



Water is for Fighting – Legal Considerations for Water Use & Ownership

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Gray Reed

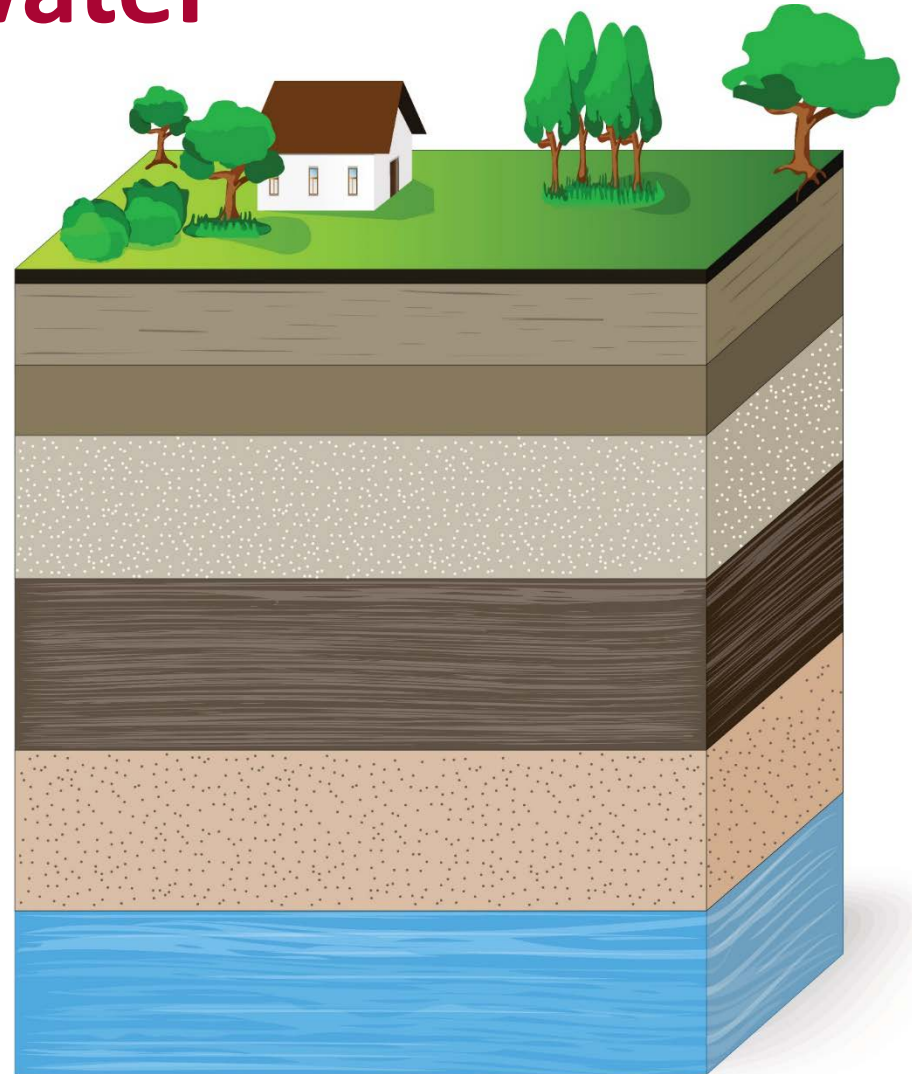


The image shows a desert environment with rows of young, green plants in sandy soil. A large, black, flexible pipe runs across the foreground. In the background, two oil pumpjacks are visible against a clear blue sky. The scene is likely related to groundwater management or extraction in an arid region.

GROUNDWATER

Groundwater

- Water percolating below the surface of the earth.
Tex Water Code 36.001(5)
- Privately owned by the surface owner.
- The Rule of Capture



The Rule of Capture



- ***Houston & Texas Central Railway Co. v. East, 81 S.W. 279 (Tex. 1904)***
 - Texas Supreme Court adopts the English common law “Rule of Capture” – the owner of the land might pump unlimited quantities of water from under the land, regardless of the impact on neighbor’s ability to obtain water on his own land.
- ***Sipriano v. Great Spring Waters of America, Inc. a/k/a Ozarka, 1 S.W. 3d. 75 (Tex. 1999)***
 - Texas Supreme Court denied landowner’s request to modify the Rule of Capture in favor of the rule of “reasonable use.” So the Rule of Capture is here to stay, but subject to limitations and regulation.

The Rule of Capture

- Limitations
 - Cannot capture and use water maliciously with the purpose of injuring a neighbor or in a manner that amounts to wanton and willful waste of the resource.¹⁴
 - Negligently pumping of groundwater that causes subsidence of neighboring land.¹⁵
 - Tex. Water Code §36.002



Groundwater Ownership

- ***City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App. – San Antonio 2008, pet denied)***
 - City argued groundwater under land not a vested right but vests only when landowner has captured it and put to beneficial use.
- ***Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012)***
 - Groundwater owned in place - “land ownership includes an interest in groundwater in place”
 - “Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are held in place, and we see no reason to treat groundwater differently.”
- **Tex. Water Code § 36.002 (a)**
 - The legislature recognizes that a landowner owns the groundwater below the surface of the landowner’s land as real property.

