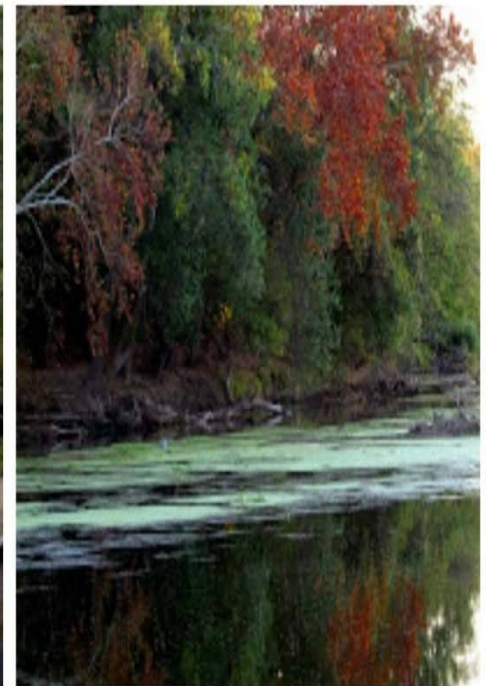


TEXAS WATER LAW

BASIC CONCEPTS & CURRENT ISSUES



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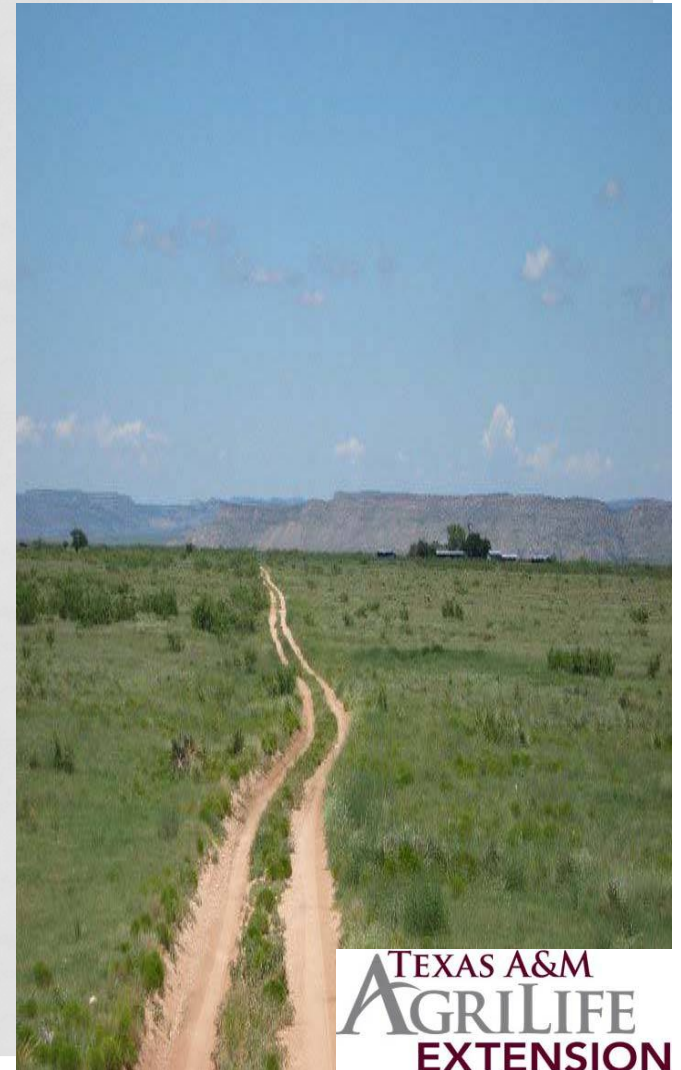
ROADMAP

Texas Water Law Basics

- Groundwater
- Surface Water

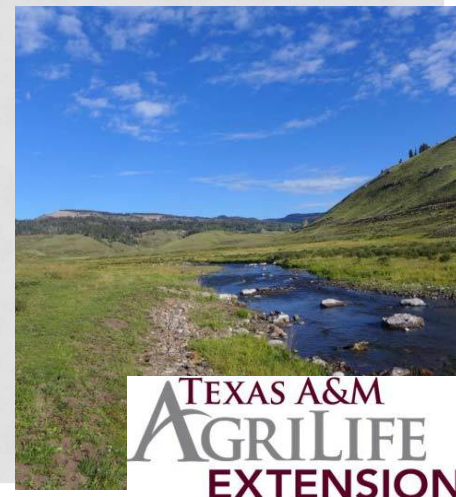
Current Hot Topics

- *Bragg v. Edwards Aquifer Authority*
- “Underground Trespass Case”
- *Texas Farm Bureau v. TCEQ*
- Treaties and Compacts



