendment, it concluded that §11.122(b) required the City's requested change be granted without publication of any notice or granting an opportunity for a contested case hearing.[86] The TCEQ's analysis was based upon the fact that the requested amendment was within the authorization of the existing permit if the same were fully utilized.[87]

On appeal, the Travis County District Court held that the TCEQ erred in its determination that § 11.122(b) required approval of the amendment without a contested case hearing and remanded the application to the TCEQ.[88] The Austin Court of Appeals affirmed, concluding that § 11.122(b) allowed a hearing where the amendment sought a change in the purpose of use.[89] In its analysis, the Texas Supreme Court noted:

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81. § 11.122(b). *But see* City of Marshall v. City of Uncertain, 206 S.W.3d 97, 105-113 (Tex. 2006) (requiring the TCEQ to consider more than just the factors enumerated in § 11.122(b) of the Texas Water Code).

82. *See Lower Colo. River Auth.*, 689 S.W.2d at 875-76.

83. *See* § 11.122(b); *Lower Colo. River Auth.*, 689 S.W.2d at 875-76.

84. *City of Marshall*, 206 S.W.3d at 101-14.

85. *Id.* at 98-99.

86. *Id.* at 99.

87. *Id.* at 100.

88. *Id.* at 100-01.

89. *Id.* at 101.

> The full-use assumption, also known as the four-corners doctrine, requires the Commission to assess a requested amendment's impact on other water rights and the on-stream environment based upon the full amount of water authorized by the existing permit irrespective of the amount that the permit holder has actually used.[90]

Accordingly, the court concluded that § 11.122(b) requires that an amendment application meet "all other applicable requirements of this chapter [11, Texas Water Code] for the approval of an application."[91] All "*other* requirements," the court concluded, included an assessment of matters outside of § 11.122, including the potential adverse impact of the amendment on other water right holders or the environment: "[W]e interpret section 11.122(b) to require the Commission to assess specified criteria other than impacts on other water right holders and the on-stream environment when considering a proposed water rights amendment."[92]

The court did confirm that the TCEQ must make the full-use assumption in considering impacts on water rights or the on-stream environment but that the potential, at least for a limited hearing on other issues addressed by Chapter 11, had to be held unless the record before the TCEQ was sufficient to allow a determination to be made without a hearing.[93]

c. Cancellation of Water Rights and Water "Banking"— "Use It" or "Lose It"

Although a permit issued in perpetuity becomes the property right of the permit holder once perfected,[94] the right is subject to cancellation, in whole or in part, for nonuse.[95] Specifically, if all or part of a water right has not been put to beneficial use at any time during the ten-year period immediately preceding the cancellation proceeding, the water right "is subject to cancellation in whole or in part . . . to the extent of the 10 years [of] nonuse."[96]

The threat of cancellation does not apply, however, to water that has not been put to beneficial use by the permittee to the extent that the permittee is participating in the Conservation Preserve Program authorized by the Food Security Act or participating in a similar governmental program.[97] The water right is also not subject to cancellation to the extent that a "significant portion of the water authorized" for use under the permit "has been used in accordance

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90. *Id.* at 100.

91. *Id.* at 105.

92. *Id.* at 108, 110-11.

93. *Id.* at 112-13.

94. *See* Booth, *supra* note 27, at 1185. *See generally In re* Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438, 444-45 (Tex. 1982); Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 646-47 (Tex. 1971).

95. *See* TEX. WATER CODE ANN. § 11.173(a) (West 2008).

96. *Id.*

97. § 11.173(b)(1).

with" an approved regional water plan.[98] Additionally, water that has been deposited in the Texas Water Bank is exempted from cancellation during the initial term of deposit up to ten years.[99]

The purpose for creation of the Water Bank was "to facilitate water transactions to provide sources of adequate water supplies for use within the State."[100] To this end, the Water Bank functions included not only serving as a broker of water rights, but also providing a clearinghouse for holders of water rights (both surface and groundwater) to conduct sale-by-owner transactions.[101] The TWDB has adopted rules for the operation of the Water Bank that are codified in Title 31, Chapter 359 of the Texas Administrative Code.[102]

The Water Bank legislation allows the holder of the water right to deposit it into the Bank for an initial term not to exceed ten years.[103] During the time the water right is on deposit, its initial term is exempt from cancellation.[104] The exemption from cancellation by the TCEQ, however, is only good one time.[105]

Two sessions after it created the Texas Water Bank, the Texas Legislature established the Texas Water Trust[106] to hold water rights dedicated to environmental needs, including instream flows, water quality, fish and wildlife habitats, bay, and estuary inflows.[107] The Texas Parks and Wildlife Department (TPWD) works closely with the TWDB in connection with the Texas Water Trust.[108] The TPWD, along with the TCEQ, is supposed to be consulted by the TWDB in the adoption of rules governing the process for holding and transferring water rights into the Trust.[109] Unlike a water right placed in the Water Bank, the legislature did not place any limit on the duration for which water may be placed in the Texas Water Trust.[110]

d. Watermaster Operations

Following the adjudication of water rights pursuant to the Water Rights Adjudication Act, the TCEQ was authorized to divide the state into "water divisions" and appoint a watermaster to administer the adjudicated rights within

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98. *See id.* §§ 11.173(a)(2), 16.053 (West 2008 & Supp. 2011).

99. *See id.* §§ 15.703(a)(4), 15.704(a)-(b), 15.702 (West 2008).

100. *See* § 15.702.

101. §§ 15.703(a)(1)-(2), (6), (8).

102. 31 TEX. ADMIN. CODE § 359.3 (2012).

103. *See* TEX. WATER CODE ANN. § 15.704(a).

104. *See id. See generally id*. §§ 11.172-11.177(a) (addressing cancellation of permit, certified filings, and certificates of adjudication for nonuse).

105. *See* § 15.704(a).

106. *See* Act of June 19, 1997, 75th Leg., R.S., ch. 1010, § 2.16, 1997 Tex. Gen. Laws 3626 (codified at TEX. WATER CODE ANN. § 15.7031(a) (West 2008)).

107. *See* § 15.7031(a); *cf. id.* § 15.7039(a)(10) (authorizing the TWDB Water Bank to accept and hold donations of water rights to meet instream, water quality, fish and wildlife habitat, or bay and estuary inflow needs).

108. *See* § 15.7031(b).

109. *See id.*

110. *See id.* §§ 15.705(a)-(b) (establishing fees for deposits into the Water Bank).

each division.[111] Only three watermaster operations exist within the state, however: the Rio Grande Watermaster and the South Texas Watermaster, which includes the Concho River Watermaster program.[112]

The Rio Grande Watermaster operation covers the Rio Grande Basin.[113] Rules governing the operation are contained in Chapter 303 of the TCEQ's rules.[114] The South Texas Watermaster operation includes the Nueces, San Antonio, Guadalupe, and portions of the Colorado River Basins and was expanded in 2005 with the creation of the Concho Watermaster.[115] Rules governing these operations are contained in Chapter 304 of the TCEQ's rules.[116]

Although the duties of the Rio Grande Watermaster vary somewhat from those of the South Texas Watermaster, the two operations have a general similarity and a common purpose to protect senior water rights.[117] In general, duties of the watermaster include inventorying water rights within the water division as well as identification of diversion works and reservoirs.[118] Watermaster duties also include monitoring diversions by water rights holders to ensure that the same do not exceed the quantities authorized by the state.[119]

In times of shortages, the watermaster operation is intended to function to protect senior water rights.[120] To accomplish this last function, the watermaster is authorized to allocate the available flows in the affected basin.[121] In the allocation process, the TCEQ rules allow the watermaster to limit and/or suspend diversion rights by junior water rights holders and order inflows into exempt and permitted reservoirs to be passed through to honor downstream senior water rights, domestic and livestock users (formerly known as riparian users), as well as minimum stream flow and release requirements.[122]

During the 2011 82nd Legislative Session, the TCEQ "Sunset Review" bill, House Bill 2694,[123] as enacted, amended, *inter alia*, Section 11.326 of the Texas Water Code by adding subsections (g) and (h).[124] The new subsections are intended to refocus attention on the State's Watermaster programs by requiring the Commission's Executive Director to evaluate at least every five years whether a watermaster is needed in those basins within the state that

111. *Id.* §§ 11.325, 11.326(a), 11.327(a).
112. *See id.* § 11.553; 30 TEX. ADMIN. CODE § 303.11(d) (2012).
113. 30 TEX. ADMIN. CODE § 303.11(a).
114. *See id.* §§ 303.1-303.93.
115. TEX. WATER CODE ANN. §§ 11.552, 11.553 (West 2008).
116. *See* 30 TEX. ADMIN. CODE §§ 304.1-304.63 (2012).
117. *See id.* §§ 303.11; TEX. WATER CODE ANN. § 11.553-11.554.
118. 30 TEX. ADMIN. CODE §§ 303.11, 304.12.
119. *Id.* § 304.21(a).
120. *Id.*
121. *Id.*
122. §§ 304.21(b), (c)(1)-(5).
123. Act of May 28, 2011, 82d Tex. Leg., R.S., ch. 1021, 2011 Tex. Gen. Laws 2578.
124. *Id.* § 5.05 (codified as TEX. WATER CODE ANN. § 11.326(g)-(h)).

currently do not have watermaster operations.[125] The Executive Director, thereafter, is required to report his "findings and make recommendations" to the Commission regarding whether watermaster operations should be considered.[126] The Commission is required (i) to determine criteria and risk factors to be considered in the Executive Director's evaluation,[127] and (ii) to include the Executive Director's findings and recommendations in the TCEQ's biannual report to the legislature.[128]

C. Overview of Groundwater Law

1. Ownership of Groundwater, the Rule of Capture, and the Courts

When it comes to groundwater, there are multiple issues confronting the landowner who desires to develop, sell or lease, and/or protect the resource from third-party capture.[129] A complicating issue is the potential impact of regulation by a groundwater conservation district.

Based upon a consistent line of Texas Supreme Court decisions and other appellate court rulings dating back more than a century, landowners in Texas believed that they had a vested property right in the groundwater beneath their property.[130] That lineage, however, came increasingly under fire since the mid-

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125. TEX. WATER CODE ANN. § 11.326(g).

126. *Id.*

127. § 11.326(h).

128. *Id.* Since passage of the legislation, the TCEQ has initiated investigations in the Brazos, Brazos-Colorado Coastal, Colorado and Colorado-Lavaca Coastal River Basins. More information about the process, including copies of letters sent to water rights holders in the respective basins, can be found on the TCEQ website at http://www.tceq.texas.gov/permitting/water_rights/wmaster/evaluation (last visited Apr. 29, 2012).

129. *See generally* Drummond, *supra* note 22, at 53, 95-96 (discussing the confusion the Rule of Capture has caused); Douglas G. Caroom & Susan M. Maxwell, *The Rule of Capture—"If It Ain't Broke . . .," in* TEX. WATER DEV. BD. REPORT 361, 100 YEARS OF RULE OF CAPTURE: FROM EAST TO GROUNDWATER MANAGEMENT 41 (2004), *available at* https://www.twdb.state.tx.us/publications/reports/numbered_reports/doc/R361/R361.pdf.

130. *E.g.*, Sipriano v. Great Spring Waters of Am., 1 S.W.3d 75, 75-79 (Tex. 1999); Gifford-Hill & Co. v. Wise Cnty. Appraisal Dist., 827 S.W.2d 811, 815 n.6 (Tex. 1992); Moser v. United States Steel, 676 S.W.2d 99, 102 (Tex. 1984); City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 686 (Tex. 1983); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 25-27 (Tex. 1978); Sun Oil Co. v. Whitaker, 438 S.W.2d 808, 811 (Tex. 1972); City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798 (Tex. 1955); Tex. Co. v. Burkett, 296 S.W. 273, 278 (Tex. 1927); Hous. & T.C. Ry. Co. v. East, 81 S.W. 279, 281 (Tex. 1904); City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613, 617-18 (Tex. App.—San Antonio 2008, pet. denied); Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff'd*, 2012 Tex. LEXIS 161 (Tex. Feb. 24, 2012); Bartley v. Sone, 527 S.W.2d 754, 759-60 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); Pecos Cnty. WCID No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.). *But see* Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *22 (Tex. Feb. 24, 2012) ("Whether groundwater can be owned in place is an issue [the Supreme Court had] never decided."). For an in-depth historical review and analysis of the law related to groundwater as a property right, see generally Drummond, *supra* note 22, at 1-97. *See Day*, 2012 Tex. LEXIS 161, at *27 & n.47. In that article, the history of groundwater law is traced from its Greek and Roman roots, through Spanish and English interpretations, to Texas's adoption of the absolute ownership rule and the corollary tort-based concept known as the Rule of Capture. *See id.* at 16-45. *See generally* HUTCHINS, *supra* note 37, at 556-72; Marvin W. Jones & Andrew Little, *The Ownership of Groundwater in Texas: A Contrived*

1990s when the number of groundwater districts existing and operating across the state went from single digits to almost 100 today.[131] The battle line that has been drawn by at least some groundwater districts is based upon an effort to insulate groundwater districts from the threat of litigation based upon the constitutional obligation to compensate landowners when property, i.e., groundwater *in situ*, is taken for a public purpose.[132] On February 24, 2012, the Texas Supreme Court ended the battle.[133] In *Edwards Aquifer Authority v. Day*, the Texas Supreme Court held that groundwater in place is the property of the landowner and is constitutionally protected.[134] Accordingly, a governmental entity could not "take" a landowner's groundwater without payment of the adequate compensation guaranteed by article I, § 17(a) of the Texas Constitution.[135]

Buying and selling groundwater rights, and for that matter leasing the groundwater rights, are all essentially real estate transactions.[136] The sale of groundwater rights *in situ*, or in place, however, is not the same as the sale of the groundwater after it has been produced from a well.[137] The sale of groundwater or groundwater rights *in situ* is a sale of real property.[138] The sale of groundwater once it has been severed and produced at the wellhead, however, is the sale of personal property.[139]

The groundwater in place belongs to the owner of the surface of the property or surface estate.[140] In a conventional real estate transaction involving the sale of surface acreage, unless expressly reserved by the grantor or previously severed from the surface estate, the conveyance includes the groundwater in place together with all the oil, gas, and other minerals.[141] The

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Battle For State Control of Groundwater, 61 BAYLOR L. REV. 578, 593-98 (2009) (discussing the corollary relationship between the absolute ownership rule and the Rule of Capture).