Groundwater Regulation

- Conservation Amendment: Tex Const. art. XVI, § 59, 1917
 - Texas Legislature has duty to protect Texas' natural resources.
- Groundwater Conservation District Act of 1949
 - First authorization of “underground water conservation districts.”
- Today Chapter 36 of the Texas Water Code governs Groundwater Conservation Districts.
 - “State's preferred method of groundwater management...” Tex. Water Code §36.0015

Groundwater Conservation District

- 98 total, and 2 subsidence districts (Harris County and Fort Bend County)
- Created by either Legislature or TCEQ
- 66 elect a Board of Directors, 31 appoint BOD through commissioners court (Edwards Aquifer Authority has combination of elected and appointed)
- Covers 174 of 254 counties, nearly 70% of the area of the state
- 60 single-county GCDs, and 38 that cover more than one county



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 County GCD - 11/3/2009
11. Central Texas GCD - 5/24/2005
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 - 11/26/1991
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 - 8/19/87
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. Kenedy 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 - 8/28/1991
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 - 12/1/2009
63. Northern Trinity GCD - 5/15/2007
64. Panhandle GCD - 1/21/1956
65. Panola County GCD - 11/6/2007
66. Pecan Valley GCD - 11/6/2001
67. Permian Basin UWCD - 9/21/1985
68. Pineywoods GCD - 11/6/2001
69. Plateau UWC and Supply District - 3/4/1974
70. Plum Creek CD - 5/1/1993
71. Post Oak Savannah GCD - 11/5/2002
72. Prairielands GCD - 9/1/2009
73. Presidio County UWCD - 8/31/1999
74. Real-Edwards C and R District - 5/30/1959
75. Red River GCD - 9/1/2009
76. Red Sands GCD - 11/6/2002
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 - 11/3/1987
89. Sutton County UWCD - 4/5/1986
90. Tarrant County GCD - 11/6/2012
91. Texana GCD - 11/6/2001
92. Trinity Glen Rose GCD - 11/5/2002
93. Upper Trinity GCD - 11/6/2007
94. Uvalde County UWCD - 9/1/1993
95. Victoria County GCD - 8/5/2005
96. West-Tex GCD - 11/5/2002
97. Wintergarden GCD - 11/7/1998

Unconfirmed Groundwater Conservation Districts

- 98. Lavaca County GCD + 8
- 99. Calhoun County GCD + 8
- 100. Deep East Texas GCD + 5
- 101. Reeves County GCD + 5

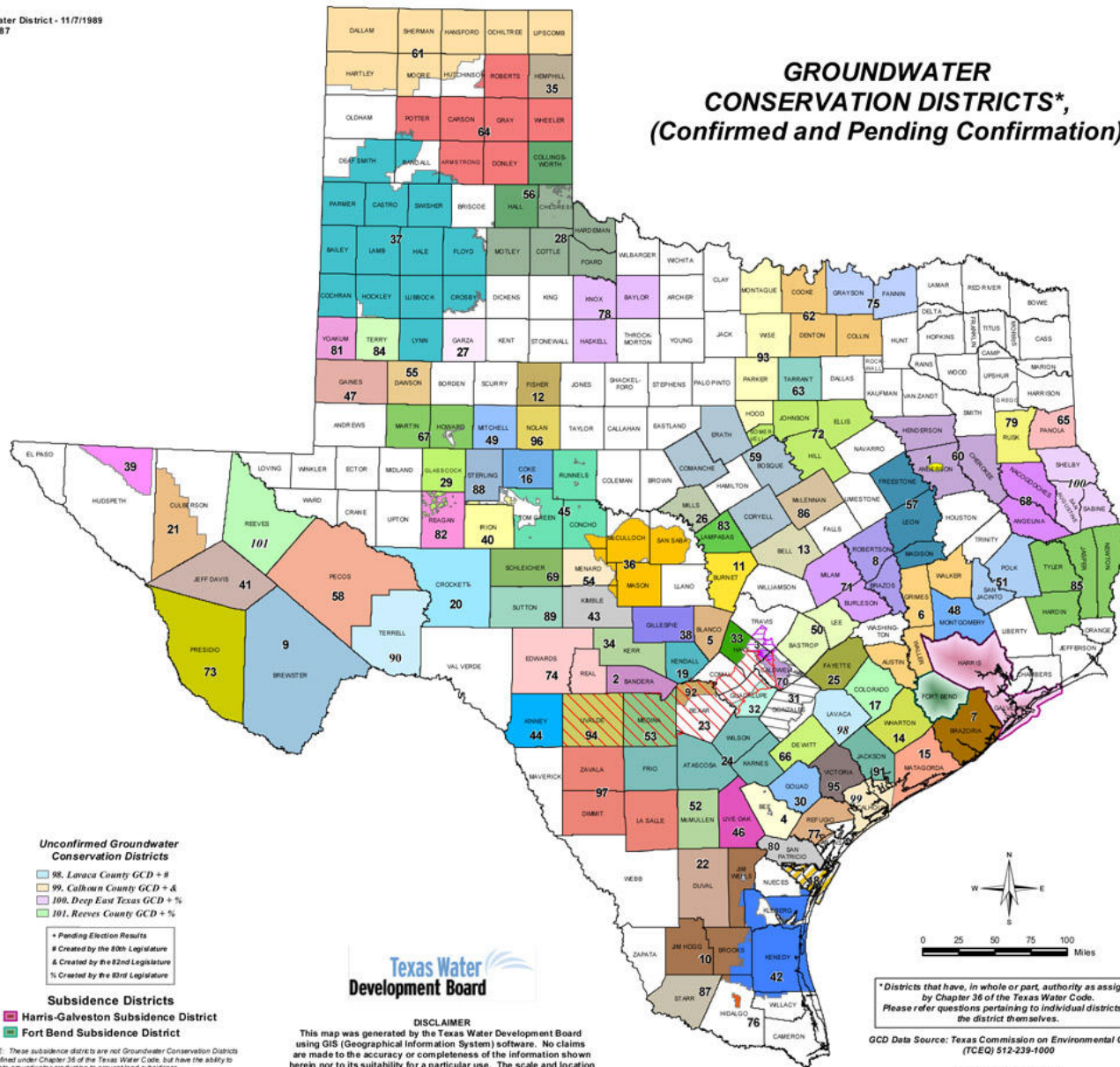
- + Pending Election Results
- # Created by the 80th Legislature
- & Created by the 82nd Legislature
- % Created by the 83rd Legislature