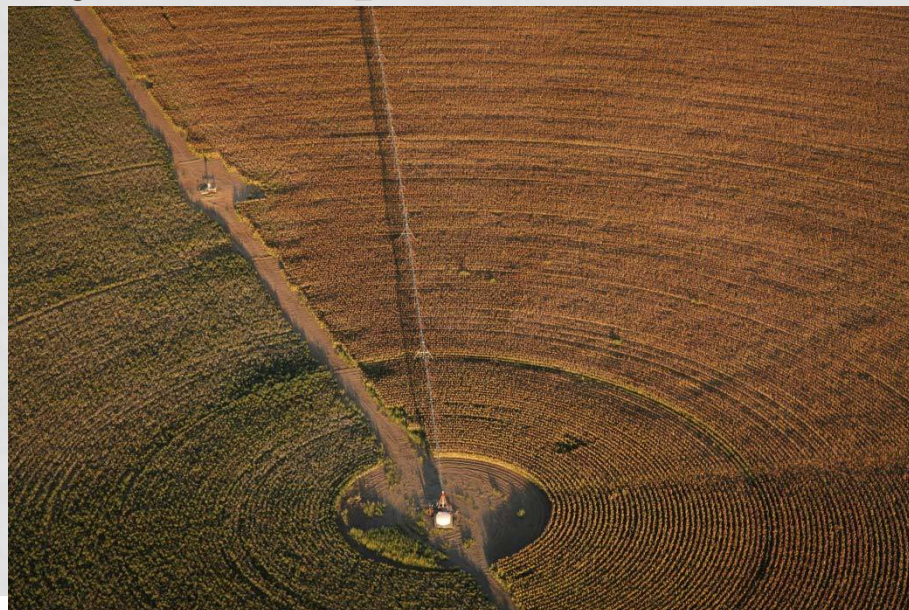
CATEGORIES OF WATER

- **Water law depends on category.**
- **Groundwater (2 categories)**
 - Percolating
 - Water percolating under the surface but not in a subterranean stream/river.
 - Aquifers
 - Subterranean rivers
 - None ever found in Texas
- **Surface Water (2 categories)**
 - Surface water in a defined watercourse
 - Streams, rivers, lakes, Gulf of Mexico...
 - Diffused surface water
 - Storm runoff prior to reaching watercourse



TEXAS GROUNDWATER USE

- Texas uses 10.2 million acre-feet of groundwater per year.
- 80% used by agriculture (mostly irrigation).
- 15% used by municipalities.



BASICS OF GROUNDWATER LAW

- Who owns the groundwater in Texas?
 - Landowners own water under property (subject to limitations on the next slide).
- Rule of Capture
 - Landowner has the right to pump water even if it drains neighbor's well (subject to limitations on the next slide).
 - “Law of the biggest pump”
- Cases
 - *Houston & Tx Central Rwy v. East* (1904)
 - *Edwards Aquifer Authority v. Day* (2012)

LIMITS ON RULE OF CAPTURE

- Ownership does not give landowner right to capture a specific amount of water or to waste water.
- Common Law Exceptions
 - Maliciously take for sole purpose of injuring neighbor
 - Wanton and willful waste
 - Negligently drilling/pumping that causes subsidence
 - Pumping from contaminated well
 - Trespassing in order to drill.
- Groundwater Conservation Districts
 - “Preferred method of groundwater management”
 - Enact rules/regulations related to groundwater.

GROUNDWATER CONSERVATION DISTRICTS

- 99 GCDS, 4 pending confirmation.
- Cover all/portions of 174 counties and 85% of groundwater in Texas.
- GCDS develop strategic plans to promote efficient use, prevent waste, promote conservation, etc.
- Post Oak Savannah Groundwater Conservation District (Milam and Burleson Counties)