131. *See Groundwater Conservation District Facts*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/groundwater/conservation_districts/facts.asp (last visited Apr. 4, 2012); Liz Carmack, *Groundwater Conservation Districts*, TEX. COMM'N ON ENVTL. QUALITY (July 7, 2011), http://www.tceq.texas.gov/publications/pd/020/10-01/groundwater-conservation-districts ("As of September 2009, 96 districts have been established, covering all or part of 152 of Texas' 254 counties.").

132. *See* TEX. CONST. art. I, § 17; U.S. CONST. amend. V.

133. Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *4 (Tex. Feb. 24, 2012).

134. *Id.*

135. *See id.*

136. *See* Drummond, *supra* note 22, at 63.

137. *See supra* Part II.A.2.

138. *See supra* Part II.A.2.

139. *See supra* Part II.A.2.

140. *Day*, 2012 Tex. LEXIS 161, at *4; *e.g.*, Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972); Tex. Co. v. Burkett, 296 S.W. 273, 278 (Tex. 1927); Pecos Cnty. Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 506 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.); City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613, 617-78 (Tex. App.—San Antonio 2008, pet. denied); *cf.* Guffey v. Stroud, 16 S.W.2d 527, 528 (Tex. Comm'n App. 1929, judgm't adopted) (absent an express reservation to the surface estate, the mineral estate owner may use groundwater to develop the mineral estate).

141. *See* Rosenthal v. R.R. Comm'n of Tex., 2009 Tex. App. LEXIS 6522, *25 n.10 (Tex. App.—Austin 2009, pet. denied) (mem. op.); Pfluger v. Clack, 897 S.W.2d 956, 959 (Tex. App.—Eastland 1995, writ denied) ("Water, surface or subsurface, unsevered expressly by conveyance or reservation, is part of the surface estate."). *See generally* TEX. PROP. CODE ANN. § 5.001 (West 2004) (providing statutory language

groundwater estate, like an oil and gas or mineral estate, can be severed from the surface and sold separately.[142] The sale of water after it has been produced from the ground and reduced to possession at the wellhead, however, is the sale of personal property.[143] It involves the sale of the water as a commodity or as goods.[144] Such sales do not convey a fee interest in the real property.[145]

Many of the issues involved in the conveyance of groundwater rights are similar to the title defect and physical contamination issues associated with traditional real estate transactions.[146] In fact, many of them can be insured against with title insurance.[147] Other issues, like regulatory schemes and marketing concerns, cannot be insured against and, therefore, need to be specifically addressed in the deal points.[148]

Growing regulation of groundwater production by groundwater districts can also significantly impact the enjoyment, use, and/or value of the groundwater rights by the owners and/or prospective purchasers of those rights.

Since 1904, Texas has followed the Rule of Capture.[149] In *Houston & Texas Central Railroad Co. v. East*, the Texas Supreme Court adopted the so-called rule of absolute ownership from the English case of *Acton v. Blundell* and concluded that the owner of the surface had the right to dig and to capture the water percolating from beneath his property, even if doing so affected his neighbor.[150] From the *East* holding, Texas's Rule of Capture has evolved.[151]

The Rule of Capture, however, has become confused with the more fundamental property right that led to its adoption, i.e., the ownership of the groundwater in place.[152] Moreover, some have used the confusion to champion efforts to diminish landowners' ownership interests in the groundwater in place beneath the surface of their property.[153] The Rule of Capture announced in *East* was a theory that allowed the Railroad to escape liability for the harm it may have produced on East's neighboring land, irrespective of whether East

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for the conveyance of an estate in land); Drummond, *supra* note 22, at 78 (discussing that once the water is pumped and withdrawn it becomes personal).

142. *See Pfluger*, 897 S.W.2d at 959. *See generally* Evans v. Ropte, 96 S.W.2d 973, 974-76 (Tex. Comm'n App. 1936) (discussing rights conveyed by a groundwater estate transaction).

143. *See* Drummond, *supra* note 22, at 78.

144. *See id.*

145. *See id.* at 78-88.

146. *See id.*

147. *See generally* James L. Gosdin, *Title Insurance for Groundwater and Surface Water Deals*, ST. B. TEX., 6TH ANNUAL THE CHANGING FACE OF WATER RIGHTS IN TEXAS: A PRACTICAL SEMINAR ON TEXAS SURFACE AND GROUNDWATER ISSUES (Feb. 10-11, 2005), *available at* http://www.texenrls.org/pdf/changing_face_water.pdf (discussing water rights as real property).

148. *See id.*

149. Hous. & T.C. Ry. Co. v. East, 81 S.W. 279 (Tex. 1904); *see* Drummond, *supra* note 22, at 13-14.

150. *East*, 81 S.W. at 280-81; *see also* City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 685-86 (Tex. 1983) (discussing the right of the landowner to capture groundwater).

151. *See* Drummond, *supra* note 22, at 41-57.

152. *See id.* at 53.

153. *See, e.g.*, *id.* at 15 (noting that "[o]ne of the authors advocated the abolishment of the Rule of Capture").

had owned the water when it was in the ground.[154] The reason, according to the Texas Supreme Court's *Day* decision discussed above, was that in *East*, the court concluded that "a landowner is the absolute owner of groundwater flowing at the surface from its well, even if the water originated beneath the land of another."[155] Writing for a unanimous court in *Day*, Justice Hecht noted: "The Railroad escaped liability, certainly not because East did own the water in place, but irrespective of whether he did."[156] The court's ruling in *Day*, according to Justice Hecht, was the first time that the Texas Supreme Court had decided the question of ownership of groundwater in place.[157]

Texas courts rendered decisions that gave the appearance of recognizing a landowner's property right in the groundwater in place.[158] Because landowners own the groundwater, they have the right to develop and produce it.[159] Due to the ownership of the water captured at the wellhead,[160] rather than the migratory nature of the resource, according to the *Day* opinion, the courts protected the landowner's right under the Rule of Capture to prevent a neighbor from claiming harm or injury for the production of groundwater that might include water that, in a static state, was beneath the neighbor's property.[161]

The court's protection from the tort liability under the Rule of Capture associated with the production of groundwater has evolved (or been diluted) over time by the courts. Specifically, the court has created exceptions to the limitation on tort liability related to the production of groundwater that results in waste, negligent injury, and/or subsidence.[162]

In 1996, the Texas Supreme Court was confronted with whether to continue to recognize the *East* holding, as well as address challenges to the specific question of the landowners' vested rights in the groundwater beneath the surface of their property and the application of the Rule of Capture in *Barshop v. Medina County Underground Water Conservation District*.[163] The

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154. Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *29-30 (Tex. Feb. 24, 2012).

155. *Id.* at *30.

156. *Id.* at *29.

157. *See id.* at *30-35 (distinguishing the court's decisions in *East*, *Pleasanton*, *City of Sherman*, *Friendswood*, and *Sipriano*).

158. *See, e.g.*, Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff'd*, 2012 Tex. LEXIS 161 (Tex. Feb. 24, 2012); Tex. Co. v. Burkett, 296 S.W. 273, 278 (Tex. 1927); City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613, 618-19 (Tex. App.—San Antonio 2008, pet. denied); Pecos Co. Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 505-07 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.). *But see Day*, 2012 Tex. LEXIS 161, at *30-35 (distinguishing the court's decisions in *East*, *Pleasanton*, *City of Sherman*, *Friendswood*, and *Sipriano*).

159. *See, e.g.*, *Day*, 274 S.W.3d at 756.

160. *Day*, 2012 Tex. LEXIS 161, at *29-30.

161. *Id.*; *see Day*, 274 S.W.3d at 755; *Clayton Sam Colt Hamilton Trust*, 269 S.W.3d at 618-19; Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 80 (Tex. 1999); Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21, 27-30 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 803 (Tex. 1955); Hous. & T.C. Ry. Co. v. East, 81 S.W. 279, 280 (Tex. 1904).

162. *See Friendswood*, 576 S.W.2d at 29-30.

163. Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 625-26 (Tex. 1996).

court concluded, however, that the ownership question was not presented.[164] In *Barshop*, the court limited its ruling to upholding the constitutionality of the legislation creating the Edwards Aquifer Authority (EAA),[165] known as the Edwards Aquifer Authority Act (EAA Act).[166] The court reserved the question of ownership of the groundwater, particularly in the context of the EAA, for a case in which the application of the EAA Act resulted in allegations of a taking of a landowner's groundwater.[167] In 2002, the court dodged the bullet again when it found that a claimed taking by the EAA was not yet ripe for adjudication.[168]

Less than a decade later, and in the midst of one of the worst droughts in Texas history, the court was confronted with the questions of groundwater ownership and its status as a constitutionally protected, vested property right by a decision out of the San Antonio Court of Appeals on petition for review.[169] In *Edwards Aquifer Authority v. Day*, which was argued to the court on petition for review on February 17, 2010, the EAA and the Texas Attorney General, supported by multiple amicus pleadings filed by groundwater districts, asked the court to conclude under Texas law that landowners have no property rights in the groundwater beneath their property.[170]

In 1927, the Texas Supreme Court clarified that the property rights in groundwater are associated with the ownership of the surface of the land.[171] In *Texas Co. v. Burkett*, the Texas Supreme Court recognized that the ordinary percolating waters are the "exclusive property of the owner of the surface."[172] The court also concluded that there was no restriction against the sale of percolating waters for industrial use off of the land from which the groundwater was produced.[173] The court held that there was a presumption that the source of the water produced was groundwater.[174] *Burkett* was not one of the precedents addressed by Justice Hecht in the *Day* opinion.[175]

Almost a quarter of a century after *Burkett*, in *City of Corpus Christi v. City of Pleasanton*, the Texas Supreme Court again considered the question of a

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164. *See id.* at 626.

165. *See id*. at 628-29, 638; *see also* Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.02, 1993 Tex. Gen. Laws 2350, 2355 (creating the EAA).

166. Acts of 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350 (as amended). The EAA Act is not codified; it is only "officially" found in the Session Laws or Texas General Laws. The EAA maintains an "unofficial compilation" of the EAA Act on its website, http://www.edwardsaquifer.org/files/EAAact.pdf. *See* Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *6-7 n.4 (Tex. Feb. 24, 2012).

167. *See Barshop*, 925 S.W.2d at 630-31.

168. Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 733, 738 (Tex. 2002).

169. *See* Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff'd*, 2012 Tex. LEXIS 161 (Tex. Feb. 24, 2012).

170. *Day*, 2012 Tex. LEXIS 161, at *15-19 & n.27; *see, e.g.*, Petition for Review of the Edwards Aquifer Auth. at 12-15, *Day*, 274 S.W.3d 742 (No. 04-07-00103-CV), 2009 WL 505724.

171. *See* Tex. Co. v. Burkett, 296 S.W. 273, 278 (Tex. 1927).

172. *Id.*

173. *See id.*

174. *Id.*

175. *See generally Day*, 2012 Tex. LEXIS 161.

landowner's rights in the groundwater produced from wells on the landowner's property.[176] Although the court was focused on whether or not the transport of groundwater down the bed and banks of a state-owned watercourse constituted waste, the court concluded that the alleged significant losses that occurred during the transport between the point of pumping the groundwater and the point of use was necessary to achieve the intended beneficial use of the water.[177] In the course of its opinion, the court reaffirmed the Rule of Capture it established in the *East* case and the attendant ownership interests of the landowner in the groundwater articulated in *Burkett*.[178] The court went further and concluded that, at common law, there was no "limitation of the means of transporting the [ground]water to the place of use."[179] The court also admonished the legislature that the duty to implement the public policy found in the Conservation Amendment did not belong to the courts, but was conferred "exclusively to the legislative branch of the government."[180] The Texas Supreme Court's opinion in *Corpus Christi* modified its ruling in *East* insofar as it recognized that waste was a limitation upon the right of the surface owner to use groundwater produced from beneath his property.[181] In *Day*, the court recognized that its decision in *Corpus Christi* recognized an exception to the rule—that groundwater allowed to flow into a watercourse lost its groundwater character and became state-owned "surface water."[182]

Landowners' rights related to the ownership of the groundwater were further refined by the El Paso Court of Appeals in what is commonly known as the *Comanche Springs* case.[183] At issue in *Comanche Springs* was the complaint by surface water rights holders downstream of Comanche Springs that groundwater pumped for irrigation in Fort Stockton was causing the springs to stop flowing to their detriment.[184] Despite complaints by the downstream Water Control & Improvement District of harm based upon the alleged loss of water for irrigation supply from the spring flows of Comanche Springs, the court upheld the landowner's right to pump the groundwater for beneficial use notwithstanding the detriment to adjacent or downstream landowners.[185] In making its ruling, the El Paso court relied upon the Texas

176. *See* City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 803 (Tex. 1955).

177. *See id.* at 802-03.

178. *See id.* at 802.

179. *Id.*

180. *Id.* at 803; *see also* TEX. CONST. art. XVI, § 59(a) (establishing what is known as the Conservative Amendment, which directs the Texas Legislature to pass laws necessary for conservation of natural resources).

181. *See* Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *30-32 (Tex. Feb. 24, 2012); *Corpus Christi*, 276 S.W.2d at 801-03; Hous. & T.C. Ry. Co. v. East, 81 S.W. 279, 281-82 (Tex. 1904).

182. *Day*, 2012 Tex. LEXIS 161, at *19-20, 30-32.

183. *See* Pecos Cnty. Water Control & Imp. Dist. No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

184. *Id.* at 505.

185. *Id.* at 504.