Subsidence Districts

- Harris-Galveston Subsidence District
- Fort Bend Subsidence District

NOTE: These subsidence districts are not Groundwater Conservation Districts as defined under Chapter 36 of the Texas Water Code, but have the ability to regulate groundwater production to provide for subsidence.

GROUNDWATER CONSERVATION DISTRICTS* (Confirmed and Pending Confirmation)



Groundwater Conservation Districts

- Political subdivisions of the state
- Subject to enabling statutes, Ch. 36 Tex. Water Code, and general laws of the state
- Must comply with Texas Open Meetings Act and Public Information Act

Groundwater Conservation Districts

- Management Plan
 - Adopt within three years of creation after notice and hearing for the public
 - Set out goals, objectives and standards for management of groundwater resources in the district, such as
 - Most efficient use of groundwater
 - Preventing waste
 - Preventing subsidence
 - Addressing drought conditions
 - Addressing conjunctive surface water management issues
 - Submit to Texas Water Development Board for comment and approval

Groundwater Conservation Districts

- Joint Planning in Management Area
- 16 Regional Groundwater Management Areas (GMA)
- GMAs comprised of all GCDs within each area
- Approve by 2/3 vote the “desired future condition” for each aquifer within their planning area
- 5 year cycle – next approval deadline January 5, 2022 to be included in 2022 State Water Plan