Confirmed Groundwater Conservation Districts

1. Anderson County UWCD - 10/17/1987
2. Bandera County River Authority & Ground Water District - 11/7/1989
3. Barton Springs/Edwards Aquifer CD - 8/13/1987
4. Bee GCD - 1/20/2001
5. Blanco-Pedernales GCD - 1/23/2001
6. Bluebonnet GCD - 11/5/2002
7. Brazoria County GCD - 11/8/2005
8. Brazos Valley GCD - 11/5/2002
9. Brewster County GCD - 11/6/2001
10. Brush Country GCD - 11/3/2009
11. Central Texas GCD - 9/24/2005
12. Clear Fork GCD - 11/5/2002
13. Clearwater UWCD - 8/21/1999
14. Coastal Bend GCD - 11/6/2001
15. Coastal Plains GCD - 11/6/2001
16. Coke County UWCD - 11/4/1986
17. Colorado County GCD - 11/6/2007
18. Corpus Christi ASRCD - 6/17/2005
19. Cow Creek GCD - 11/5/2002
20. Crockett County GCD - 1/26/1991
21. Culberson County GCD - 5/2/1998
22. Duval County GCD - 7/25/2009
23. Edwards Aquifer Authority - 7/28/1996
24. Evergreen UWCD - 8/30/1985
25. Fayette County GCD - 11/6/2001
26. Fox Crossing Water District - 4/4/1986
27. Garza County UWCD - 11/5/1996
28. Gateway GCD - 5/3/2003
29. Glasscock GCD - 8/22/1981
30. Goliad County GCD - 11/6/2001
31. Gonzales County UWCD - 11/2/1994
32. Guadalupe County GCD - 11/14/1999
33. Hays Trinity GCD - 5/3/2003
34. Headwaters GCD - 11/5/1991
35. Hemphill County UWCD - 11/4/1997
36. Hickory UWCD No. 1 - 8/14/1982
37. High Plains UWCD No. 1 - 9/29/1951
38. Hill Country UWCD - 8/8/1987
39. Hudspeth County UWCD No. 1 - 10/5/1957
40. Irion County WCD - 8/2/1985
41. Jeff Davis County UWCD - 11/2/1993
42. Kennedy County GCD - 11/2/2004
43. Kimble County GCD - 5/3/2002
44. Kinney County GCD - 11/2/2002
45. Lipan-Kickapoo WCD - 11/3/1987
46. Live Oak UWCD - 11/7/1989
47. Llano Estacado UWCD - 11/3/1998
48. Lone Star GCD - 11/6/2001
49. Lone Wolf GCD - 2/2/2002
50. Lost Pines GCD - 11/5/2002
51. Lower Trinity GCD - 11/7/2006
52. McMullen GCD - 11/6/2001
53. Medina County GCD - 8/26/1991
54. Menard County UWCD - 8/14/1999
55. Mesa UWCD - 1/20/1990
56. Mesquite GCD - 11/4/1986
57. Mid-East Texas GCD - 11/5/2002
58. Middle Pecos GCD - 11/5/2002
59. Middle Trinity GCD - 5/4/2002
60. Neches & Trinity Valleys GCD - 11/6/2001
61. North Plains GCD - 1/2/1955
62. North Texas GCD - 12/1/2005
63. Northern Trinity GCD - 5/15/2007
64. Panhandle GCD - 1/2/1/1955
65. Panola County GCD - 11/6/2007
66. Pecan Valley GCD - 11/6/2001
67. Permian Basin UWCD - 9/21/1985
68. Pineywoods GCD - 11/6/2001
69. Plateau UWC and Supply District - 3/4/1974
70. Plum Creek GCD - 5/1/1993
71. Post Oak Savannah GCD - 11/5/2002
72. Prairielands GCD - 5/1/2009
73. Presidio County UWCD - 8/31/1999
74. Real-Edwards C and R District - 5/30/1959
75. Red River GCD - 9/1/2009
76. Red Sands GCD - 11/5/2002
77. Refugio GCD - 11/6/2001
78. Rolling Plains GCD - 1/26/1999
79. Rusk County GCD - 6/5/2004
80. San Patricio County GCD - 5/12/2007
81. Sandy Land UWCD - 11/7/1989
82. Santa Rita UWCD - 8/19/1989
83. Saratoga UWCD - 11/7/1989
84. South Plains UWCD - 2/8/1992
85. Southeast Texas GCD - 11/2/2004
86. Southern Trinity GCD - 6/19/2009
87. Starr County GCD - 1/6/2007
88. Sterling County UWCD - 11/2/1987
89. Sutton County UWCD - 4/5/1986
90. Texana GCD - 11/6/2001
91. Trinity Glen Rose GCD - 11/5/2002
92. Upper Trinity GCD - 11/6/2007
93. Uvalde County UWCD - 9/1/1993
94. Victoria County GCD - 9/5/2005
95. West-Tex GCD - 11/5/2002
96. Wintersgarden GCD - 11/7/1998