Supreme Court's ruling in *Burkett* that the surface landowner had the absolute ownership of the water beneath his land.[186] The El Paso court further held that there were no correlative rights in the groundwater for the benefit of downstream landowners.[187]

In 1978, the Texas Supreme Court further limited the unbridled right of a landowner under the Rule of Capture to produce, without limits, groundwater from beneath his property.[188] In *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, the court held that a landowner was prohibited from negligently pumping groundwater in a manner that would cause subsidence.[189] The court's ruling, which was expressly made prospective in its application, had no effect on the proposition that the landowner owned the groundwater beneath his property, i.e., absolute ownership continues to be the rule of land in Texas.[190]

Five years after *Friendswood*, the Texas Supreme Court relied upon *East* to hold that the Texas Public Utility Commission (PUC) lacked jurisdiction to regulate the City of Sherman's production of groundwater or adjudicate correlative groundwater rights.[191] According to Justice Hecht in the *Edwards Aquifer Authority v. Day* opinion, the court's decision in *City of Sherman* "did *not* implicate ownership of groundwater in place."[192] Instead, Justice Hecht summarized the 1983 decision as turning on a corollary to the absolute ownership theory adopted in *East*, i.e., "the right of the landowner to capture such [ground]water,"[193] and the legislature's delegation of regulatory authority over "groundwater use and production [to] groundwater districts under the Water Code."[194]

Approximately ten years after *Friendswood*, the Austin Court of Appeals reconfirmed the sweeping application of both the Rule of Capture and the rule of absolute ownership as developed in the lineage of the Texas Supreme Court's rulings in the *East*, *Burkett*, *Corpus Christi*, *City of Sherman*, and *Friendswood* cases.[195] In *Denis v. Kickapoo Land Co.*, the Austin Court of Appeals upheld a landowner's right to capture groundwater before it reached the surface at a spring opening and, thereafter, to flow the same downstream to a place of beneficial use.[196] The Austin court observed that "[w]hen squarely

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186. *Id.* at 506; *see also* HUTCHINS, *supra* note 37, at 560-63. *But cf. Day*, 2012 Tex. LEXIS 161, at *4, 22 (indicating that the *Day* decision is the first time the court "decided" whether groundwater can be "owned in place").

187. *Pecos Cnty. Water Control & Imp. Dist. No. 1*, 271 S.W.2d at 505.

188. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21 (Tex. 1978).

189. *Id.* at 30.

190. *Id.* at 25; *see Day*, 2012 Tex. LEXIS 161, at *32.

191. City of Sherman v. Pub. Util. Comm'n, 643 S.W.2d 681, 685-86 (Tex. 1983); *see Day*, 2012 Tex. LEXIS 161, at *32-33.

192. *Day*, 2012 Tex. LEXIS 161, at *33.

193. *Id.* (citing *City of Sherman*, 643 S.W.2d at 686).

194. *See id.*

195. *See* Denis v. Kickapoo Land Co., 771 S.W.2d 235 (Tex. Civ. App.—Austin 1989, writ denied).

196. *Id.* at 238.

faced with the issue, the Supreme Court has consistently adhered to the English rule [of absolute ownership]."[197]

Drought conditions and a booming population combined during the 1990s to highlight both the existing and looming long-term water supply shortages around the state.[198] One of the first and largest battlefronts in the groundwater world was San Antonio and its reliance upon the Edwards Aquifer in central Texas.[199] The aquifer was, and remains, the primary water supply for approximately 1.8 million Texans.[200] The multi-year litigation involved the threatened impact of the aquifer pumping on several endangered species dependent upon the aquifer and the flows discharged at the Comal and San Marcos Springs.[201] The prospect of federal regulation of the aquifer resulting from the litigation led the legislature to enact the EAA Act and create the EAA.[202]

The EAA Act imposed a cap on the quantity of the water that could be pumped from the aquifer on an annual basis and mandated that in order for a landowner to be allowed to pump water from the aquifer beneath his property, a permit be obtained from the EAA.[203] The constitutionality of the EAA's enabling legislation was challenged in *Barshop v. Medina County Underground Water Conservation District* by landowners within the EAA's jurisdiction and the Medina County Underground Water Conservation District on the basis that the EAA Act violated landowners' rights to withdraw groundwater from beneath their property.[204] As the EAA had never acted to limit, or otherwise restrict, any landowner's pumping from the Aquifer at the time the suit was brought, the Texas Supreme Court interpreted the litigation as a facial challenge to the constitutionality of the EAA Act.[205] The court determined that the Act was, on its face, constitutional and reserved the question of whether the implementation of its authority to issue permits and

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197. *Id.*

198. *See* Todd H. Votteler, *Raiders of the Lost Aquifer? Or, the Beginning of the End to Fifty Years of Conflict over the Texas Edwards Aquifer*, 15 TUL. ENVTL. L.J. 257, 261-62 (2002); Todd H. Votteler, *The Little Fish that Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide over the Texas Edwards Aquifer*, 28 ENVTL. L. 845, 866 (1998).

199. *See Raiders of the Lost Aquifer?*, *supra* note 198, at 300, 313; *The Little Fish that Roared*, *supra* note 198, at 862-63.

200. *See* Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *5-6 (Tex. Feb 24, 2012) (citing EAA Act and Edwards Aquifer Authority v. Chem. Lime, Ltd., 291 S.W.3d 392, 394 (Tex. 2009)); *Raiders of the Lost Aquifer?*, *supra* note 198, at 258; *The Little Fish that Roared*, *supra* note 198, at 846.

201. *See Raiders of the Lost Aquifer?*, *supra* note 198, at 270-71; *The Little Fish that Roared*, *supra* note 198, at 851-54.

202. Act May of 30, 1993, 73d Leg., R.S., ch. 626, § 1.02, 1993 Tex. Gen. Laws 2350, 2351 [hereinafter EAA Act]; *see Raiders of the Lost Aquifer?*, *supra* note 198, at 276; *The Little Fish that Roared*, *supra* note 198, at 859.

203. EAA Act § 1.02, at 2351; *see Raiders of the Lost Aquifer?*, *supra* note 198, at 276; *The Little Fish that Roared*, *supra* note 198, at 859; *Day*, 2012 Tex. LEXIS 161, at *59-60; Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 618 (Tex. 1996).

204. *Barshop*, 925 S.W.2d at 623.

205. *Id.*

actually restrict, or prohibit, a landowner's pumping constituted an unconstitutional taking.[206] In limiting the scope of its 1996 decision, the court postponed addressing the alleged conflict between the Rule of Capture and the state's exercise of its police powers through the EAA Act.[207]

Three years later in *Sipriano v. Great Spring Waters of America*, the Texas Supreme Court was confronted with a direct challenge to the continued reliance upon the Rule of Capture in Texas.[208] Landowners filed suit for damages alleging that Ozarka, which installed wells to support a bottling plant that produced approximately 90,000 gallons of water a day, had negligently drained their groundwater.[209] The trial court granted summary judgment for Ozarka on the basis of the Rule of Capture.[210] In a split decision, the Texas Supreme Court upheld, for then, the Rule of Capture adopted by the *East* court in 1904.[211] In doing so, the court reiterated the position it had taken in 1955: "By constitutional amendment, Texas voters made groundwater regulation a duty of the Legislature."[212] The court also acknowledged the legislature's position that "[g]roundwater conservation districts . . . are the state's preferred method of groundwater management," and made clear that it was prepared to act if the legislature did not, admonishing "[w]e do not shy away from change when it is appropriate."[213] In his concurring opinion, Justice Hecht wrote: "I agree with the Court [majority] that it would be inappropriate to disrupt the processes created and encouraged by the 1997 legislation before they have had a chance to work. I concur in the view that, for now—but I think only for now—*East* should not be overruled."[214]

Two years after *Sipriano*, the legislature amended § 36.002 of the Texas Water Code, purportedly modifying the state's policy on ownership of groundwater to further empower groundwater districts:

> The ownership and rights of the owners of the land . . . in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners . . . of the ownership or rights, *except as those rights*

206. *Id.* at 626; *see Day*, 2012 Tex. LEXIS 161, at *60-64.

207. *Barshop*, 925 S.W.2d at 626. *See generally* Drummond, *supra* note 22, at 69-70 (discussing the EAA Act's imposed aquifer cap).

208. Sipriano v. Great Spring Waters of Am., 1 S.W.3d 75 (Tex. 1999); *see Day*, 2012 Tex. LEXIS 161, at *33-35.

209. *Sipriano*, 1 S.W.3d at 76.

210. *Id.* at 75.

211. *Id.* at 76, 80-81; *cf. Day*, 2012 Tex. LEXIS 161, at *34-35 (focusing on the court's concern over the legislature's failure to provide protection to groundwater supplies, rather than the ownership of groundwater in place in *Sipriano*).

212. *Sipriano*, 1 S.W.3d at 80; *see* TEX. CONST. art. XVI, § 59.

213. *Sipriano*, 1 S.W.3d at 79, 80 (first quote quoting TEX. WATER CODE ANN. § 36.0015 (West 2008)).

214. *Id.* at 83 (Hecht, J., concurring) (emphasis added).

> *may be limited or altered by rules promulgated by a [groundwater] district*.[215]

The broad interpretation being given to the underscored language by some groundwater districts has resulted in the mindset that groundwater districts can adopt any rules they desire to restrict the production or use of groundwater, or both, until they are told otherwise at the courthouse.[216] The broad interpretation of this language since its enactment, in part, led to the defense strategy proffered by the EAA in the *Day* case and prompted the introduction of Senate Bill 332.[217]

2. Ownership of Groundwater, the Rule of Capture, and the Legislature

In addition to the court proceedings, the Texas Legislature recently considered several pieces of competing legislation designed to resolve the issue of groundwater ownership. The two bills that captured the legislature's attention throughout the 2011 Legislative Session were Senate Bill 332 by Senator Troy Fraser (SB 332) and Senate Bill 667 by Senator Robert Duncan (SB 667).[218] Both bills targeted the language of § 36.002 of the Texas Water Code, entitled "Ownership of Groundwater," which provided in pertinent part as follows:

> The ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district.[219]

As filed, SB 332 would have clarified current law relating to a landowner's ownership interest in groundwater beneath the surface by expressly describing the same as a vested right.[220] The original bill also purported to limit the power of groundwater districts to restrict a landowner's right to produce groundwater.[221] According to the Bill Analysis, Senator Fraser's intent in filling SB 332 was as follows:

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215. Act of Sept. 1, 2005, 79th Leg., R.S., ch. 1116, § 2, sec. 36.002, 2005 Tex. Gen. Laws 3700 (amended 2011) (current version at TEX. WATER CODE ANN. § 36.002 (West 2008 & Supp. 2011) (emphasis added).

216. *See supra* notes 130-32 and accompanying text.

217. *See* Act of Sept. 1, 2011, 82d Leg., R.S., ch. 1207, § 1, sec. 36.002, 2011 Tex. Gen. Laws 3224.

218. *See id.* (Senator Fraser serves as the Chairman of the Senate Natural Resources Committee); Tex. S.B. 667, 82d Leg., R.S. (2011) (Senator Duncan is a member of Senate Natural Resources Committee).

219. Act of Sept. 1, 2005, 79th Leg., R.S., ch. 1116, § 2, sec. 36.002, 2005 Tex. Gen. Laws 3700 (amended 2011).

220. *See* Act of Sept. 1, 2011, § 1, at 3224.

221. *See id.* at 3224-25.

> In 1904 the Texas Supreme Court in *Houston & TC Railway Company v. East* established the rule of capture in Texas. The supreme court ruled that a landowner has an ownership interest in the groundwater beneath [his] property. This ownership gives the landowner the right to capture the groundwater without being held liable for damage to others. Groundwater Conservation Districts (GCDs) were created by the Texas Legislature to be the preferred method of groundwater management. They are charged with the task of protecting and conserving groundwater resources. Recently, landowners' interest in groundwater below the surface has come into question in the courts. The argument being made by some GCDs is that the landowner does not have an interest in the water below the surface until they capture it.[222]

This bill clearly defines that a property owner has a vested ownership interest in, and the right to produce, the groundwater below the surface of his property.[223] SB 667, as filed, countered SB 332's vested right language with the declaration that the right of the landowner only included the "right to seek and attempt to capture groundwater that underlies the surface of the land."[224] The original bill went on to declare that the "preservation and conservation of groundwater" is necessary to the public welfare of the state, effectively imprinting a public trust on groundwater.[225] With that underpinning, the original bill went on to undercut landowners' property rights with the following declaration:

> The recognition of rights under Subsection (a) shall not be construed to prohibit the reasonable regulation, preservation, and conservation of groundwater by a district. A district may develop limits on the production of groundwater that affect the availability of permits issued by the district if the limitations are:
> (1) reasonable and warranted under the district's management plan;
> (2) consistent with the desired future conditions adopted under Section 36.108;
> (3) not designed so that the limitations prevent a landowner from accessing a reasonable amount of water for livestock watering or domestic purposes for use on the landowner's property; and
> (4) implemented in accordance with the authority granted by this chapter or a special law governing a district.[226]

Albeit from polar opposite perspectives, both bills were intended to resolve the debate created by groundwater districts over whether landowners

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222. *See* Act of Sept. 1, 2011, Bill Analysis, 82d Leg., R.S., ch. 1207, § 1, sec. 36.002, 2011 Tex. Gen. Laws 3224.
223. *Id.*
224. Tex. S.B. 667, 82d Leg., R.S. (2011).
225. *See id.*
226. *Id.*

possess a vested property right in the groundwater beneath their property that entitles them to compensation for a taking if the local groundwater conservation district denies them a permit to produce and beneficially use the groundwater.[227]

When the dust settled, SB 332 was enacted and, effective September 1, 2011, § 36.002 of the Texas Water Code, reads as follows:

> § 36.002. OWNERSHIP OF GROUNDWATER.
> (a) The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property.
> (b) The groundwater ownership and rights described by this section:
> (1) entitle the landowner, including a landowner's lessees, heirs, or assigns, to drill for and produce the groundwater below the surface of real property, subject to Subsection (d), without causing waste or malicious drainage of other property or negligently causing subsidence, but does not entitle a landowner, including a landowner's lessees, heirs, or assigns, to the right to capture a specific amount of groundwater below the surface of that landowner's land; and
> (2) do not affect the existence of common law defenses or other defenses to liability under the rule of capture.
> (c) Nothing in this code shall be construed as granting the authority to deprive or divest a landowner, including a landowner's lessees, heirs, or assigns, of the groundwater ownership and rights described by this section.
> (d) This section does not:
> (1) prohibit a district from limiting or prohibiting the drilling of a well by a landowner for failure or inability to comply with minimum well spacing or tract size requirements adopted by the district;
> (2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; or
> (3) require that a rule adopted by a district allocate to each landowner a proportionate share of available groundwater for production from the aquifer based on the number of acres owned by the landowner.
> (e) This section does not affect the ability to regulate groundwater in any manner authorized under:
> (1) Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, for the Edwards Aquifer Authority;
> (2) Chapter 8801, Special District Local Laws Code, for the Harris-Galveston Subsidence District; and
> (3) Chapter 8834, Special District Local Laws Code, for the Fort Bend Subsidence District.[228]

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227. *Compare* Act of Sept. 1, 2011, Bill Analysis, 82d Leg., R.S., ch. 1207, § 1, sec. 36.002, 2011 Tex. Gen. Laws 3224 (taking the position that landowners have a vested property right in groundwater), *with* Tex. S.B. 667, 82d Leg., R.S. (2011) (taking the position that landowners merely have an exclusive right to capture groundwater beneath their lands).