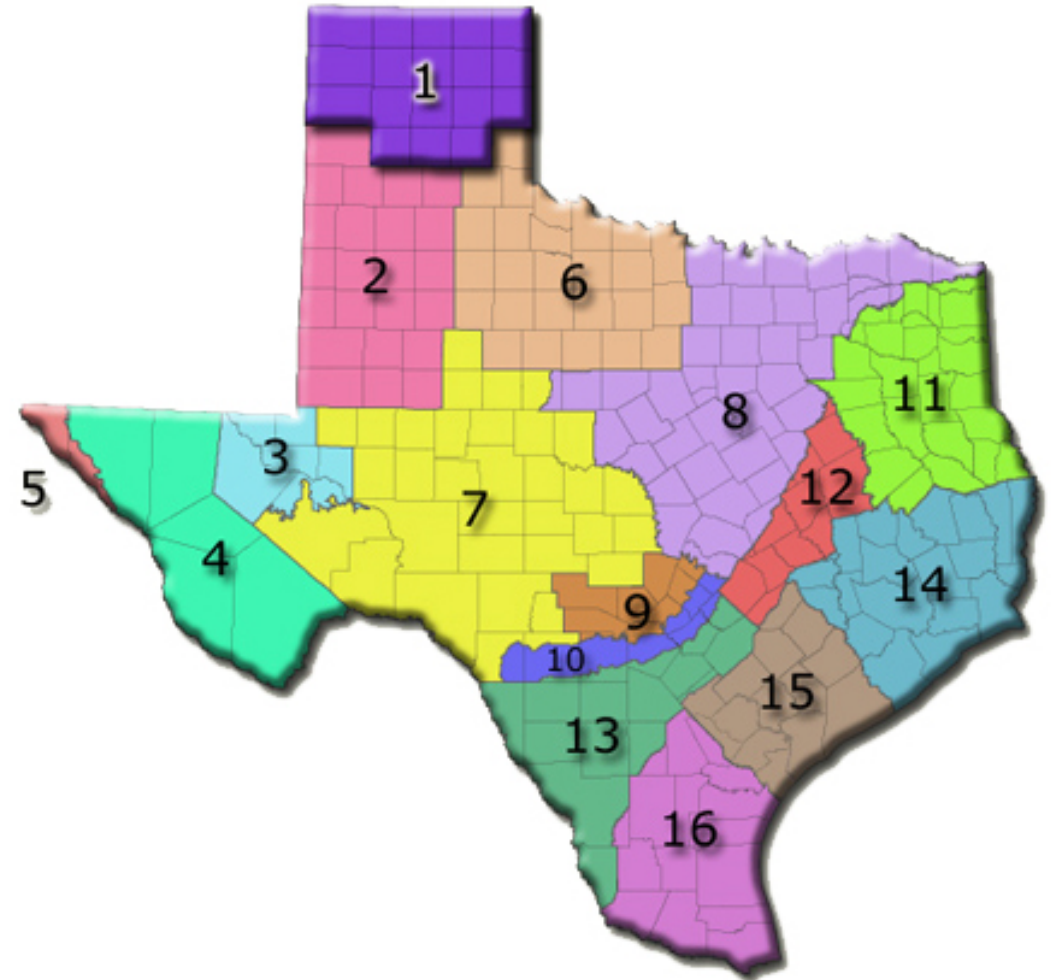
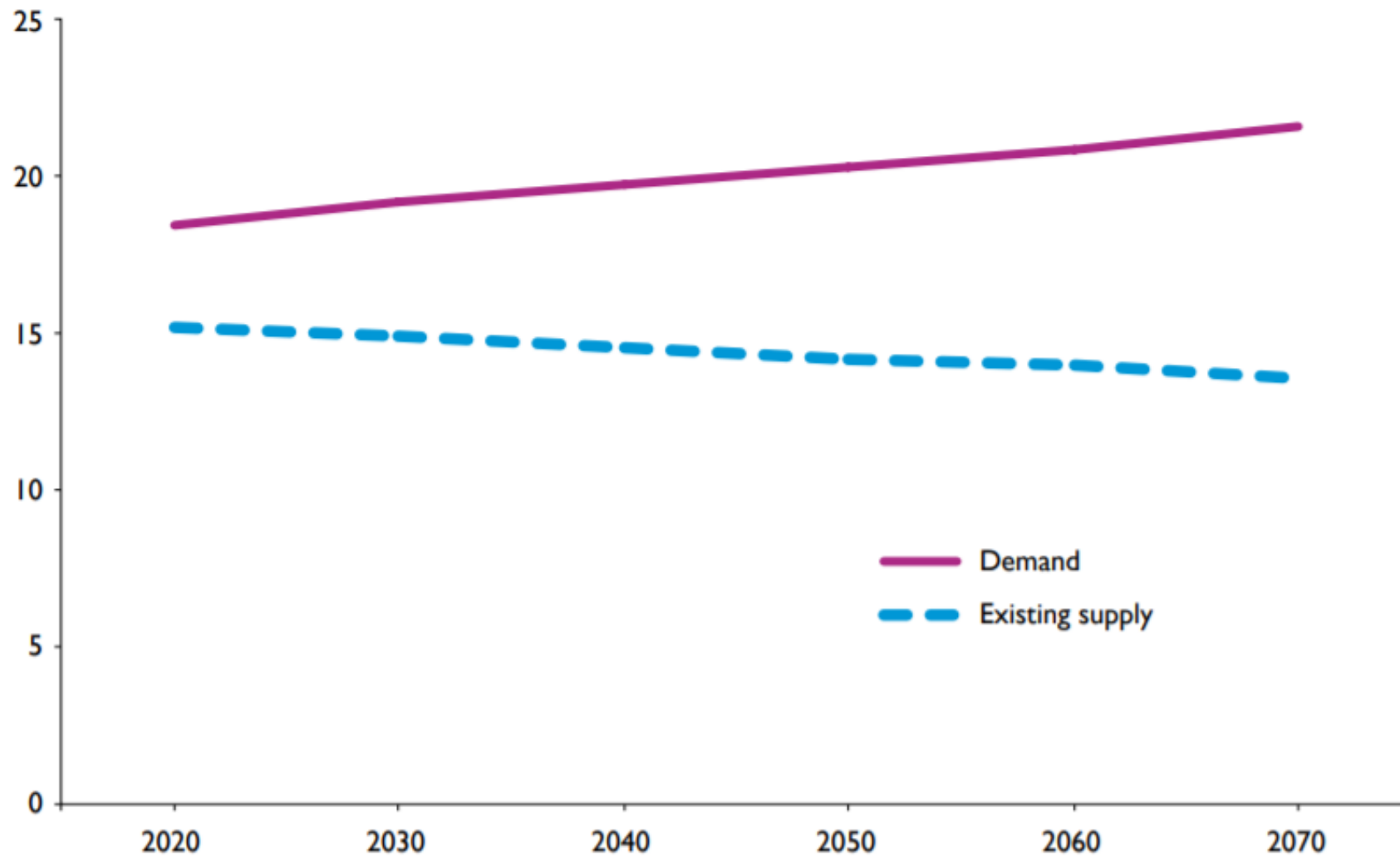


