

YOUR LAND, YOUR WATER?

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EXEMPT USES OF GROUNDWATER AND SURFACE WATER

I. INTRODUCTION

This paper describes what rights a landowner has to use water available on the land without seeking approval for the use. It does not address use requiring a permit from the TCEQ or a groundwater conservation district. It will explore exempt uses of surface water and groundwater recognized in Chapters 11 and 36 of the Texas Water Code. The paper also discusses how various groundwater conservation districts have applied Chapter 36 exemptions in their rules, and the distinction between diffused surface water and state surface water and what that means for the landowner.

II. GROUNDWATER

Nine major aquifers supply about 97 percent of the groundwater used in Texas, with 21 minor aquifers supplying the other three percent.¹ Each aquifer formation is unique, varying in the volume of water stored and ability to recharge. Rainfall also varies widely across the State, as do other conditions affecting groundwater use. Thus the State's preferred method of groundwater management is through local groundwater conservation districts and the rules promulgated by those districts in accordance with the provisions of Chapter 36 of the Texas Water Code.² As of September 2018, there are 98 confirmed groundwater conservation districts in Texas, with two others pending confirmation.³ The confirmed number includes the Edwards Aquifer Authority, a special law district with its own enabling legislation.⁴ Texas's two major subsidence districts also have authority to regulate groundwater production, although these districts are not groundwater conservation districts as defined under Chapter 36.⁵ In the absence of a groundwater district landowners need no regulatory approval to drill and operate a groundwater well. Local jurisdictions do, in some instances, limit or prohibit wells.

¹ See Tex. Water Dev. Bd., *Water for Texas—2007* (Nov. 14, 2006) available at <http://www.twdb.state.tx.us/wrpi/swp/swp.htm>.

² TEX. WATER CODE ANN. § 36.0015 (Vernon 2008).

³ See Tex. Water Dev. Bd., *Map of Groundwater Conservation Districts (Confirmed and Pending Confirmation)* (December 2017) available at <http://www.twdb.state.tx.us/mapping/index.asp#gcdmap>.

⁴ See, e.g., The Edwards Aquifer Authority is one special law district with its own enabling legislation. See Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as amended by Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60–2.62 and 6.01–6.05, 2001 Tex. Gen. Laws 1991, 2021–22 and 2075–76; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen. Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01–2.12, 2007 Tex. Gen. Laws 4612, 4627; and Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901.

⁵ See Tex. Water Dev. Bd., *Map of Groundwater Conservation Districts* (December 2017); see also, e.g., Harris-Galveston Subsidence District, TEX. SPEC. DIST. LOCAL LAWS CODE ANN. § 8801.001-8801.204 (Vernon 2008).

A. Exemptions under Chapter 36

When adopting rules regulating groundwater production, all districts must comply with their enabling legislation.⁶ The following sections discuss the enabling legislation and rules of Chapter 36 GCDs, with a focus on the legislation relating to exempt uses of water and the district rules promulgated pursuant to that authority.

1. A GCD's authority and limits

Chapter 36 of the Texas Water Code grants GCDs broad authority to manage, conserve, and protect groundwater resources through rulemaking and permitting.⁷ A GCD is authorized to require a permit for the “drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps,” if the well will be used for commercial purposes and it may require permit amendments for changes in “the withdrawal or use of groundwater” during a permit term.⁸ By rule a GCD must “determine each activity regulated by the district for which a permit or permit amendment is required.”⁹ It is a violation of Chapter 36 for any person, firm, or corporation to “drill a well,” “alter the size of a well or well pump such that it would bring that well under the jurisdiction of the district,” or “operate a well” without first obtaining a permit.¹⁰

Section 36.117(a) grants discretion to a GCD to exempt wells from the requirement of obtaining a drilling permit, an operating permit, or any other permit required by Chapter 36 or the GCD's rules.¹¹ Thus, a GCD's rules should always be consulted to determine if the GCD has exempted other types of wells or broadened the qualifications. Chapter 36 limits GCD discretion by requiring GCDs, absent contrary language in their enabling legislation, to exempt certain types of wells from the “permitting” requirements of the GCD. Section 36.117(b) prohibits a GCD from requiring any permit for:

(1) a well used solely for domestic use or for providing water for livestock or poultry on a tract of land larger than 10 acres that is either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;

(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 well is located on the same lease or field associated with the drilling rig; or

(3) the drilling of a water well authorized under a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, or for production

⁶ See *Guitar Holding Co. v. Hudspeth County Underground Water Conserv. Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008); *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004).

⁷ TEX. WATER CODE §§ 36.101(a) (rulemaking authority), 36.113(a) (permitting authority), 36.116(a)(2)(A)-(F) (listing specific methods a GCD may use to limit groundwater production).