228. TEX. WATER CODE ANN. § 36.002 (West Supp. 2011).

3. Ownership of Groundwater, Groundwater Districts, and Regulation

a. History of Groundwater Districts

In *Edwards Aquifer Authority v. Day*, the court acknowledged the legislature's recent amendments to § 36.002 of the Texas Water Code to address with greater specificity the intent of the statutory recognition of "[t]he ownership and rights of the owner of the land, his lessees and assigns, in underground water."[229] According to Justice Hecht, the legislature shares the court's view of Texas common law that the landowner owns the groundwater in place.[230]

The court also discussed the State's argument in *Day* that while "landowners have ownership rights in groundwater[,] . . . those rights are 'too inchoate' to be protected by the Takings Clause of the Texas Constitution."[231] In support of its position, the State argued that the inability to allocate a "specific amount of [ground]water" to any landowner in a rechargeable aquifer made compensation to a landowner difficult in the absence of a total prohibition from all access to groundwater.[232] However, the State's brief in *Day* argued that, "under some facts," regulation of groundwater could "effect a compensable taking of property."[233] The court dismissed the State's concerns, however, concluding that "[g]roundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking."[234]

Noting the role of groundwater districts as the state's "preferred" if not "only" method for groundwater management presently,[235] the court discussed Day's claims that the permitting process under the EAA Act constituted a "taking" for which compensation is due under article I, § 17 of the Texas Constitution.[236] After reviewing the EAA Act's history, the elements of both regulatory and physical "takings," and historic federal and state court precedents,[237] the court concluded that landowners do have a constitutionally protected right and that Day was entitled to have the case remanded to the district court for development of the record on the elements of a taking.[238]

Finally, the court addressed what it described as "some tension" between the language in the subsections (c) and (e) in the amended § 36.002 of the

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229. *See* Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *45-46 (Tex. Feb. 24, 2012) (quoting Act of May 23, 1949, 51st Leg., R.S., ch. 306, § 1, 1949 Tex. Gen. Laws 559, 562 (codified at TEX. WATER CODE ANN. § 36.002)).

230. *Id.* & n.102 ("Importantly, the State does not claim to own groundwater [in place].").

231. *Id.* at *47.

232. *See id.* at *47-48.

233. *Id.* at *48 & n.103 (citing Brief of Petitioner State of Texas at 26).

234. *Id.* at *48.

235. *See id.* at *49-59, 77 & n.119.

236. *Id.* at *48-49.

237. *See id*. at *48-80.

238. *Id.* at *77-78.

Texas Water Code.[239] Subsection (e) makes the amendments to § 36.002 inapplicable to the EAA.[240] The court explained that the EAA's authority to prohibit all groundwater use except for domestic and livestock use was subject to the requirement to pay adequate compensation for the taking or impairment of property rights.[241]

The court noted that "[t]he requirement of compensation may make the regulatory scheme more expensive, but it does not affect the regulations themselves or their goals for groundwater production."[242]

In 1917, the Texas Districts passed article XVI, § 59 of the Texas Constitution, an amendment that has come to be known as the Conservation Amendment.[243] The amendment declared the conservation of the state's natural resources, including water, to be a public right and duty and imposed the obligation for the implementation of that policy upon the state legislature.[244] Specifically, the legislature was empowered to pass all laws necessary to protect, enhance, and preserve natural resources of the state, including its groundwater.[245] One state court held that the Conservation Amendment evidenced the "clear and explicit purpose to conserve the public waters of the State and to develop their use in the public interest."[246]

It was not until 1949, however, that the legislature took its first action to enact groundwater legislation pursuant to the Conservation Amendment.[247] The first groundwater district was created in the 1950s, pursuant to the Groundwater Conservation District Act of 1949.[248]

Since 1997, the proliferation of groundwater districts has impacted groundwater rights in Texas dramatically. Among the changes to the Water Code, the legislature amended Chapter 36 to add § 36.0015, which provides, in part, that "[g]roundwater conservation districts created as provided by this chapter [36] are the state's preferred method of groundwater management."[249]

Writing for a split court in the Texas Supreme Court's 1999 reaffirmation of the *East* case and the Rule of Capture in *Sipriano v. Great Spring Waters of*

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239. *See id.* at *75-76; TEX. WATER CODE ANN. § 36.002(c), (e) (West Supp. 2011).

240. § 36.002(e); *see Day*, 2012 Tex. LEXIS 161, at *75.

241. *Day*, 2012 Tex. LEXIS 161, at *76.

242. *Id.* at *76-77.

243. TEX. CONST. art. XVI, § 59.

244. *See id.*; *see also* Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 757 (Tex. App.—San Antonio 2008), *aff'd*, 2012 Tex. LEXIS 161 (Tex. Feb. 24, 2012) (discussing art. XVI, § 59 of the Texas Constitution).

245. *See Edwards Aquifer Auth.*, 274 S.W.3d at 757; City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 803 (Tex. 1955).

246. Clark v. Briscoe Irrigation Co., 200 S.W.2d 674, 680, 682 (Tex. Civ. App.—Austin 1947, writ dism'd).

247. *See* HUTCHINS, *supra* note 37, 588 & n.62 (citing Act of May 19, 1949, 51st Leg., R.S., ch. 306, §§ 1, 3c, 1949 Tex. Gen. Laws 559).

248. *See id.*; Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *50 & n.107 (Tex. Feb. 24, 2012).

249. TEX. WATER CODE ANN. § 36.0015 (West 2008).

America, Inc., Justice Enoch reiterated the legislature's position regarding the state's preferred management strategy for groundwater.[250]

For landowners, the question is whether these local groundwater districts will pursue a management style that focuses on (i) developing the resource and preventing waste, or (ii) preventing landowners from the beneficial use of their groundwater rights by restricting groundwater production to prevent possible export.[251] Despite the wisdom of Professor Hutchins's words quoted above, the legislature has opened the door to abuses by groundwater districts by expanding the powers of these districts with few checks and balances for recourse by landowners short of going to the courthouse.[252]

As noted in the discussion above, the Texas Legislature has modified the Rule of Capture in Texas by enacting laws empowering groundwater districts to regulate the production of the resource.[253] Most likely, any property with sufficient water to warrant interest in the development of a long-term groundwater project will be found within the boundaries of an existing or proposed groundwater district and will be subject to its jurisdiction.

b. Dealing with Your Local Groundwater District

Groundwater districts appear to be here to stay. They do represent the primary regulators of the permitting of wells and production of groundwater.[254] For better or worse, "local control" is the catch phrase these groundwater authorities have seized upon.[255] According to both the Texas Legislature and the appellate courts, at least for now, groundwater districts remain the state's preferred means to manage groundwater resources.[256]

Accordingly, getting to know your local groundwater district(s) is important. Set forth below are some pointers regarding practicing before, and dealing with, groundwater districts.

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250. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76, 79 (Tex. 1999); *cf. id.* at 81 (Hecht, J., concurring) (noting that groundwater conservation districts are the only method for groundwater management currently available).

251. *See generally id.* at 81-83 (Hecht, J., concurring) (discussing the effects of the rule of capture).

252. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.27, 1997 Tex. Gen. Laws 3610 (current version at TEX. WATER CODE ANN. § 36.052 (West 2008)). During the 75th Regular Legislative Session (2005), the legislature passed House Bill 1763 in an effort to require groundwater districts to develop, and apply with some uniformity, procedural rules as part of the permitting process. *See id.*

253. *See, e.g.*, TEX. WATER CODE ANN. § 36.0015 (West 2008).

254. *See* Caroom & Maxwell, *supra* note 123, at 46-48.

255. *Id.* at 50.

256. § 36.0015; *Sipriano*, 1 S.W.3d at 79.

i. Familiarize Yourself with the District

All groundwater districts are subject to Chapter 36 of the Texas Water Code.[257] Accordingly, a working knowledge of the provisions of Chapter 36 is beneficial.

Many groundwater districts, however, were created by special legislative enactment, known as "enabling legislation."[258] With certain limited exceptions, an individual groundwater district's enabling legislation prevails over any conflicting provision of Chapter 36, while Chapter 36 prevails over any other conflicting provision of Texas law.[259] Accordingly, a working knowledge of the individual groundwater district's enabling legislation is also essential to the practitioner.

Unfortunately, with limited exceptions, most groundwater districts' enabling legislation is not currently codified.[260] Public access to the enabling legislation, therefore, may not necessarily be available from traditional sources. In its uncodified form, district enabling legislation, and all amendments thereto, can only be found by going to the session laws or the Texas General Laws.[261] These volumes are not as readily available for public review as the statutes codified in Vernon's black statutes.[262] Most law firms and, in fact, many smaller county courthouses do not possess session law volumes in their libraries. While not necessarily the most user-friendly resources, there are two online sources one can look to for uncodified statutes in the session laws: (i) the Legislative Reference Library of Texas and (ii) the Texas Legislature Online.[263]

An alternative source of a district's enabling legislation is the district itself. Many groundwater districts have their own websites on which they post information about the district, including its enabling legislation, rules, application forms, meeting notices and agendas, and newsletters.[264] If you do not know your district's website URL, it can probably be found on the Texas Alliance of Groundwater Districts website, which contains a list of its member districts and their respective website URLs where available.[265]

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257. *See* § 36.052 ("Other Laws Not Applicable."). Districts created by special legislative enactment are also specifically subject to their enabling legislation. *See id.*

258. *See* Caroom & Maxwell, *supra* note 123, at 53-54.

259. *See* § 36.052.

260. *See, e.g.*, TEX. SPEC. DISTS. CODE ANN. §§ 1.001-1004.23 (West 2005).

261. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 4.27, 1997 Tex. Gen. Laws 3610 (current version at TEX. WATER CODE ANN. § 36.052).

262. *See, e.g.*, § 36.052.

263. *See* LEG. REFERENCE LIB. OF TEX., http://www.lrl.state.tx.us/ (last visited Feb. 25, 2012); TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/ (last visited Feb. 25, 2012).

264. *See, e.g.*, CENT. TEX. GROUNDWATER CONSERVATION DIST., http://www.centraltexasgcd.org/ (last visited Feb. 25, 2012).

265. TEX. ALLIANCE OF GROUNDWATER DISTS., http://www.texasgroundwater.org (last visited Feb. 25, 2012). The Texas Alliance of Groundwater Districts (TAGD) is a non-profit, statewide organization made up of member districts. *See id.* TAGD is also known by the shorter acronym "TAG."

In addition to developing a working knowledge of Chapter 36 and the district's enabling legislation, it is important to become knowledgeable of the district's rules. As noted above, a good source of access to the district's rules is frequently the district's website.[266] You should become familiar with the district's well registration forms, permit applications, and any required reporting forms (e.g., production reports, well logs, etc.).

ii. Meet the District's Board Members and Personnel

In order to successfully appear before and work with any organization, being familiar with the leadership of both its governing body and management as well as key members of the districts' field operations is important. Because groundwater districts have prospered under the mantra of local control and many regulate rural and/or thinly populated areas where folks know each other on a first name basis, you do not want to appear before the board as an outsider. Finally, as important as the development of personal relationships will be, knowing the educational and professional backgrounds as well as the politics and/or philosophy of those with whom you are dealing will be important. Accordingly, subject to the ethical considerations related to such things as ex parte communications, it is a good idea with districts you do a lot of work with to periodically sit down and visit with board members and staff over a cup of coffee or a glass of tea.

iii. Participate in the District

The majority of groundwater districts around the state are less than fifteen years old and have been actively involved in permitting and rulemaking for less than a decade.[267] Accordingly, the rules and permitting processes either are still in the developmental stages or are continuing to evolve to address (i) unintended consequences, (ii) statutory requirements to develop updated management plans,[268] or (iii) participation in joint management planning with other groundwater districts within their management area to determine critical issues such as the future desired condition of the aquifer(s) they regulate.[269]

District decisions on rules, management plan goals and objectives, joint management activities leading toward decisions about the future desired condition of the aquifer(s), as well as decisions on other permit applications, will affect both your ability to deal effectively with the district and to represent your clients' interests.

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266. *See id.*

267. *See* Liz Carmack, *Groundwater Conservation Districts*, TEX. COMM'N ON ENVTL. QUALITY, http://www.tceq.texas.gov/publications/pd/020/10-01/groundwater-conservation-districts (last modified July 7, 2011).

268. *See* TEX. WATER CODE ANN. §§ 36.1071-.1073 (West 2008 & Supp. 2011).

269. *Id.* § 36.108.

In order to keep abreast of district activities, you should consider the following actions:

> (a) Learn when the board regularly schedules meetings, watch for agenda notices to be posted or published, and attend meetings;[270]
> (b) Provide district personnel with your name, mailing address, fax number, and e-mail address and ask them to provide you with copies of agenda notices;
> (c) With respect to rulemaking hearings, each calendar year, you should file a written request with each district of interest to receive notice of all rulemaking proceedings;[271]
> (d) With respect to permit proceedings, each calendar year you should file a written request with each district of interest to receive notice of all permit proceedings;[272]
> (e) Subscribe to the district's web alerts, if any;
> (f) Subscribe to the district's newsletter, if any; and
> (g) Monitor the district's website for updates.

With respect to the recommendation to make written requests to the district on an annual basis to receive notices of permit proceedings and rulemaking proceedings, be aware that the request does not guarantee receipt of those notices.[273] Specifically, while § 36.101(d)(4) requires the district to provide notice to anyone who has made the requisite annual written request, the statute expressly provides that "[f]ailure to provide notice under Subsection (d)(4) does not invalidate an action taken by the district at a rulemaking hearing."[274] Similarly, the notice provision for permit proceedings to be provided to anyone who files the annual written request under § 36.404(d), although mandatory, carries with it no recourse if not sent.[275] All that is required to establish delivery of the notice under § 36.404(d) is that an officer or employee of the district executes an affidavit to the effect that the officer attempted service by first class mail, facsimile, or e-mail to the person requesting the notice based upon the information provided by that person, and that shall be sufficient proof that the notice was delivered.[276] Additionally, the statute provides that the "[f]ailure to provide notice under [§ 36.404](c)(3)(B) does not invalidate an action taken by the district at the [permit] hearing."[277]

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270. *See id.* § 36.063 (requiring districts to publish meeting notices in compliance with the Open Meetings Act). *See generally* TEX. GOV'T CODE ANN. ch. 551 (West 2004) (dealing with open meetings).