Figure ES.3 - Projected annual water demand and existing water supply in Texas (millions of acre-feet)



Groundwater Conservation Districts

- Rulemaking
 - Make and enforce rules based on management plan
 - Very broad authority and rulemaking power
 - Public process requiring public notice and opportunity to comment
 - Rules may limit production based on tract size or spacing of wells
 - Permitting and registration of wells
 - Permit required for drilling, equipping, operating or completing wells
 - May regulate well spacing and production
 - Permits issued so as to achieve “desired future conditions”

Groundwater Conservation Districts

- Exemptions from Permitting
 - Well used solely for domestic use or for providing water to livestock if well incapable of producing more than 25K gallons per day if well located on a tract larger than 10 acres
 - Well used solely to supply water for a rig that is actively engaged in drilling or exploration operations permitted by RRC provided 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....include fracking operations?
 - Well authorized under permit from RRC for mining activities
 - Still must register wells and otherwise conform to GCD rules

Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

- Confirmed severability of groundwater estate from surface estate
- Confirmed groundwater estate is the dominate estate, just as mineral estate
- Confirmed Accommodation Doctrine applies in context of groundwater



Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

- Coyote Ranch – 26,000 acres in Bailey County in the Texas Panhandle, on the New Mexico border
- 1953, during “the most costly and one of the most devastating droughts in 600 years” the City of Lubbock purchased the Ranch’s groundwater
- Ranch conveys the groundwater to the City, reserving water for domestic use, ranching operations, oil and gas production and agricultural irrigation



Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

- Deed contains detailed surface use provisions for the City:
 - “full...rights of ingress and egress in, over, and on [the Ranch], so that the [City] may ***at any time and location*** drill water wells and test wells on said lands...”
 - “has the rights to use all or part of [the Ranch] ***necessary or incidental*** to the taking, production, treating, transmission, and delivery of....water”.



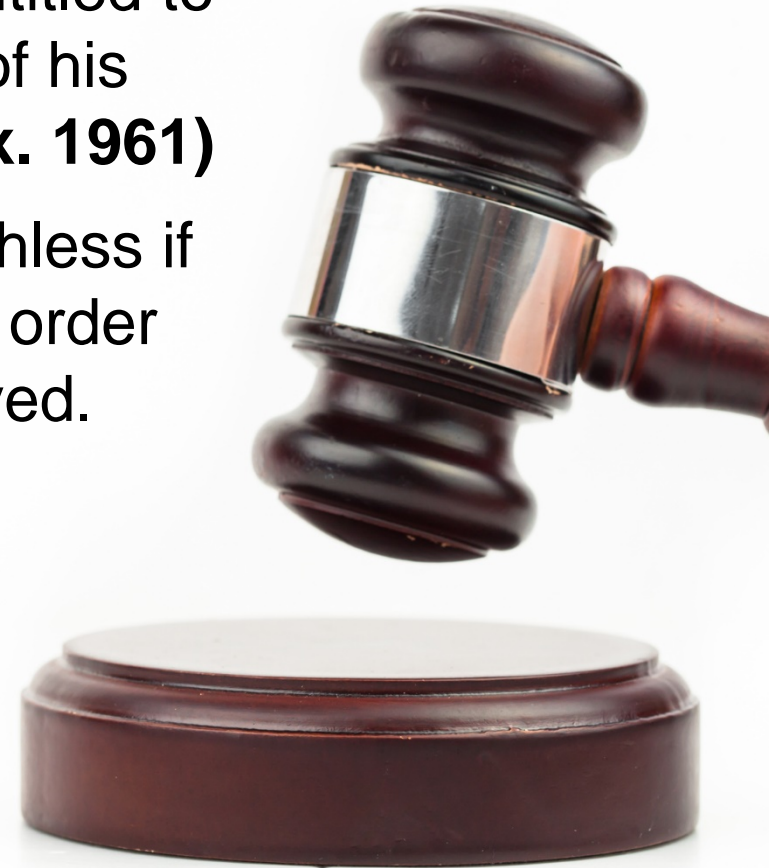
Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

- 2012 City announced plans to greatly increase water extraction on the Ranch
- Ranch objected – “City has contractual and common law responsibility to use only that amount of the surface that is reasonably necessary to its operations.....a duty to conduct its operations with due regard for the rights of the surface owner.”
- City – deed provides full rights to pursue its plans as it sees fit, and even if silent there is no duty on groundwater owners, like mineral owners, to accommodate the surface owner.
- Court – “We disagree with the City that the deed provisions alone determine its rights to use the Ranch”



Coyote Lake Ranch, LLC v. City of Lubbock, *498 S.W.3d 53 (Tex. 2016)*

- “[The mineral] estate is dominant, ... and its owner is entitled to make reasonable use of the surface for the production of his minerals.” ***Brown v. Lundell*, 344 S.W.2d 863, 866 (Tex. 1961)**
- “a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.” ***Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943)**
- Court rules the same applies to the groundwater estate.



Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

- Should the Accommodation Doctrine apply to the severed groundwater estate? YES
- Surface owner must show groundwater/mineral owner use completely precludes or substantially impairs existing surface use, and
 - No reasonable alternative method available to surface owner, *AND IF CARRY THIS BURDEN*
 - Show alternative, reasonable, customary and industry- accepted methods available to groundwater/mineral owner ***Merriman v. XTO Energy, Inc. 854 S.W.2d 909 (Tex. 1993)***



Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

- Takeaways
 - Implied easements over surface....just like mineral estate
 - Right to use as much of the surface estate as is reasonably necessary to produce and remove the groundwater
 - Surface Use Agreements – tables have turned
 - Dueling dominant estates



PRODUCED WATER

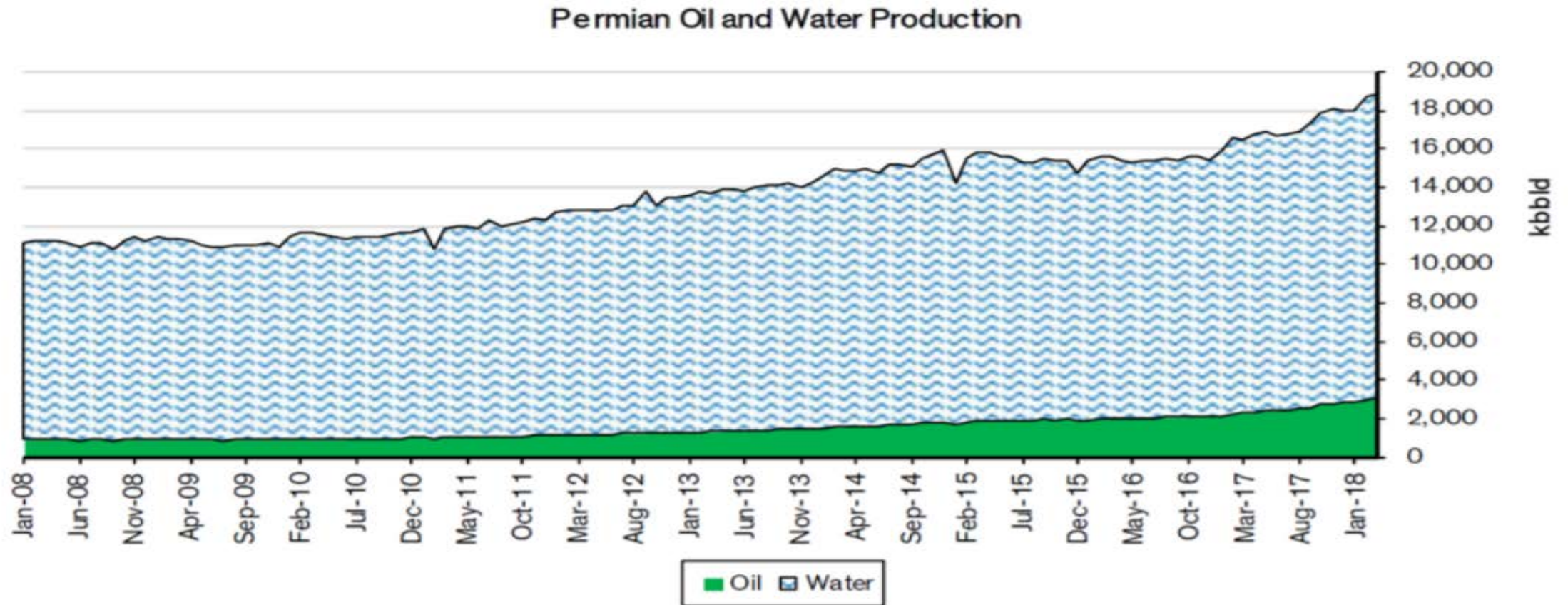


Produced Water

- Water produced as a byproduct in oil and gas production
- Massive growth in production



Produced Water



Source: DI Desktop, Bernstein analysis

Current Disposal Trends

- Reinjection/waterflooding less common
 - Tight shale plays like Wolfcamp
- Almost all produced water disposed of in disposal wells
- Shift from trucking to pipeline as volumes increase
 - \$2.50/bbl to as low as \$0.30/bbl
 - Significant upfront investment
- Varying contents and type make treatment difficult and costly