Unconfirmed Groundwater Conservation Districts

- 97. Lavaca County GCD + #
- 98. Calhoun County GCD + #
- 99. Terrell County GCD + #

+ Pending Election Results
Created by the 80th Legislature
& Created by the 82nd Legislature

Subsidence Districts

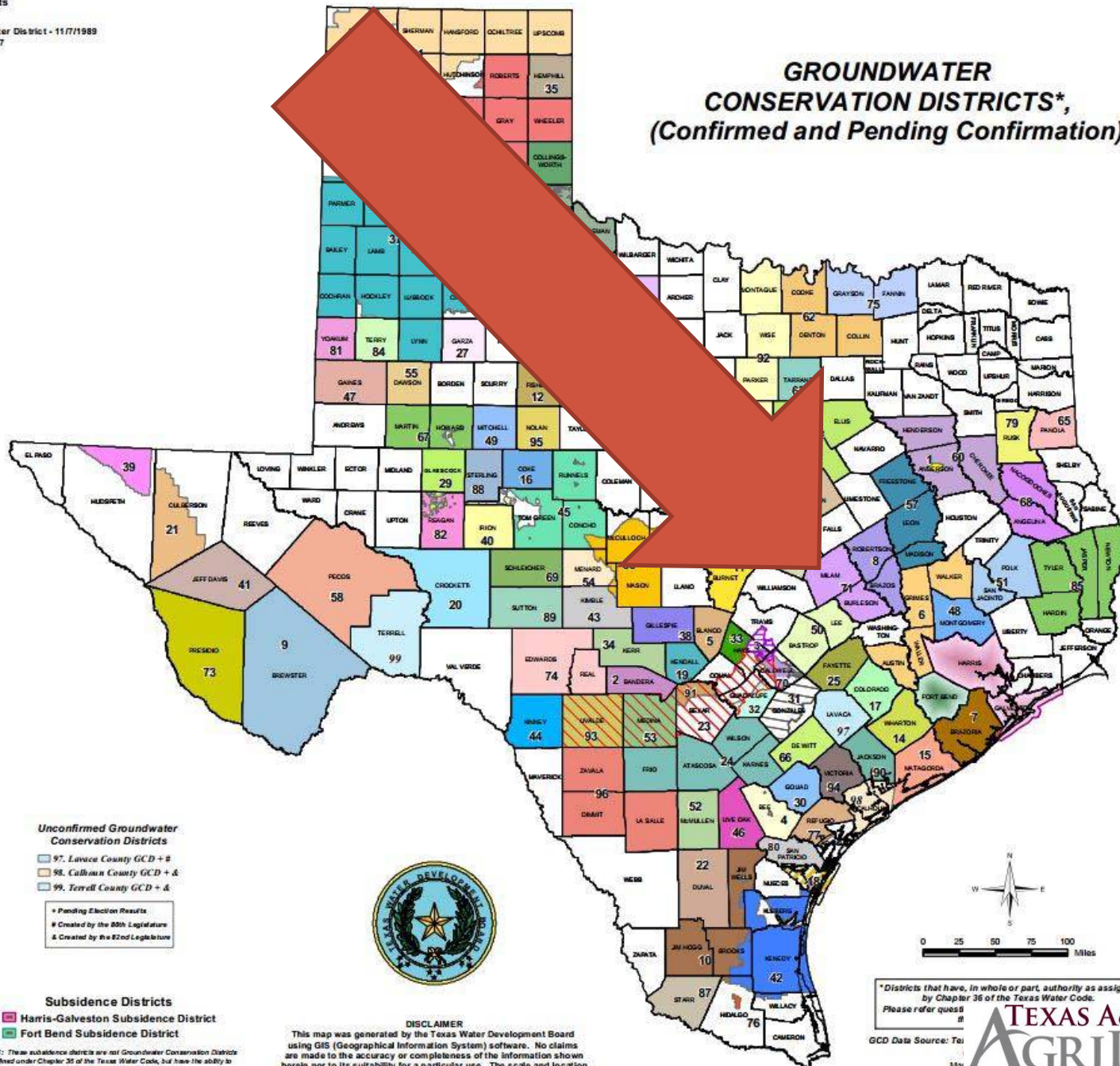
- Harris-Galveston Subsidence District
 - Fort Bend Subsidence District
- NOTE: These subsidence districts are not Groundwater Conservation Districts as defined under Chapter 35 of the Texas Water Code, but have the ability to regulate groundwater production to prevent land subsidence. (Refer to Senate Bill 1537 from the 79th Legislative Session)



DISCLAIMER

This map was generated by the Texas Water Development Board using GIS (Geographical Information System) software. No claims are made to the accuracy or completeness of the information shown herein nor to its suitability for a particular use. The scale and location of all mapped data are approximate.