271. TEX. WATER CODE ANN. § 36.101(i) (West 2008 & Supp. 2011).

272. *Id.* § 36.404(d) (West 2008).

273. §§ 36.101(i), .404(d).

274. §§ 36.101(k), (d)(4). Section 36.101(d)(4) provides that "[n]ot later than the 20th day before the date of a rulemaking hearing, [either] the general manager or board shall . . . provide notice by mail, facsimile, or electronic mail to any person who has requested notice under Subsection (i); . . . ." § 36.101(d)(4).

275. *See* § 36.404(e).

276. *See* § 36.404(d).

277. *See* § 36.404(e).

Although these provisions appear to be giant loopholes for districts to ignore providing notices as requested, the fact that the district employee or officer is required to execute an affidavit confirming that he or she sent the notice does create the potential for penalties and recourse associated with falsifying government documents and other potential criminal charges that could be used against the district and its personnel in the event that the notice was actually not sent, as opposed to sent but undelivered. Accordingly, to be certain that you are in the loop, take the time to submit the annual requests to districts where you have frequent dealings.

iv. Open Meetings and Open Records

In addition to the enabling legislation and Chapter 36, two other statutory schemes generally applicable to groundwater districts are the Texas Open Meetings Act and the Texas Public Information Act, formerly known as the Texas Open Records Act.[278] Both of these statutes provide vehicles to obtain information about, and from, the district at times when it may not otherwise be readily available.[279] Subject to the caveat discussed below, these statutes should be utilized as a secondary tool when information is not forthcoming from the district. This is particularly true of the Public Information Act, also known as "Open Records Act."

Most districts have limited staffs and resources. As a result, if it is evident that your request is being ignored intentionally, personal visits or calls to the district office with offers to help locate information in district files may work best to obtain desired information. The caveat noted above is that the district may ask you to put your request in writing (i.e., file a formal open records request).[280]

Though not required, districts frequently follow this practice to maintain a record of the receipt of the request and when and how the district responded.[281]

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278. TEX. GOV'T CODE ANN. chs. 551, 552 (West 2004 & Supp. 2011); *see also* TEX. WATER CODE ANN. § 36.065 (West 2008) (requiring districts to maintain records in a safe place and making district records and record-keeping practice subject to Chapter 552 of the Texas Government Code and Chapter 201 of the Texas Local Government Code).

279. *See* § 552.205(a). The district public records officer is required to "prominently display a sign in the form prescribed by the attorney general that contains basic information about the rights of a requestor, the responsibilities of a governmental body, and the procedures for inspecting or obtaining a copy of public information" under the Public Information Act. *Id.* The statute requires that the sign be displayed "at one or more places in the administrative offices" of the district where it is plainly visible. *Id.* Details regarding the statutorily mandated signage, its contents, and the rights of a requestor can be found in Title 1, Chapter 70 of the Texas Administrative Code. *See* 1 TEX. ADMIN. CODE § 70.11 (2011) ("Informing the Public of Basic Rights and Responsibilities Under the Public Information Act").

280. *See generally* TEX. GOV'T CODE ANN. § 552.225 (filing a written request for additional time to examine information); TEX. WATER CODE ANN. § 36.101(i) (West 2008 & Supp. 2011) (written request for notice of a rulemaking hearing); *id.* § 36.404(d) (West 2008) (written request for notice of a permit hearing).

281. *See supra* note 280 and accompanying text.

Some districts will use the tactic for purposes of harassment or delay; however, they will find that it will backfire on them.

If it becomes apparent that the only way you can obtain information from a district is to file formal written requests that trigger statutory response deadlines pursuant to the Public Information Act,[282] the practitioner should keep in mind the following:

> (a) If the information requested is clearly identifiable and of a volume of pages for which copying will be neither time consuming nor costly, you should request the copies, specifically identifying with as much particularity as possible the documents needed, and include with the written request a check for the estimated copying and labor costs.[283] In the request, you should also advise the district to either refund any overpayment or send you an invoice for the balance, which you agree to remit promptly. This tactic avoids having the district wait until the last day it has to respond and then send you a letter with an estimated bill and demand for payment before it will process the request.
> (b) If you are uncertain exactly what you are looking for, and/or the number of documents that may have to be copied is potentially voluminous and costly due to the uncertainty of your request, file your request to inspect the documents.[284] During your inspection you can tag documents you want copied and make arrangements to have them copied and paid for in a timely manner.
> (c) If you get into a battle with the district and/or believe that you are being overcharged for copies, (i) be sure to request a copy of the district's board approved rate schedule for reproducing public information, and (ii) compare the district's rate schedule with the charges authorized by the Attorney General's office.[285]

v. Going to the Courthouse

When all else fails, a landowner or his lessee must be prepared to take the groundwater district to the courthouse to enforce and/or protect his property rights. The legislature's 2011 amendments to § 36.002 of the Texas Water Code, coupled with the Texas Supreme Court's definitive holding in *Edwards Aquifer Authority v. Day* that landowners have a constitutionally protected property right in the groundwater beneath their property, provide landowners

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282. TEX. GOV'T CODE ANN. §§ 552.221, 552.225.

283. *See generally id.* § 552.261 (charges for providing copies of public information).

284. *See generally id.* § 552.271 (describing the process for inspecting public information in paper record).

285. *See id.* §§ 552.261, 552.2615, 552.262, 552.269; 1 TEX. ADMIN. CODE ch. 70 (2012). The Attorney General and the Secretary of State websites contain helpful information regarding charges for open records. *See* ATTORNEY GEN. OF TEX., http://www.oag.state.tx.us/opinopen/pia/ (last visited Mar. 5, 2012); TEX. SECRETARY OF ST., http://www.sos.state.tx.us/tac/index.shtml (last visited Mar. 5, 2012).

with enhanced weapons if litigation becomes the only viable alternative to resolve a dispute with a groundwater conservation district. Being prepared, in this instance, places emphasis on knowing and following the statutorily prescribed steps to protect the court's jurisdiction and therefore, the landowner's interests. While a thorough analysis of issues and procedures related to litigation with groundwater districts is beyond the scope of this Article, a brief overview of the topic is meritorious.

Districts may be sued by any person "affected by or dissatisfied with" a rule or order of the district.[286] The suit may be brought to challenge the "validity of the law, rule, or order."[287]

Venue for the suit is proper "in any county in which the district or any part of the district is located."[288] Suit cannot be filed, however, until "all administrative appeals to the district are final."[289] Exhaustion of a landowner's administrative remedies is normally a jurisdictional prerequisite to following suit.[290]

Chapter 36 does not define the meaning of "administrative appeals to the district," nor does it specify when "all administrative appeals to the district are final."[291] Although the Texas Administrative Procedures Act (APA) does not generally apply to groundwater districts or proceedings under Chapter 36,[292] the administrative law concept of motions for rehearing or requests for rehearing filed with the board has historically been adopted as the convention for the last step in exhausting one's administrative remedies or appeals before going to the courthouse and is described in most districts' rules or bylaws. In 2005, the legislature amended Chapter 36 to provide more clarity with respect to the exhaustion of remedies by permit applicants.[293] The legislature has clarified when a district's decision becomes final for purposes of bringing suit at the courthouse with respect to permits and permit amendments.[294] There remains, however, some uncertainty in Chapter 36 with respect to other district matters such as orders or rulemaking.[295] Careful attention should be paid to the district's rules on the subject in those cases.

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286. TEX. WATER CODE ANN. § 36.251 (West 2008).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id. See generally id.* §§ 36.001-36.419 (West 2008 & Supp. 2011) (containing no explanation of these terms in the section, in § 36.251, or in any other section in Chapter 36).

292. *See* TEX. WATER CODE ANN. § 36.253 (West 2008) (providing that the APA's "substantial evidence rule" (TEX. GOV'T CODE ANN. § 2001.174) is the standard of review on appeal from district actions); *see, e.g.*, *Rules of the Brazos Valley Groundwater Conservation District*, 46 (2010), http://www.brazosvalleygcd.org/upload/text/Revised%20Rules%2010-7-2010.pdf [hereinafter *Brazos Valley*].

293. *See* TEX. WATER CODE ANN. § 36.412 (West 2008) (Request for Rehearing or Findings and Conclusions).

294. *See id.* § 36.413 (Decision; When Final).

295. *Compare id.* § 36.101 (West 2008 & Supp. 2011) (failing to state exactly when a rule becomes effective), § 36.1011 (failing to state exactly when an emergency rule becomes effective), *and* § 36.251

Most districts require a motion or request for rehearing to be filed within twenty calendar days of the date of the board action sought to be reconsidered.[296] The practitioner is encouraged to be alert to, and wary of, the following:

(a) The action that triggers the time deadlines can be the oral vote of the board at an open, duly-posted public hearing or meeting.[297] In other words, the deadline may start (and in fact be past) before a written order is issued.[298] Accordingly, because the requirement to exhaust one's administrative appeals or remedies appears to be of a jurisdictional nature,[299] a motion or request for rehearing should be filed (i) at the time the board "votes" on the matter and (ii) at the time a written order or other document memorializing the board vote is published.

(b) Some districts have adopted rules that attempt to modify and/or limit the availability of the "mailbox" rule by requiring receipt of the motion or request at the district office, or at the P.O. Box, by the deadline and purporting not to permit service by fax or in person.[300] There is no penalty for filing multiple motions or requests for rehearing.[301] In light of the ambiguity of § 36.251, the practitioner will be well served to err on the side of filing multiple motions or requests.[302]

With respect to permits and permit amendments, the 2005 amendments to Chapter 36 authorize the applicant or any party in a contested case hearing on a permit or permit amendment to file a written request for either (i) "findings and conclusions or [(ii)] rehearing before the board not later than the 20th [calendar] day after the date of the board's decision."[303] If a proper request for findings and conclusions is timely received, the board has thirty-five calendar days to provide the same to the applicant and other parties to the hearing.[304]

(failing to define what constitutes a final order), *with* § 36.413 (providing for the exact circumstances that trigger a final decision).

296. *See, e.g.*, *Brazos Valley*, *supra* note 292.

297. *See* Kinney Cnty. Groundwater Conservation Dist. v. Boulware, 238 S.W.3d 452, 460-61 (Tex. App.—San Antonio 2007, no pet.).

298. *See id*.

299. *See* § 36.251.

300. *See, e.g.*, *Panola County Groundwater Conservation District*, 12, 46 (2011), http://www.pcgcd.org/ADOPTED%20PCGCD%20Rules%20-%20December%2027%Rulemaking%20Hearing.pdf (stating that the "date of receipt, not the date of posting, is determinative of the time of filing" and requiring requests for rehearing to be mailed).

301. *See* TEX. WATER CODE ANN. § 36.412 (West 2008) (stating when and how a motion or request must be filed but not limiting how many may be filed).

302. *See* § 36.251. *See generally Boulware*, 238 S.W.3d at 452, 460-61 (concluding that the applicants had exhausted their administrative remedies after the district did not respond to three motions for rehearing).

303. § 36.412(a). The statute does *not* specify that the decision be in writing. *See* § 36.412. Accordingly, an oral decision during a properly noticed and posted public hearing or meeting likely triggers the time deadline. *See id*.; *see also Boulware*, 238 S.W.3d at 455-56 (noting that the board declared the date of the oral announcement as the effective date). In any event, filing a motion for rehearing in response to an oral announcement has been recognized by a Texas appellate court. *Boulware*, 238 S.W.3d at 460-61.

304. § 36.412(b).

Following the issuance of the findings and conclusions, any party has twenty days to file a request for rehearing in the district's office.[305] In the absence of a request for findings and conclusions, the request for rehearing must be filed not later than the twentieth calendar day after the board's decision.[306]

With respect to requests for rehearing, the board can either (i) grant the request and schedule the rehearing within forty-five calendar days,[307] or (ii) take no action, in which case the request is denied as a matter of law on "the 91st day after the date the request is submitted."[308] The statute expressly provides that no one can file suit against the district under § 36.251 "if a request for rehearing was not filed on time."[309]

The board's decision becomes final and appealable to the courthouse under the following scenarios if a timely request for rehearing is filed: (a) on the date the board "renders a written decision after rehearing", or (b) on the date the board denies the request for rehearing.[310] If a timely request for rehearing is not filed, then the board's decision becomes final on the "expiration of the period for filing a request for rehearing" *and* is not appealable.[311]

In the case of a final, appealable decision, the applicant or other party to the contested case proceeding has sixty calendar days from the date the decision became final to file suit appealing the district's decision pursuant to § 36.251.[312] Failure to file the suit by this deadline appears to be jurisdictional.[313]

Aside from the sixty-day timetable in which to file suit in district court to challenge board action with respect to a permit or permit amendment,[314] there does not seem to be a similar statute of limitations or jurisdictional time period in which to file suit with respect to challenging other district activities or actions unrelated to actions on permits. For example, there is no similar express timetable for challenging rulemaking decisions.[315] There is, however, a presumption created by Chapter 36 that any action taken by a district is valid

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305. § 36.412(b)-(c).

306. § 36.412(a).

307. § 36.412(d).

308. § 36.412(e).

309. *Id.* § 36.413(c). This jurisdictional limitation is located in Subchapter M, dealing with permits and permit amendments. *See* § 36.413(b). It is specifically found in § 36.413(b), defining when decisions on permits and permit amendments are final; however, districts may attempt to give it a more expansive application. *See id.*; *see, e.g.*, *Rules of the Evergreen Underground Water Conservation District*, 27-28 (2009), http://www.evergreenuwcd.org/files/Evergreen%20rules%20Adopted%201-23-09.pdf (applying language similar to that in § 36.413 to "[a]ny decision of the Board," not only permits and permit amendments).

310. *See* § 36.413(a)(2).

311. *See* § 36.413(a)(1), (c).

312. § 36.413(b).