⁸ *Id.* § 36.113(a).

⁹ *Id.* § 36.114(a).

¹⁰ *Id.* § 36.115.

¹¹ *Id.* § 36.117(a).

from such a well to the extent the withdrawals are required for mining activities regardless of any subsequent use of the water.¹²

As addressed below, there are qualifications to these mandatory exemptions from permitting. Nor is the list absolute. Enabling legislation or subsequent amendments to their enabling legislation for some districts restrict these exemptions further and some broaden these exemptions. Many districts, by rule, have exempted larger wells or eliminated some of the statutory conditions.

2. Qualifications in Section 36.117

a. General qualifications

Even if a well is exempted from permitting under Section 36.117(a) or (b), the well still must (1) “be registered in accordance with rules promulgated by the district” and (2) “be equipped and maintained so as to conform to the district’s rules requiring installation of casing, pipe, and fittings to prevent the escape of groundwater from a groundwater reservoir to any reservoir not containing groundwater and to prevent the pollution or harmful alteration of the character of the water in any groundwater reservoir.”¹³ The driller of a well exempted under Section 36.117(a) or (b) must also file a drilling log with the GCD.¹⁴

Section 36.117(j) states that a well used to supply water in a subdivision of land for which a plat approval is required by Chapter 232, Local Government Code, is not exempt under Section 36.117(b).¹⁵ However, a GCD presumably has discretion to exempt such wells under Section 36.117(a).

Finally, Section 36.117(k) states that groundwater withdrawn from any type exempt well and subsequently transported outside the boundaries of the GCD is subject to any applicable production and export fees implemented by the GCD under Sections 36.122 and 36.205.¹⁶

b. Wells used for domestic and livestock purposes

The specific language of Section 36.117(b) provides that the well must be used solely for domestic use or for providing water for livestock or poultry. Although not specifically mentioned, presumably water used for wildlife purposes would likewise be viewed as an exempt use. Domestic use is not defined in Section 36.001, but the TCEQ defines domestic use to include drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard. The definition goes on to state that it includes use for watering of domestic animals, and for water recreation including aquatic and wildlife enjoyment. The definition says that domestic use does not include water used to support activity for which consideration is given or received or for which the product of the activity is sold.

This definition can be used as guidance in determining whether a well qualifies as exempt because it is used for domestic purposes, but it does not answer all questions related to what qualifies. For instance, does a church qualify? Do wells on a ranch leased for hunting activities qualify? A well for an office building occupied by only one tenant? Are swimming pools included within the definition?

¹² *Id.* § 36.117(b)(1)-(3).

¹³ *Id.* § 36.117(h).

¹⁴ *Id.* § 36.117(i).

¹⁵ *Id.* § 36.117(j).

¹⁶ *Id.* § 36.117(k).

While not a huge issue in most parts of the state, the Edwards Aquifer Authority has quietly been notifying owners of wells who thought their use was exempt from permit requirements that their use was, in fact, not within the exemption. These include wells for churches, office buildings and other small commercial facilities, even though non-commercial.

c. What limits exist on exempt use

A GCD may not restrict the production of any well that is exempt from permitting for purposes of domestic or livestock use.¹⁷ For instance, so long as the well continues to qualify for exempt well status under Section 36.117(b)(1), a GCD may not limit production from that well during times of drought. An interesting qualification exists for exempt domestic and livestock wells located in a GCD within the Hill Country Priority Groundwater Management Area. Section 36.117(d)(1) states that, notwithstanding Section 36.117(b), a GCD may require a well to be permitted by the GCD and to comply with all GCD rules if “the withdrawals from a well in the Hill Country Priority Groundwater Management Area and exempted under Subsection (b)(1) are no longer used solely for domestic use or to provide water for livestock or poultry.”¹⁸ This language seems superfluous. The plain terms of Section 36.117(b)(1) allow a GCD, regardless of its location, to regulate any well exempted under Section 36.117(b)(1) that is no longer “used solely for domestic use or for providing water for livestock or poultry.” The exemption simply does not apply unless the wells are used “solely” for the stated purposes. A person does not have a statutory right to, and a GCD need not provide, an exemption for wells that do not meet the plain terms of Section 36.117(b). Of course, a GCD has discretion under Section 36.117(a) to allow an exemption for mixed uses.