GROUNDWATER CONSERVATION DISTRICTS*, (Confirmed and Pending Confirmation)



*Districts that have, in whole or part, authority as assigned by Chapter 36 of the Texas Water Code. Please refer questions to GCD Data Source: Texas A&M AgriLife Extension

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GROUNDWATER CONSERVATION DISTRICTS (CONT.)

- Three main powers: (1) create rules; (2) plan; (3) permit.
- **Must** require a permit for the drilling and operating of any well or altering the size of a well or pump.
 - Impact on existing users,
 - Beneficial use,
 - Waste/conservation plan, and
 - Consistent with GCD plan
- **Must** require drillers logs be kept and filed.
- **May** require records and reports of drilling and production.
- **May** regulate spacing of wells and production of groundwater.
- **May** impose export fees for groundwater to be taken out of the district.

EXEMPT WELLS

- No permit necessary for certain types of wells:
 - Domestic use or providing water for livestock or poultry if the well is:
 - Located on a tract of 10 acres or more; and
 - Not capable of producing more than 25,000 gallons/day
 - Used to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas if located on same lease as rig
 - Water used for mining activities.
- These exemptions are baseline—a local GCD can allow more exemptions.

TEXAS SURFACE WATER USE

- Texas uses 6.6 million acre-feet per year.
- Most of the water, 65%, is used for cities and industry.
- 35% is used for agricultural irrigation.



SURFACE WATER BASICS

- Who owns surface water?
 - “Regular”: State of Texas
 - Diffused: Landowner may capture while on his/her property.
- May be used by citizens with permit for beneficial use.
- Prior Appropriation governs.
- Permits administered by TCEQ.



SURFACE WATER LAW

- Prior Appropriation
 - First in time, first in right.
 - Senior rights superior to junior rights.
- Emergency exceptions do exist if necessary to protect public health, safety and welfare.
- Beneficial Use
 - Domestic, municipal, agricultural, industrial, mining, recovery of minerals, hydroelectric power, navigation, recreation, public parks, game preserves, and “any other beneficial use.”

APPLICATION FOR WATER RIGHT

- Must apply for “water right” with TCEQ
- Right may only be granted if:
 - There is unappropriated water available.
 - The application seeks to put water to beneficial use.
 - The use would not impair existing water rights.
 - The use would not be detrimental to the public welfare.
 - The use is consistent with the State and Regional Water Plan
 - Reasonable diligence will be used to avoid waste and achieve conservation.