313. *Id.*

314. *See id.*

315. *See id.* § 36.101 (West 2008 & Supp. 2011).

upon the third anniversary of that action, assuming that the district's action is not subject to pending litigation on the third anniversary.[316] The only exceptions to this presumption of validity are as follows:

> (a) "[A]n act or proceeding that was void at the time it occurred";[317]
> (b) An act or proceeding that under state or federal statute was a misdemeanor or a felony at the time it occurred;[318]
> (c) A rule that was preempted by state or federal statute at the time it was passed;[319] or
> (d) Any matter that was involved in litigation as of May 28, 2001,[320] if the litigation results in the action being held to be invalid by final judgment of a court or the action has already been held to be invalid by final judgment of a court.[321]

In addition to this apparent three-year statute of limitations for purposes of challenging district governmental acts or proceedings, other applicable statutes of limitations may affect the ability to challenge district actions including, for example, actions under the Texas Tort Claims Act.[322] Suing a groundwater district, like suing any political subdivision, has its own set of idiosyncrasies. Always keep in mind that the deck is stacked in favor of the defendant district.[323]

Groundwater districts can be sued in the name of the district by and through its board of directors.[324] The district's board president and/or its general manager are the statutorily designated agents for service of process.[325]

According to Chapter 36, the suit is to be expedited and no postponements or continuances are granted "except for reasons considered imperative by the court."[326] A district is not required to give bond for appeal, injunctions, or any suit to which it is a party[327] and is entitled to recovery of its attorneys fees and

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316. *See id.* § 36.124(a) (West 2008) ("Governmental act or proceeding of a district is conclusively presumed, as of the date it occurred, valid and to have occurred in accordance with all applicable statutes and rules if: (1) the third anniversary of the effective date of the act or proceeding has expired; and (2) a lawsuit to annul or invalidate the act or proceeding has not been filed on or before that third anniversary.").

317. § 36.124(b)(1).

318. § 36.124(b)(2).

319. § 36.124(b)(3).

320. *See* § 36.124. May 28, 2001, is the effective date of § 36.124. § 36.124(b)(4).

321. *See* § 36.124(b)(4).

322. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101 (West 1985).

323. TEX. WATER CODE ANN. § 36.253 (West 2008) ("The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed *prima facie* valid." (emphasis added)).

324. *See id.* § 36.066(a).

325. *See* § 36.066(c).

326. *See id.* § 36.252.

327. *See* § 36.066(f).

costs if it prevails in litigation and did not voluntarily intervene in the suit.[328] Those fees and costs are to be set by the court.[329]

By statute, the burden of proof in the litigation is on the person suing the district.[330] Additionally, Chapter 36 creates a presumption of validity in favor of the district law, order, or act being challenged.[331] On appeal, the standard of review is the "substantial evidence rule" defined by § 2001.174 of the Texas Government Code.[332]

c. Groundwater District Planning Issues

Groundwater districts in Texas are not required to be formed along the lines of aquifers.[333] Most commonly they are formed along political boundaries, i.e., county lines.[334] In fact, fifty-nine of the ninety-eight groundwater districts across the state were formed as single county districts.[335] As aquifers do not recognize political boundaries, the legislature mandated joint planning activities by groundwater districts with regulatory jurisdiction over the common aquifer in an effort to avoid inconsistent planning and regulatory programs by multiple groundwater districts overlying the same aquifer.[336]

Pursuant to § 35.004 of the Texas Water Code, the TWDB was charged with dividing the state into groundwater management areas[337] for purposes of water planning.[338] By rule, the TWDB divided the state into sixteen groundwater management areas (GMAs).[339] Each of the GMAs is charged with developing the Desired Future Condition(s) (DFCs)[340] for each of the aquifers subject to regulation within the GMA.[341] The DFC developed by the GMA is then submitted to the TWDB for development of values for the Managed

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328. *See* § 36.066(g).

329. *See id.*

330. *See id.* § 36.253.

331. *See id.*

332. *See* TEX. GOV'T CODE ANN. § 2001.174 (West 1993).

333. *See* TEX. WATER CODE ANN. § 36.012 (West 2008).

334. *See id.* For a map prepared by TWDB identifying the existing groundwater districts across Texas, see *Groundwater Conservation Districts*, TEX. WATER DEV. BD. (Sept. 2011), http://www.twdb.state.tx.us/mapping/maps/pdf/gcd_only_8x11.pdf.

335. *See* TEX. WATER CODE ANN. § 35.001 (West 2008).

336. *See id*. § 36.108 (West 2008 & Supp. 2011); *Groundwater Conservation District Facts*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/groundwater/conservation_district/facts.asp (last visited Mar. 5, 2012).

337. *See Groundwater Management Area FAQs*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/groundwater/faq/faqgma.asp (last visited Mar. 5, 2012).

338. *See* TEX. WATER CODE ANN. §§ 35.001, .004(a), (c)-(d) (West 2008); Robert E. Mace et al., *A Street Car Named Desired Future Conditions: The New Groundwater Availability for Texas*, ST. B. TEX., 7TH ANNUAL THE CHANGING FACE OF WATER RIGHTS IN TEXAS 2 & fig.1 (May 18-19, 2006), *available at* http://www.texaswca.com/downloads/TWDB-DesiredFutureConditions.pdf.

339. *See* 31 TEX. ADMIN. CODE § 356.23 (2002); Mace, *supra* note 338, at Fig 1.

340. *See Desired Future Condition FAQs*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/groundwater/faq/faqdfc.asp (last visited Mar. 5, 2012).

341. *See* TEX. WATER CODE ANN. § 36.108; Mace, *supra* note 338, at 3-5.

Available Groundwater (MAG) within the region and each district.[342] The districts are then required to incorporate the MAG into their respective Groundwater Management Plans and utilize the same in their permitting process.[343]

4. Oil and Gas, and the Rule of Capture

The profound impact that oil and gas exploration and production has had on Texas leaves Texans with the impression that the industry and the jurisprudence related to it have been with us since the days of the Republic. Although the Constitution of 1866 released and relinquished mineral rights to the owners of the soil, it was not until the 1900s that litigation began reaching the courts dealing with the rights of landowners to the oil and gas in place.[344] In fact, it was not until 1915 that the Texas Supreme Court adopted the absolute ownership rule with respect to a landowner's rights in the oil and gas beneath his property.[345]

In *Texas Co. v. Daugherty*, over a decade after the Texas Supreme Court adopted the Rule of Capture and absolute ownership rule relating to groundwater in *Houston & Texas Central Railway Co. v. East*, the court was confronted with arguments of the "fugitive nature or vagrant habit—the disposition to wander or percolate" of oil and gas beneath the ground as the basis for denying the surface owner any property right in the substances *in situ*.[346] The court went to great length in the *Daugherty* case to explain the flaws in the arguments proffered (i) supporting the position that there could be no property right because they were incapable of absolute ownership until captured and reduced to possession and (ii) analogizing the ownership of oil and gas in place beneath the surface of the ground to that of things *ferae naturae*.[347]

The *Daugherty* court opined that the purchaser of the oil and gas in the ground "assumes the hazard of their absence through the possibility of their escape from beneath the particular tract of land."[348] If there is no oil and gas discovered in the ground, either because it escaped or was never present, the court analogized the absence to be no different from the risk that the purchaser of land looking to mine a solid mineral from the land assumes if he discovers it does not exist.[349] The court then posed the following three questions:

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342. *See* § 36.108; Mace, *supra* note 338, at 4.

343. *See* § 36.108; *Groundwater Management Plans Certified*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/newsmedia/newsletters/WaterforTexas/wftwinter99/article2.htm (last visited Mar. 5, 2012).

344. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS 26-34 (3d ed. 1991).

345. Tex. Co. v. Daugherty, 176 S.W. 717, 720 (Tex. 1915); *see also* HEMINGWAY, *supra* note 344, at 29-30; STATE BAR OF TEX., SELECTED WORKS OF A.W. WALKER, JR. 2 (2001).

346. *Daugherty*, 176 S.W. at 719; Hous. & T.C. Ry. Co. v. East, 81 S.W. 279, 287 (Tex. 1904).

347. *Daugherty*, 176 S.W. at 719.

348. *Id.*

349. *Id.* at 719-20.

> [1.] Conceding that they [oil and gas] are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they [oil and gas] have not departed, they [the oil and gas] are a part of the land?
> [2.] Or when conveyed in their natural state, and they [oil and gas] are in fact beneath the particular tract, that their grant amounts to an interest in the land?
> . . .
> [3.] [H]ow does that possibility alter the character of the property interest which they [oil and gas] constitute while in place beneath the land?[350]

The *Daugherty* court's collective answer to these three questions was as follows:

> The argument [against the landowner possessing a property right in the oil and gas in place] ignores the equal possibility of their [oil and gas] presence, and that the parties have contracted upon the latter assumption; that, if [oil and gas] are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty.[351]

The court's analysis can be summarized as follows: If the oil and gas that are the subject of the conveyance are not, in fact, beneath the land and, therefore, are not capable of being reduced to possession, then the conveyance is of no effect.[352] If the oil and gas have not departed, however, they are a part of the realty and the conveyance of them in place is the conveyance of an interest in real property.[353]

The court concluded in *Daugherty* that the oil and gas, while in the ground, "constitute a property interest."[354] Since *Daugherty*, the Texas Supreme Court has adhered to the absolute ownership rule with respect to the surface landowner's property interest in oil and gas in place.[355]

In August 2008, the Texas Supreme Court reaffirmed the court's reliance on the Rule of Capture in oil and gas jurisprudence in *Coastal Oil & Gas Co. v. Garza*.[356] Justice Hecht, author of the majority opinion, wrote: "The Rule of Capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation."[357] In support of his declaration, Justice

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350. *Id.* at 720.
351. *Id.*
352. *See id.* at 719.
353. *See id.* at 720.
354. *See id.* at 719-21.
355. *See, e.g.*, Coastal Oil & Gas v. Garza, 268 S.W.3d 1, 13 (Tex. 2008); Stephens Cnty. v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923); *cf.* HECI Exploration Co. v. Neel, 982 S.W.2d 881, 890 (Tex. 1998) ("A royalty interest is an interest in real property that is a distinct part of the mineral estate."); *see also* SELECTED WORKS OF A.W. WALKER, JR., *supra* note 345, at 2.
356. *See Coastal Oil & Gas Co.*, 268 S.W.3d at 10.
357. *Id.* at 13 (quoting 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS, § 1.1(A) (2d ed. 1998)).

Hecht cited the following quote from the treatise *Texas Law of Oil & Gas*: "The Rule of Capture may be the most important single doctrine of oil and gas law."[358]

The landowner may sever the oil and gas estate, either by a conveyance of the oil and gas estate, or by conveyance of the surface realty reserving or excepting from the conveyance the oil and gas estate.[359] In their severed states, the oil and gas estate is considered to be the "dominant estate" and the surface the "servient estate."[360] As the dominant estate, the owner of the oil and gas estate, in the absence of some express restriction or limitation to the contrary, is entitled to use as much of the premises of the surface estate "as is reasonably necessary to effectuate the purposes of the [oil and gas] lease."[361] This right includes the right to use water from the leased premises, i.e., the groundwater in place beneath the surface.[362]

Although the Texas Supreme Court adopted the absolute ownership rule in the *East* case some years before it did so with respect to oil and gas in *Daugherty*,[363] the jurisprudence in Texas surrounding oil and gas has grown and evolved much quicker than it has with respect to groundwater. The invention of the internal combustion engine in the late 1800s, Henry Ford's introduction of the Model T in 1908, and Ford's subsequent development of the assembly line that facilitated the mass production of automobiles created a huge increase in the demand for oil and other petroleum products.[364] The resulting social, cultural, and economic impacts to society related to the growing industry and marketplace helped to promote an increase in the litigation of issues dealing with the exploration, development, and ownership of oil and gas.[365]

Unlike oil and gas, the history of water in Texas and the evolution of its jurisprudence have both been driven by continuing drought.[366] Since 1997, when the Texas Legislature enacted Senate Bill 1 (SB1)[367] and mandated that the state develop and implement a statewide Water Plan, sixteen Regional Planning Groups have been working to identify potential water supplies and strategies to facilitate the development of adequate water supplies to meet

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358. SMITH & WEAVER, *supra* note 357; *see Coastal Oil & Gas Co.*, 268 S.W.3d at 13.

359. Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 302 (Tex. 1923); *see also* HEMINGWAY, *supra* note 344, at 30-31; SELECTED WORKS OF A.W. WALKER, JR., *supra* note 345, at 3.

360. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810-11 (Tex. 1972).

361. *Id.*

362. *Id.* at 811.

363. *Compare* Hous. & T.C. Ry. Co. v. East, 81 S.W. 279, 287 (Tex. 1904), *with* Tex. Co. v. Daugherty, 176 S.W. 717, 719 (Tex. 1915).

364. *See* HEMINGWAY, *supra* note 344, at 2.

365. *See id.*

366. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 440-41 (Tex. 1982); *see also* Drummond, *supra* note 22, at 42 (summarizing the correlation between droughts and significant changes in Texas water law).

367. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

projected statewide water supply demands for a rolling fifty-year cycle.[368] Increased interest in water development to meet future demands, coupled with continually narrowing options for the development of new sources of supply, has created a thirst for existing surface water rights and available groundwater resources.[369] Although water is a hot commodity in Texas, water projects take time to develop. The lack of existing infrastructure, e.g., pipelines and new reservoirs, as well as treatment, surface and subsurface storage facilities, and/or funding for the same, coupled with evolving regulatory schemes and simple "fear" are all issues that slow down the process.[370]

Starting from the premise that "while the rule of capture does not entail ownership of groundwater in place, neither does it preclude such ownership[,]"[371] the court turned to its historical oil and gas precedents to support its holding that landowners own the groundwater in place.[372] Citing its landmark decisions in *Stevens County v. Mid-Kansas Oil & Gas Co.*,[373] *Texas Co. v. Daugherty*,[374] *Elliff v. Texon Drilling Co.*, [375] and *Brown v. Humble Oil & Refining Co.*,[376] the court analogized the "fugacious" character of oil and gas in the ground to groundwater in place, and, thereafter, dismissed the EAA's arguments against landowner ownership of groundwater in place as well as the right to compensation in the event of a governmental taking.[377] The court acknowledged distinctions between the two substances,[378] confirmed that groundwater in place is not considered a "mineral" in Texas in most contexts,[379] and discussed differences in the "legal treatment" of the two vis-à-vis correlative rights and forced pooling.[380] The court, however, rejected the EAA's arguments that groundwater cannot be treated like oil and gas because landowners have no correlative rights.[381]

Quoting its decision in *Elliff*, Justice Hecht restated Texas law regarding the ownership of oil and gas in place and the effect of the Rule of Capture on that ownership as follows:

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368. TEX. WATER DEV. BD., WATER FOR TEXAS—2007, Vol. I at 2-7 (2007), *available at* http://www.twdb.state.tx.us/publications/State_Water_Plan/2007/ (describing the regional water planning process); *see* TEX. WATER CODE ANN. § 16.051 (West 2008 & Supp. 2011) (mandating regional water planning to be used for state water plan).