Current Disposal Trends

- 2019: \$2.5 billion of water-related mergers, acquisitions, private equity investments and other deals in the oilfield, according to the global energy research firm Wood Mackenzie



Current Disposal Trends

Produced Water Transfer Closes \$100 Million Strategic Financial Partnership with Orion Energy Partners to Fund Cotton Valley and Haynesville Infrastructure

December 19, 2017 11:00 AM Eastern Standard Time

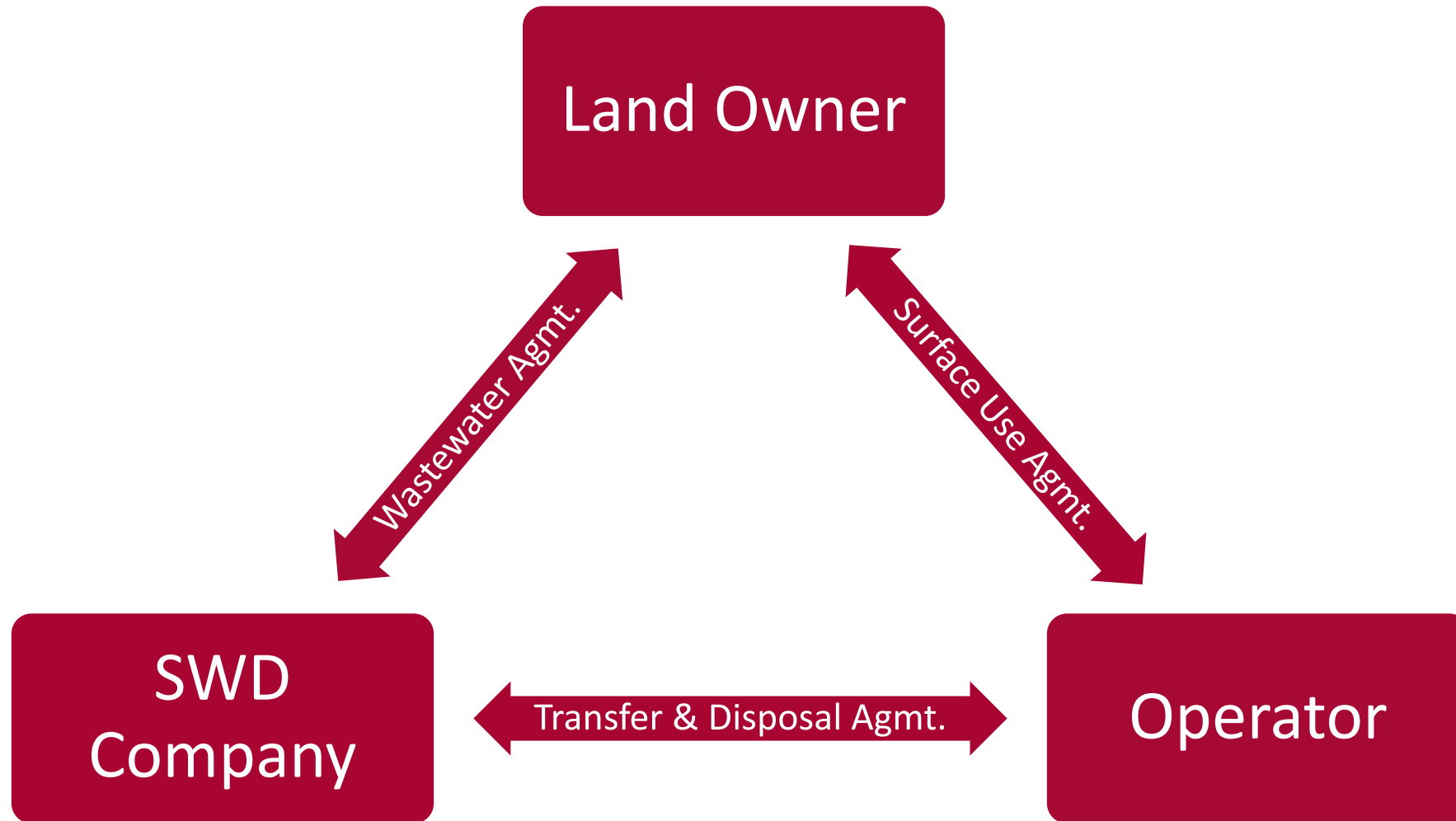
Pilot Flying J Strengthens Logistics Business to Better Serve Oil and Gas Industry

Joint Venture to Form PWT LLC

In June, Pilot Flying J, Produced Water Transfer LLC and Complete Vacuum and Rental LLC formed PDPS LLC, a new company operating under the name PWT LLC.