EXEMPT DIVERSIONS

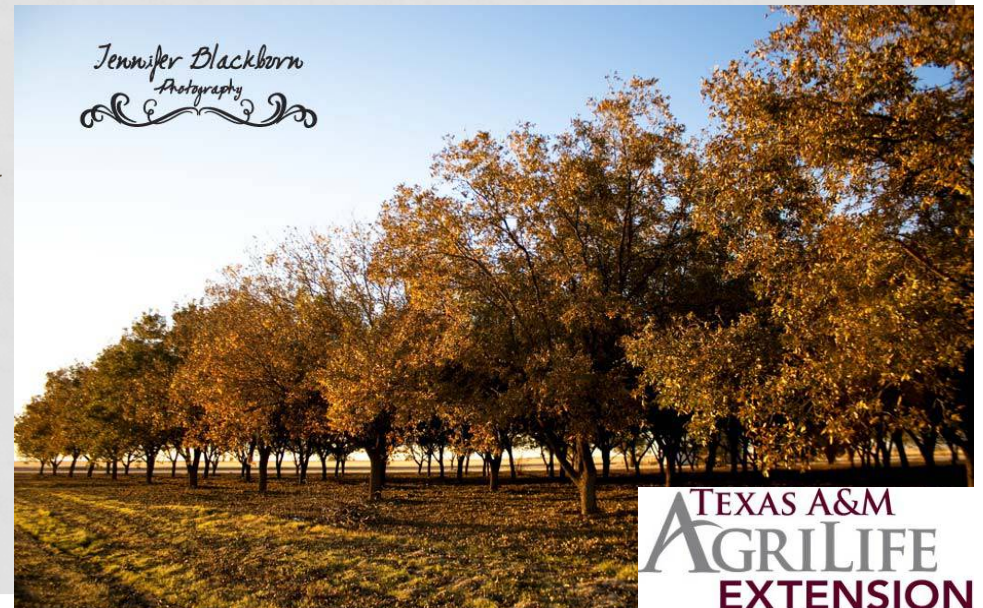
- No permit necessary for certain types of diversions on non-navigable streams:
 - **Domestic or livestock purposes:** Can build a tank or reservoir if less than 200 acre-feet capacity and for a non-commercial purpose.
 - **Commercial or non-commercial wildlife management, including fishing, but not fish farming:** Can build a tank or reservoir if less than 200 acre-feet capacity.
 - **Surface coal mining operations:** May maintain a reservoir if used solely for sediment control or compliance with laws regarding fire/dust suppression.
 - **Drilling and producing petroleum:** May divert from the Gulf, bays and arms, so long as not more than 1 acre foot/day.

WHAT ABOUT STOCK TANKS?

- **If filled with state water:**
 - Limit of 200 acre-foot capacity;
 - Measured by 12 month average (so can be over sometimes);
 - Limited purposes: domestic, livestock, wildlife management, fishing (but not fish farming).
- **If filled with diffused surface water:**
 - No limitations—can be as big as you want and used for whatever you want.
 - BUT—be sure it is diffused and not state-owned water!
- **If filled with groundwater:**
 - Must comply with GCD requirements—if well filling the pond is an exempt livestock well, you are probably okay.

BRAGG V. EDWARDS AQUIFER AUTHORITY

- Facts: Pecan farmer wants to drill irrigation wells, EAA denies permits.
- Courts side with farmer.
- EAA appealed to Tx. Supreme Court.
- Why does this matter?
 - First application of *Day*
 - Limits the regulations that can be imposed by GCDs.



Jennifer Blackburn
Photography

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“THE UNDERGROUND TRESPASS CASE”

- Facts: EPS drills deep subsurface injection well. Rice farmer neighbors claim subsurface trespass.
- Jury found for EPS. Court of Appeals found for farmers. Currently pending at Texas Supreme Court.
- Why does this matter?
 - Property rights v. oil and gas.
 - Would be first recognition in US.
 - Possibility of contamination.
 - Potential for desalination.



TEXAS FARM BUREAU V. TCEQ

- Dow Chemical is 1942 water holder on Brazos River.
- Makes priority call in 2012.
- TCEQ grants call, but exceptions for municipalities and power generators.
- Suspended rights: 841 rights; 117,227 AF/yr
- Exempted rights: 19; 1.8 million AF/yr

ARGUMENTS

- Farmers say violates prior appropriation.
- TCEQ says have authority under emergency exceptions in statute.



EMERGENCY EXCEPTIONS

- Texas Water Code Section 11.053
 - “During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, in accordance with the priority of water rights established by Section 11.027 [prior appropriation]:
 - (1) temporarily suspend the right of any person who holds a water right to use the water; and
 - (2) temporarily adjust the diversions of water by water rights holders.”
- Texas Water Code Section 11.139
 - ...the commission may grant an emergency permit, order, or amendment to an existing permit...after notice to the governor for an initial period of not more than 120 days if the commission finds that emergency conditions exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible practicable alternatives to the emergency authorization.
 - A person desiring to obtain an emergency authorization shall submit a sworn application...
 - The person granted an emergency authorization is liable to the person from whom the use is transferred for the fair market value of the water transferred as well as for any damages caused by the transfer.

TEXAS FARM BUREAU V. TCEQ

- Trial judge sides with Texas Farm Bureau.
- TCEQ can suspend and alter rights under 11.053, but the orders must comply with prior appropriation.

- Texas Water Code Section 11.053:
- “During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, **in accordance with the priority of water rights established by Section 11.027:**
- (1) temporarily suspend the right of any person who holds a water right to use the water; and
- (2) temporarily adjust the diversions of water by water rights holders.”

Texas Water Code Section 11.027:

“As between appropriators, the first in time is the first in right.”