369. *Infrastructure: Water*, TEXAS IN FOCUS: A STATEWIDE VIEW OF OPPORTUNITIES, WINDOW ON STATE GOV'T, http://www.window.state.tx.us/specialrpt/tif/water.html (last visited Mar. 5, 2012).

370. *See id.*

371. Edwards Aquifer Auth. v. Day, No. 08-0964, 2012 Tex. LEXIS 161, at *35 (Tex. Feb. 24, 2012).

372. *See id.* at *35-46.

373. Stevens Cnty. v. Mid-Kan. Oil & Gas Co., 254 S.W. 290, 292 (Tex. 1923).

374. Tex. Co. v. Daugherty, 176 S.W. 717, 718-20 (Tex. 1915).

375. Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948).

376. Brown v. Humble Oil & Ref. Co., 83 S.W.2d 935 (Tex. 1935).

377. *See Day*, 2012 Tex. LEXIS 161, at *35-45.

378. *See id.* at *43-46.

379. *Id.* at *43 & n.97 (citing TEX. NAT. RES. CODE ANN. § 53.1631(a)).

380. *Id.* at *43-44.

381. *See id.* at *43.

> In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.[382]

The *Day* opinion then holds that "this correctly states the common law [of Texas] regarding the ownership of groundwater in place."[383]

III. GROUNDWATER USE IN OIL & GAS DEVELOPMENT

Due to the limited scope of the topic, this Article will focus on the exempt use of groundwater for oil and gas development and the growing controversy surrounding the use of groundwater for hydraulic fracturing operations in shale gas formations.

A. Exempt Use of Groundwater Under Chapter 36, Texas Water Code

Within the jurisdictional boundaries of a local groundwater conservation district, all groundwater is generally regulated by the local groundwater district.[384] This includes the use of groundwater produced for purposes of facilitating oil and gas production.[385] A key distinction is that while regulated by the district, the production of the groundwater may be exempt from requirements related to permitting, including rules requiring the district to grant drilling and/or production permits for water wells associated with oil and gas production.[386] Specifically, § 36.117(b)(2) provides as follows:

> (b) [A] district shall provide an exemption from the district requirement to obtain a permit for:
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> . . . .
>
> (2) the drilling of 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 provided that the person holding the permit is responsible for drilling and operating the water well and the water well is located on the same lease or field associated with the drilling rig[.][387]

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382. *Id.* at *45 (quoting Elliff v. Texon Drilling, Inc., 210 S.W.2d 508, 561 (Tex. 1948)).
383. *Id.*
384. *See* TEX. WATER CODE ANN. §§ 36.113(a), .114(a) (West 2008 & Supp. 2011).
385. *See id.* §§ 36.114(c), .117(c).
386. *See* §§ 36.114(a), .117(a).
387. § 36.117(b)(2) (West 2008).

The quoted language, however, does *not* create a blanket exemption from all aspects of regulation by the local district. Moreover, the exemption has limitations, even if the water is used for oil and gas operations. For example, the water well must be 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."[388] Additionally, the person holding the Railroad Commission of Texas (RCT) permit must be responsible for drilling and operating the water well, and the water well must be located on the same lease or field associated with the oil and gas drilling rig.[389]

With respect to regulation by the local groundwater district, non-permitting requirements of Chapter 36[390] can be applied to the otherwise exempt oil and gas related water wells to require registration of the well, compliance with spacing requirements, and filing of drilling logs and production reports that will assist the district both in the development of scientific data related to the affected aquifer and in its overall management of the aquifer.[391] Similarly, wells are required to be properly cased and completed to prevent pollution and waste.[392] Additionally, some local districts interpret the statute's language "the drilling of a water well" to prohibit the conversion of an existing groundwater well that might otherwise require a production permit from a district, or that qualified for another permitting exemption, e.g., domestic and livestock, to an exempt well using the oil and gas exemption.[393] Finally, the groundwater produced must be put to beneficial use.[394] The fact that the water is being produced without a permit because of an exempt use does not allow it to be wasted.[395]

With respect to the oil and gas exemption, a strict interpretation of § 36.117(b)(2) would cause the exempt status of an oil and gas water well to be lost if water from the well was put to an additional use, including an additional exempt use, e.g., domestic and/or livestock purposes.[396] Some districts have broad interpretations of their authority and narrow interpretations of the law. For example, a few districts take the position that the exemption for oil and gas drilling or exploration operations ceases immediately upon the discovery of oil

388. *Id.*

389. *See* § 36.117(d)(2).

390. *See id.* §§ 36.109, 36.111-36.112.

391. *See* § 36.117(f), (i).

392. *See* § 36.117(h)(2).

393. *See* Carl R. Galant et al., *Exempt Uses of Groundwater and Surface Water*, MCGINNIS LOCHRIDGE & KILGORE LLP, 5-9 (Mar. 2009), http://www.mcginnislaw.com/pub_pres/277_exempt_uses_of_groundwater_and_surface_water.pdf (detailing the variations in statutory interpretation amongst Ground Water Districts).

394. *See* TEX. WATER CODE ANN. §§ 36.001(8), 36.1071(a)(2), (f), 36.108(c)(2)-(3), 36.113(d)(6), (f), 36.116(a) (West 2008 & Supp. 2011).

395. § 36.117(h)(2).

396. *See* § 36.117(b)(2).

or gas.[397] In their narrow view, the exemption does not apply to any form of ongoing production activities, including reworking operations, any enhancement activity such as using the water to frac a well, or as part of a water drive recovery program.[398]

This narrow interpretation has not been tested at the courthouse. Given Texas's demands for energy in a state where oil and gas is king, it is likely that such an interpretation will not withstand judicial scrutiny based upon historical court decisions which have broadly interpreted Texas law, including the law related to the use of groundwater, favorably toward the oil and gas industry.[399]

Finally, pursuant to § 36.117(g), even if the well is not exempt under § 36.117(b)(2), i.e., a permit is required,[400] a district may not deny an application for a drilling or production permit for a water well associated with hydrocarbon production activities "if the application meets all applicable rules as promulgated by the district."[401] If the water produced will be used outside of the district, even from an exempt well, it "is subject to any applicable production and export fees under § 36.122 and § 36.205."[402]

B. Issues Related to "Fracing"

Hydraulic fracturing—or fracing, as it is commonly called—has been defined as a process used to widen and deepen existing cracks and create new cracks and fractures in tight formations through the injection of fluids into well bores under high pressure to allow more oil and gas to be produced from wells that were "previously thought dry or in decline."[403] Actual fracing practices vary depending on the rock type of the formation, formation depth, and other factors.[404] The fluid used for fracing is usually a mixture of water or water mixed with solvents or drilling mud.[405] To this fluid is added a solid known as a proppant, designed to keep the newly expanded or created fractures open to allow oil and gas to flow through the fractures.[406] Common types of proppants include sand, aluminum pellets, or other "small granular material."[407]

"Though hydraulic fracturing has been commonplace in the oil and gas industry for over sixty years, neither the legislature nor the [Railroad]

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397. *See Water Use in Association with Oil and Gas Activities Regulated by the Railroad Commission of Texas*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/barnettshale/wateruse.php (last visited Mar. 5, 2012).

398. *See id.*

399. *See* Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 17 (Tex. 2008) ("[D]amages for drainage by hydraulic fracturing are precluded by the rule of capture."); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972).

400. *See* TEX. WATER CODE ANN. §§ 36.113, 36.115, 36.119 (West 2008 & Supp. 2011).

401. *See* § 36.117(g).

402. *See* § 36.117(k); *see also id.* §§ 36.122, 36.205 (West 2008 & Supp. 2011).

403. Kurth, *supra* note 19, at 4.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

Commission [of Texas] has ever seen fit to regulate it, though every other aspect of production has been thoroughly regulated."[408] The recent increased use of fracing in high profile formations like the Barnett Shale around the Dallas–Fort Worth Metroplex and the Eagle Ford Shale in South Texas, however, caused increased interest among lawmakers and regulators in hydraulic fracturing.[409] That interest has risen to the level of action.[410]

According to records of the Railroad Commission of Texas, the first South Texas Eagle Ford Shale well was drilled by Petrohawk in the Hawkville (Eagle Ford) Field in La Salle County in 2008.[411] The well flowed at a rate of 7.6 million cubic feet of gas per day from a 3,200-foot lateral and had "10 frac stages."[412] In 2009, the Eagle Ford Shale produced 16 billion cubic feet (BCF) of gas and 307,000 barrels of oil.[413] The Eagle Ford Shale saw a significant increase in production in 2010 producing almost 64 BCF of gas and 2.6 million barrels of oil.[414] Drilling continues in the Eagle Ford Shale at a rapid pace, with drilling permits rising from less than forty in 2008, to ninety-four in 2009, and to more than 1,000 in 2010.[415]

Prior to development of the Eagle Ford Shale, the major shale gas play in Texas was the Barnett Shale.[416] The Barnett Shale is a hydrocarbon-producing geological formation that is estimated to stretch from the City of Dallas to the west and south, covering approximately 5,000 square miles within eighteen counties around the Dallas–Fort Worth Metroplex, including Denton, Johnson, Tarrant, and Wise Counties.[417] In 1993, only about 150 wells were permitted in the Barnett Shale.[418] In 2010, the number of permitted wells was up to almost 14,000.[419] Similarly, production of gas from the Barnett Shale in 1993 was 11 BCF.[420] That volume grew to almost 1800 BCF in 2010, with cumulative gas

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408. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 17 (Tex. 2008); *see also* Kurth, *supra* note 19, at 41 & n.306 (citing *Coastal Oil & Gas Corp*., 268 S.W.3d 1); SMITH & WEAVER, 3 TEXAS LAW OF OIL AND GAS, § 14.4(B), at 14-74 (2d ed. 2009).

409. *See* Kurth, *supra* note 19, at 10.

410. *See id.*

411. *See Eagle Ford Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/eagleford/index.php (last visited Mar. 6, 2012).

412. *Id.*

413. *See Texas Eagle Ford Shale Oil Production*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/eagleford/eaglefordoilproduction.pdf (last visited Mar. 6, 2012); *Texas Eagle Ford Shale Gas Well Gas Production*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/eagleford/EagleFordGWGProduction.pdf (last visited Mar. 6, 2012).

414. *See* sources cited *supra* note 413.

415. *See Texas Eagle Ford Shale Drilling Permits Issued*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/eagleford/EagleFordDrillingPermitsIssued.pdf (last visited Mar. 6, 2012).

416. *See* Kurth, *supra* note 19, at 10.

417. *See Barnett Shale Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last visited Mar. 6, 2012).

418. *See Newark, East (Barnett Shale) Drilling Permits Issued*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/barnettshale/drillingpermitsissued.pdf (last visited Mar. 6, 2102).

419. *Id.*

420. *See Newark, East (Barnett Shale) Gas Well Gas Production*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/barnettshale/NewarkEastField_1993-2011.pdf (last visited Mar. 6, 2012).

production for the period 1993 through 2010 reaching almost 7 trillion cubic feet (TCF).[421]

With the drilling and corresponding economic boom came some backlash. Drilling within the highly urban areas of the Dallas–Fort Worth Metroplex caused some concern. In 2009, Range Resources drilled two Barnett Shale Wells identified as "Butler Unit Well 1-H" and "Teal Unit Well 1-H" in Hood County southwest of Fort Worth.[422] In December of 2010, the EPA filed an "Emergency Administrative Order" alleging that Range Resources wells had contaminated two domestic drinking water wells due to the escape of methane gas and other contaminates released as a result of hydraulic fracturing associated with the well production.[423] The Order also alleged that the EPA was asserting jurisdiction due to the lack of responsiveness to the issues on the part of the Railroad Commission of Texas.[424] The findings of fact in the EPA order appear to be largely circumstantial, turning on the fact that Range Resources wells were the only gas wells in the area (with 2,000 feet of the domestic wells), and that the contamination was from gas and associated constituents.[425]

On December 7, 2010, the same day the EPA entered its Order, the Railroad Commission of Texas issued a news release responding to the allegations that it had failed to properly investigate and take action in response to complaints and refuting some of the EPA's broad fact findings.[426] The news release contained a summary of the Commission's activities chronologically since August 6, 2010, the date it received the landowner's complaint about gas odor.[427] The Commission's local field office conducted a "field inspection" on the same date and followed up with other inspections including Range Resources' Butler and Teal Unit wells.[428] The Commission conducted a hearing on the matter in January 2011, and a decision is pending.[429]

In addition to the initiation of regulatory investigations, the landowners of the allegedly contaminated wells filed suit in state district court in Tarrant County, and the EPA filed a federal lawsuit.[430] Separate from these

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421. *Id.*

422. R.R. Comm'n of Tex., *Commission Called Hearing to Consider Whether Operation of the Range Production Company Butler Unit Well NO. 1H and Teal Unit Well NO, 1H in the Newark, East (Barnett Shale) Field, Hood County, Texas, Are Causing or Contributing to Contamination of Certain Domestic Water Wells in Parker County, Texas*, Docket No. 7B-0268689 (2011), *available at* http://www.rrc.state.tx.us/meetings/ogpfd/RangePFD.PDF [hereinafter *Commission Hearing*].

423. Envtl. Prot. Agency, *In the Matter of Range Resources Corporation et al.*, Emergency Administrative Order, EPA Docket No.: SDWA-06-2011-1208, Dec. 7, 2010.

424. *Id.*

425. *Id.*

426. News Release, R.R. Comm'n of Tex., Railroad Commission's Active, Ongoing Investigation of Parker County Well Complaint (Dec. 7, 2010), *available at* http://www.rrc.state.tx.us/pressreleases/2010/120810.php.

427. *Id.*

428. *Id.*

429. *Commission Hearing*, *supra* note 422.

430. United States v. Range Prod. Co., 793 F. Supp. 2d 814, 816 (N.D. Tex. 2011); Lipsky v. Range

proceedings, lawsuits alleging contamination of groundwater resulting from hydraulic fracturing activities have been filed against other operators in the Barnett Shale.[431]

The primary issue to be litigated is how one proves that the alleged contamination is in fact the result of the hydraulic fracturing or fracing activity.[432] Even then, given the myriad of combinations of constituents used to develop frac fluids, the number of different entities operating within the same formation, and the thousands of operating wells being fraced in any given year, cause and effect and tying liability to a single well or operator will be difficult.