PWT will leverage its fleet of tanker trucks and network of salt water gathering pipelines and disposal facilities to provide salt water transportation and disposal services to the oil and gas sector. The new company will focus on providing services to producers across Louisiana, Oklahoma and Texas. Pilot Flying J will own a majority of the business, which will be managed by Produced Water Transfer's President and CEO Steve Kent and his experienced management team.

Recent Case Study



Recent Case Study

- Surface Use Agreement
 - ... “Should a wastewater or saltwater disposal facility exist on any surface acreage owned by the Owner, and be located within ten miles of the leased Surface, the Operator must dispose of any wastewater or saltwater fluids from any production associated with the Leased Premises...at the facility on Owner's surface...provided the disposal fee is a market-based rate unless Owner gives Operator written permission to do otherwise.”
 - Includes liquidated damages for breach

Recent Case Study

- Wastewater Agreement
 - Similar to standard SWD lease
 - Prohibition on Owner amending Surface Use Agreement to amend water disposal language without SWD Company consent
 - Prohibition on SWD Company recycling water or selling to others
 - Obligation of SWD Company to complete well by deadline
 - Owner gets royalty for each barrel disposed of on Owner's land

Recent Case Study

- Saltwater Transfer and Disposal Agreement
 - Similar to standard gathering and disposal agreement
 - Operator has first priority and preference for disposal on Owner's land
 - Transportation and disposal fee per barrel
 - Dedication of all produced water

Future Disposal Issues

- Wood Mackenzie: \$3–6/bbl water disposal cost
- RRC further reducing well injection pressures
 - Seismic activity - injection limits in Oklahoma
 - New Mexico restricting number of disposal wells

Recycling produced water is still very rare.

“

“Texas has been blessed with the geology that lends itself toward disposal, and I see disposal as an important part of the overall oil and gas framework virtually forever. Disposal and recycling are not mutually exclusive. There’s almost always some portion of the recycled product that needs to be disposed of.”

Executive director of the Texas Water Recycling Association

Recycling

- Technologies more widespread in basins with fewer disposal wells
- Disposal costs to drive R&D costs
- Pressures in arid regions to recycle water for fracing needs and other uses
- Agricultural uses
 - Texas A&M and Anadarko study

Recycling

- RRC exempted “mobile” recyclers from applying for permits
- U.S. EPA beginning “extensive study” to find alternatives to the use of underground injection
- Simmons Energy: At least a dozen water recycling companies in Permian
- Increased private equity money in recycling
- Chapter 122 Natural Resources Code

Chapter 122 – Natural Resources Code

- Unless otherwise expressly provided by a contract, bill of sale, or other legally binding document, water “transferred to a person who takes possession of that waste for the purpose of treating the waste for a subsequent beneficial use” is now the property of that recycler
- Drilling operations that elect to send their waste to recyclers for beneficial reuse are relieved of tort liability for damages if there is a contractual agreement that the treated waste will be used “in connection” with drilling procedures
- Recyclers who pass the now-treated waste to a subsequent party would also be relieved of tort liability

Chapter 122 – More Questions than Answers?

- Produced water owned by surface owner
- Taking claim under the Texas Constitution?
- Chapter 122 silent on revenues from sale of produced water



HB 3246



1 AN ACT
2 relating to the treatment and recycling for beneficial use of
3 certain waste arising out of or incidental to the drilling for or
4 production of oil or gas.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section 122.002, Natural Resources Code, is
7 amended to read as follows:

8 Sec. 122.002. OWNERSHIP OF FLUID OIL AND GAS WASTE
9 TRANSFERRED FOR TREATMENT AND SUBSEQUENT BENEFICIAL USE. Unless
10 otherwise expressly provided by an oil or gas lease, a surface use
11 agreement, a contract, a bill of sale, or another ~~[other]~~ legally
12 binding document:

13 (1) when fluid oil and gas waste is produced and used
14 by or transferred to a person who takes possession of that waste for
15 the purpose of treating the waste for a subsequent beneficial use,
16 the waste ~~[transferred material]~~ is considered to be the property
17 of the person who takes possession of it for the purpose of treating
18 the waste for subsequent beneficial use until the person transfers
19 the waste or treated waste to another person for disposal or use;
20 and

HB 3246



- Approved by Texas Legislature in Spring 2019
- Effective September 1, 2019
- Does it answer the questions?
- New Mexico House Bill 546

Contract Provisions

- Be proactive in including contract provisions for produced water issue
 - Address ownership, care, custody and control
 - Address fees, expenses and revenues
- Prepare for produced water to be an asset rather than waste



HB 3067



- Filed March 4, 2019
- Rep. Trent Ashby (R – Lufkin)
- Oil & gas production tax credit for producers that recycle produced water
- Tax credit up to \$25 million per year
- Died in committee

Produced Water - Summary

- Focus on micro and macro impacts of produced water on oil and gas industry
- Understand varying issues with produced water in different regions
- Be prepared for change
- Make sure your contracts are ready for issues that are not issues, yet

THANK YOU!



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