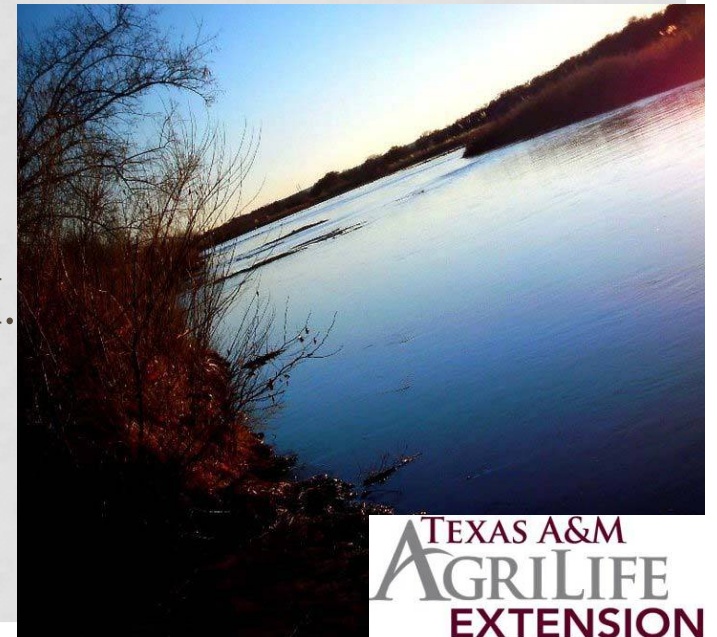
TEXAS FARM BUREAU V. TCEQ

- TCEQ has filed an appeal, pending.
- Why does this matter?
 - Impacts whether irrigators receive water.
 - Will determine whether TCEQ can ignore priority when making emergency exception under 11.053.
 - May impact right of persons to receive compensation and damages under 11.139.
 - Similar dispute going on in San Saba basin between irrigators and exempt water users.