In February 2011, the EPA introduced a new study it proposed to conduct on the potential impacts of hydraulic fracturing on drinking water resources.[433] In November 2011, the EPA published its final 190-page study plan.[434] According to the PowerPoint the EPA created to introduce the plan, the purpose of this study is to answer the following questions: (1) Can hydraulic fracturing impact drinking water resources? (2) If so, what are the driving factors that affect the severity and frequency of any impacts?[435] The study describes the overall purpose in its executive summary as being "to understand the relationship between hydraulic fracturing and drinking water resources."[436] As the title indicates, the scope of the November 2011 Final Study Plan goes beyond groundwater, looking at impacts to surface water and other potential drinking water supply resources.[437]

At the state legislative level, bills related to hydraulic fracturing processes and its regulation were introduced during the 2011 legislative session.[438] Effective September 1, 2011, House Bill 3328 amended Chapter 91 of the Natural Resources Code to add Subchapter S, which related to the disclosure of the composition of hydraulic fracturing fluids.[439] The Act applies only to fracing performed on wells for which the initial drilling permit is issued on or after the date the initial rules adopted by the Railroad Commission take effect.[440]

Prod. Co., No. 153-250032-10, (153rd Dist. Ct., Tarrant County, Tex. Feb. 16, 2012).

431. *See* Jack Z. Smith, *Two Lawsuits Contend Groundwater in Barnett Shale Contaminated by Drilling*, FORT WORTH STAR-TELEGRAM (Dec. 16, 2010), www.star-telegram.com/2010/12/15/2707805/two-lawsuits-contend-groundwater.html.

432. *See id.*

433. ENVTL. PROT. AGENCY, *Draft Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources* (EPA/600/D-11/001, Feb. 2011).

434. ENVTL. PROT. AGENCY, *Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources* (EPA/600/R-11/122, Nov. 2011), *available at* http://www.epa.gov/hfstudy/.

435. *Id.*

436. *Id.* at viii.

437. *Id.*

438. Acts of 2011, 82d Leg., R.S., ch. 1179, 2011 Tex. Gen. Laws 3097-99.

439. *Id.*; *see* TEX. NAT. RES. CODE ANN. §§ 91.851 (West Supp. 2011).

440. Acts of 2011, 82d Leg., R.S., ch. 1179, 2011 Tex. Gen. Laws 3099.

The Railroad Commission adopted Rule 3.29 to implement the new requirements.[441] The Rule became effective January 2, 2012, and applies to wells for which an initial drilling permit is issued on or after February 1, 2012.[442]

The Rule prescribes the required disclosure of components, as well as provisions for maintaining trade secrets.[443] A claim for protection of trade secrets is subject to review by the attorney general or a court review when the claim is challenged by the landowner on whose property the well is located, an adjacent landowner, or a state agency.[444] Among the information required to be disclosed is the total volume of water used in the hydraulic fracturing treatment(s).[445]

IV. SURFACE WATER USE IN OIL & GAS DEVELOPMENT

As discussed above, the use of state water, i.e. the water flowing in our rivers, streams, lakes, bays, estuaries, and the Gulf of Mexico,[446] requires a permit[447] in the absence of an exemption.[448] Of the half dozen available exemptions to the permit requirement,[449] the two of particular interest to the oil and gas industry are found in § 11.142, subsections (a) and (c).[450]

Only the exemption in subsection (c), however, actually allows the oil and gas operator to use state water without a permit.[451] Even when available, the subsection 9(c) exemption has limited utility due to the geographic and volumetric restrictions that apply.[452]

Specifically, § 11.142(c) allows an oil and gas operator to divert water from the Gulf of Mexico and its adjacent bays to facilitate "operations associated with drilling and producing petroleum."[453] The exempt use, however, is limited to diversion in an amount not to exceed one acre-foot within a twenty-four-hour period.[454]

The other exemption that is often of interest to the operator in the field, but which is not available, is the right of a landowner to impound no more than 200 acre-feet of state water on his property.[455] The right is limited to (i) off-

441. 16 TEX. ADMIN. CODE ANN. § 3.29 (West 2011).
442. § 3.29(b).
443. § 3.29(c), (e).
444. § 3.29(e), (f).
445. § 3.29(c).
446. *See* TEX. WATER CODE ANN. § 11.023 (West 2008).
447. *Id.* §§ 11.022, 11.081-.083, 11.0841-.0843, 11.121.
448. *Id.* §§ 11.121, 11.142, 11.1421, 11.1422 (West 2008 & Supp. 2011).
449. §§ 11.142, 11.1421, 11.1422.
450. § 11.142(a), (c).
451. § 11.142(c).
452. *Id.*
453. *Id.*
454. *Id.*
455. § 11.142(a).

channel reservoirs or reservoirs that are on-channel but on a non-navigable stream, and (ii) use of the water for domestic and livestock purposes only.[456] The use must be for non-commercial purposes.[457]

The presence of an otherwise exempt reservoir structure (water impoundment), also know as a stock tank, or even a non-exempt permitted reservoir, may still be a benefit to the oil and gas operator. Its use, however, will require a permit or permit amendment.[458] With respect to the historically exempt stock tank, a permit can be obtained to convert its use to non-exempt use for either industrial or mining purposes to support the oil and gas operations.[459] Even though no physical change is being made to the stock tank, and even though an oil and gas operator may plan to use only temporary or portable equipment to divert water from the historically exempt impoundment, a permit will be required because of the change in use.[460] Notwithstanding the temptation to use the stock tank, it is important to remember that the unlawful use of state water is subject to a fine of up to $5,000 per day—with each new day being a new violation.[461] Finally, absent a permit pursuant to § 11.042 of the Texas Water Code, using an exempt stock tank to store groundwater for use in oil and gas operations may be illegal if the stock tank is on a watercourse.[462] Once the groundwater is commingled in the on-channel stock tank, irrespective of its navigability, the character of the groundwater may be converted to state water.[463]

V. ETHICAL CONSIDERATIONS

Worthy of note are several ethical considerations dealing with water related matters in the oil patch. The first, and probably the easiest to violate, is the obligation for lawyers to avoid conflicts of interest.[464] Specifically, Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct (DRs) prohibits a lawyer from handling a matter for a client whose interests are substantially related to another client such that the representation is, or could be, materially and directly adverse to the interests of another client.[465]

The prospect of securing an adequate consent to and waiver of the conflict aside, the rule should be a guide to lawyers to not become counsel for both the

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456. *See id.*
457. *Id.*
458. *Id.* §§ 11.022, 11.081-.083, 11.0841-.0843, 11.121, 11.143.
459. § 11.143; *see id.* §§ 11.023-.024 (West 2008).
460. § 11.143.
461. § 11.082; *see* § 11.081.
462. *See id.* § 11.042 (West 2008 & Supp. 2011); San Marcos v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 264, 274-75 (Tex. App.—Austin 2004, pet. denied).
463. § 11.042.
464. *See* Tex. Disciplinary Rules of Prof'l Conduct R. 1.06(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X, § 9).
465. *See id.*

oil and gas operators and the landowner whose water is the objective—whether the water involved is surface water or groundwater.

For the sake of expediency and to keep costs down, the temptation exists to represent both parties in (i) negotiating the contract for the water, and (ii) preparing and filing the application for the permit whether at the TCEQ or the local groundwater district. Either act should be avoided. The red tape and time delays associated with the permitting process before either regulatory entity can become tedious and try the best of relationships. The lawyer who took on both sides as his clients will find himself in the middle of some dispute, particularly when the landowner is waiting to receive his money or the operator is waiting for the right to use the water. The other important pitfall for counsel to be wary of is an ex parte communication.[466] Historically, attorneys practicing before administrative agencies thought they could rely upon § 2001.061 of the Administrative Procedures Act as the bright line for avoiding inappropriate contacts.[467] The fact that § 2001.061 does not apply to groundwater district proceedings,[468] coupled with a 2009 interpretation of DR Rule 3.05 by the State Bar's Professional Ethics Committee,[469] has created a lingering black cloud over attorney communications with permitting agencies.

In May 2009, the Ethics Committee issued Opinion No. 587.[470] The opinion concluded that, pursuant to Rule 3.05, an attorney may not contact or communicate with the decision maker of an administrative agency (e.g., TCEQ or a groundwater district) in connection with any matter in which it is reasonably foreseeable that the matter could become subject to an adjudicatory proceeding or contested case hearing.[471]

As noted, in light of § 2001.061 and the historic appellate court decisions in *Vandygriff v. First Savings & Loan Ass'n of Borger* and *Lewis v. Guaranty Federal Savings & Loan Ass'n*, attorneys confidently communicated with agency representatives, including decision makers, about matters pre-application.[472] Once an application was filed, the rules became tighter and communications with agency heads more limited, but interaction with agency staff continued.[473]

The issue presented to the Ethics Committee in Opinion No. 587 was: "Before filing a matter with an administrative agency having decision-making

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466. *See* TEX. GOV'T CODE ANN. § 2001.061 (West 2008).

467. *See id.*

468. TEX. WATER CODE ANN. § 36.052(a) (West 2008); *cf. id.* § 36.253 (making § 2001.174 of the Administrative Procedures Act applicable to groundwater district decisions).

469. *See* Tex. Comm. on Prof'l Ethics, Op. 587, 72 TEX. B.J. 596, 596 (2009) [hereinafter Opinion No. 587].

470. *See id.*

471. *See id.* at 598.

472. *See* TEX. GOV'T CODE ANN. § 2001.061; Vandygriff v. First Sav. & Loan Ass'n of Borger, 617 S.W.2d 669, 672 (Tex. 1981); Lewis v. Guaranty Fed. Sav. & Loan Ass'n, 483 S.W.2d 837, 838 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

473. *See* Opinion No. 587, *supra* note 469, at 597.

authority over the matter, may a lawyer communicate with the administrative agency concerning the matter?"[474]

The opinion concludes:

> In the absence of applicable law that permits ex parte communications in a particular situation, Rule 3.05 . . . imposes strict limits on ex parte communications with an agency's decision maker prior to the filing of a matter with an agency that is expected to act concerning the matter in a dispute resolution, licensing, or adjudicatory capacity, if a purpose of the ex parte communication is to influence the agency's decision in the matter.[475]

While the Opinion purports to qualify its applicability by stating Rule 3.05 does not apply to communications with non-decision makers of the agency, that qualification is limited by the caveat "unless such communications are intended to be indirect *ex parte* communications with the decision maker for the purpose of influencing the outcome of the matter."[476]

As one might imagine, the purpose of meeting with an agency staff member is likely going to include persuading them to support the application and, thereafter, communicate that support to the decision maker. Given the broad impart of the Opinion's conclusion, such an activity seems at least susceptible to attack as an indirect ex parte communication.[477]

Opinion No. 587 was received with much angst by the administrative lawyers in Texas.[478] In response, the ethics committee published Opinion No. 604 in January 2011.[479]

The new Opinion addressed three questions related to Opinion No. 587 and its interpretation of DR Rule 3.05:

(1) may a lawyer communicate with the agency members about a rule or regulation under consideration if it would require his client to obtain a permit if adopted;

(2) may the lawyer communicate about the client's planned permit in the context of the consideration of the regulation; and

(3) may the client communicate with the members if the lawyer cannot?[480]

The Opinion concludes that the lawyer is not prohibited from communicating about a regulation that represents a legislative activity of the agency.[481]

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474. *Id.* at 596.
475. *Id.* at 598.
476. *Id.*
477. *Id.*
478. *See* Tex. Comm. on Prof'l Ethics, Op. 604, 74 TEX. B.J. 154, 156 (2011) [hereinafter Opinion No. 604].
479. *See id.* at 154.
480. *See id.*
481. *Id.* at 158.

The lawyer is, however, prohibited by Rule 3.05 from communicating about the regulation after it has been adopted for purposes of attempting to influence a decision on an application the lawyer and his client plan to file.[482] While a non-attorney client who is not subject to Rule 3.05 would not be prohibited by the DR from communicating with the agency decision maker, Rule 3.05 and Rule 8.04(a)(1) would prohibit the lawyer from encouraging his client to undertake any such ex parte communications.[483]

The opinions both arguably concern some gray areas of the law with respect to as-applied factual determinations about who is and is not a decision maker, or what is reasonably foreseeable.[484] The opinions, however, both err on the side of concluding the action is likely governed by Rule 3.05.[485]

There is no bright-line rule. There are flashing lights cautioning counsel to be wary, however. The uncertainty is somewhat compounded in the context of dealing with groundwater districts. As most district board members are non-lawyers and prefer to act informally unless compelled to adopt and follow formal guidelines, dealing with the districts on behalf of the client can be a minefield. Specifically, avoiding inadvertent, or even knowing, violations of Rule 3.05 can be viewed as a direct affront to district decision makers, jeopardizing your client's permit application.

VI. CONCLUSION

We must have water to drink. There is no debate about that fact. Equally important, we must have water available for the development of our energy resources.

To this end, the oil and gas industry must be careful to balance the use of this precious natural resource both to insure its availability as a tool for continued oil and gas development and to protect and preserve its quality.

Accomplishing these objectives requires recognition of water's value and its finite nature. It also requires a concentrated effort to achieve conservation through improved efficiency in development technologies, consistent non-wasteful use of the available water, and investments in innovative methods to enhance the sustainability of the resource through such means as recycling and reuse, as well as treatment of lesser quality brackish water supplies to a usable quality.

The late President John F. Kennedy has been credited with making the following observation: "Anyone who can solve the problems of water will be worthy of two Nobel prizes—one for peace and one for science."[486] The

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482. *Id.*

483. *Id.*

484. *See id.* at 156; Opinion No. 587, *supra* note 469, at 597-98.

485. *See* Opinion No. 604, *supra* note 478, at 156-58; Opinion No. 587, *supra* note 469, at 597-98.

486. Martin M. Cooper, *Water, Not Oil, Will Be Source of Conflict*; *Kaleidoscope Our Changing Valley*, 13 SAN FERN. V. BUS. J. 63, 63 (2008).

greatest challenge facing Texas is its ability to ensure the long-term availability of sustainable water supplies. Water is the key to Texas's future growth and prosperity.