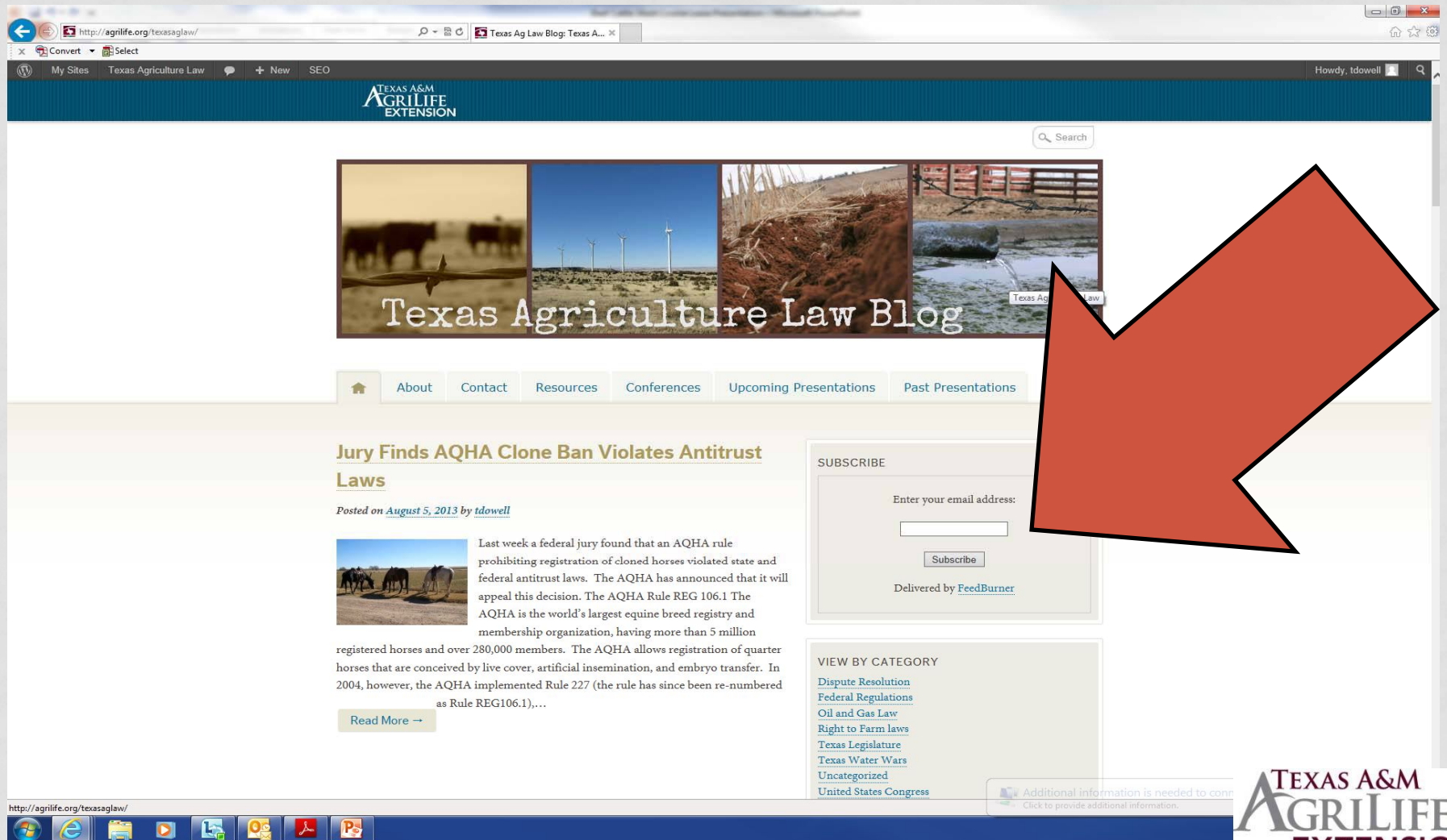


TREATIES AND COMPACTS

- Texas v. Mexico
 - 1944 Treaty regarding rivers along border.
 - Mexico not providing required amount of water.
 - Political pressure, bills pending in Congress.
- Texas v. New Mexico
 - 1938 Compact regarding Rio Grande
 - Too many diversions/new wells in NM.
 - Lawsuit filed in Supreme Court.



HTTP://AGRILIFE.ORG/TEXASAGLAW



The screenshot shows a web browser window displaying the Texas Agriculture Law Blog. The browser's address bar shows the URL <http://agriflife.org/texasaglaw/>. The website's header features the Texas A&M AgriLife Extension logo and a search bar. Below the header is a banner with four images (cows, wind turbines, a field, and a fence) and the text "Texas Agriculture Law Blog". A large red arrow points from the right side of the page towards the "SUBSCRIBE" form. The main content area displays a post titled "Jury Finds AQHA Clone Ban Violates Antitrust Laws" by tdowell, dated August 5, 2013. The post includes a small image of horses and a "Read More" link. To the right of the post is a "SUBSCRIBE" form with an email input field and a "Subscribe" button. Below the form is a "VIEW BY CATEGORY" list with links to various topics. The footer of the website includes the Texas A&M AgriLife Extension logo and a note about additional information needed for contact.

http://agriflife.org/texasaglaw/

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Jury Finds AQHA Clone Ban Violates Antitrust Laws

Posted on August 5, 2013 by tdowell



Last week a federal jury found that an AQHA rule prohibiting registration of cloned horses violated state and federal antitrust laws. The AQHA has announced that it will appeal this decision. The AQHA Rule REG 106.1 The AQHA is the world's largest equine breed registry and membership organization, having more than 5 million registered horses and over 280,000 members. The AQHA allows registration of quarter horses that are conceived by live cover, artificial insemination, and embryo transfer. In 2004, however, the AQHA implemented Rule 227 (the rule has since been re-numbered as Rule REG106.1),...

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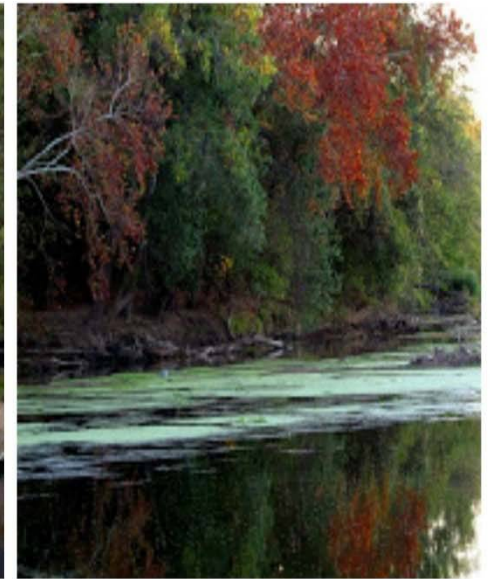
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QUESTIONS?



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