d. Wells used for oil/gas exploration and surface coal mining

Section 36.117(b)(2) exempts 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 Texas Railroad Commission.¹⁹ The person holding the permit must drill and operate the water well and the well must be located on the same lease or field associated with the drilling rig.²⁰ Notwithstanding this drilling exemption, a GCD may require a well to be permitted and to comply with all GCD rules if the well is no longer 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.”²¹ However, Section 36.117(g) prohibits a GCD from denying “an application for a permit to drill and produce water for hydrocarbon production activities if the application meets all applicable rules as promulgated by the district.”²²

While the issue is not settled by the courts, most groundwater conservation districts take the position that water produced for support in hydraulic fracturing operations does not qualify under this exemption even if it meets all other requirements of Subsection (b)(2). Perhaps the practical reason this issue has not been litigated is that the other limitations, particularly that the well be located on the property where the drilling will occur, operate to prevent its widespread use in support of hydraulic

¹⁷ *Id.* § 36.117(c).

¹⁸ *Id.* § 36.117(d)(1).

¹⁹ *Id.* § 36.117(b)(2).

²⁰ *Id.*

²¹ *Id.* § 36.117(d).

²² *Id.* § 36.117(g).

fracturing operations. Despite that, many oil and gas operators believe the exemption applies and may be prepared to obtain a judicial interpretation of this exemption.

Section 36.117(b)(3) exempts the drilling of or production from wells permitted by the Texas Railroad Commission under Chapter 134 of the Texas Natural Resources Code. Chapter 134 is the Texas Surface Coal Mining and Reclamation Act, which grants the Texas Railroad Commission authority to regulate and issue permits for surface coal mining and reclamation operations.²³ The entity holding the Texas Railroad Commission permit that authorizes the drilling of the water well exempted under Section 36.117(b)(3) must file monthly reports to the GCD containing: “(1) the total amount of water withdrawn during the month; (2) the quantity of water necessary for mining activities; and (3) the quantity of water withdrawn for other purposes.”²⁴

Despite this exemption, a GCD may require this type of well to be permitted and to comply with all GCD rules if the withdrawals from the well “are no longer necessary for mining activities or are greater than the amount necessary for mining activities specified in the permit issued by” the Texas Railroad Commission.²⁵ However, even if a GCD can regulate a mining well of this type, the GCD may not require the well to comply with the GCD’s spacing requirements.²⁶

Section 36.117(l) states:

This chapter applies to water wells, including water wells used to supply water for activities related to the exploration or production of hydrocarbons or minerals. This chapter does not apply to production or injection wells drilled for oil, gas, sulphur, uranium, or brine, or for core tests, or for injection of gas, saltwater, or other fluids, under permits issued by the Railroad Commission of Texas.²⁷

The first sentence in Section 36.117(l) clarifies that Chapter 36 applies to all water wells, even if used to explore for or produce “hydrocarbons or minerals.” This reiterates that, even if the permit exemptions in Section 36.117(b)(2)-(3) are available for wells using water to explore for or produce “hydrocarbons or minerals,” the wells still must meet other requirements in Chapter 36 that a GCD can apply to all wells, such as registering and properly equipping the well and filing a driller’s log.²⁸ In addition to these requirements, it is important to note that a GCD can require the owner or operator of a well that is exempt under Section 36.117(b)(2)-(3), “to report groundwater withdrawals using reasonable and appropriate reporting methods and frequency.”²⁹ This means a GCD can require exempt oil and gas or surface coal mining water wells to file groundwater production reports. Thus, while the operator may be exempt from the requirement to obtain a drilling or operating permit, the GCD’s rules will likely require the operator to make filings with the GCD and to comply with equipment standards.

²³ TEX. NAT. RES. CODE ANN. §§ 134.001-.188 (Vernon 2001 & Supp. 2008).

²⁴ TEX. WATER CODE § 36.117(e).

²⁵ *Id.* § 36.117(d)(3).

²⁶ *Id.* § 36.117(f).

²⁷ *Id.* § 36.117(l).

²⁸ *Id.* § 36.117(h), (i).

²⁹ *Id.* § 36.111(b).

The second sentence in Section 36.117(1) clarifies that Chapter 36 does not apply to certain production or injection wells permitted by the Texas Railroad Commission, presumably because these are not water wells as contemplated by Chapter 36.

3. How some GCDs apply the exemptions

Following is a sample of how GCDs within the various groundwater management areas of the state treat exempt uses in their rules, with a focus on the oil/gas exploration exemption. The discussion relates only to the plain language of the GCD's rules as posted on their respective websites and does not relate to how these exemptions are applied in practice by the GCDs.

a. Brazos Valley GCD (Nov. 19, 2017)³⁰

The Brazos Valley GCD is located in east-central Texas, covering Brazos and Robertson Counties. Rule 8.1(a) of the Brazos Valley GCD provides an exemption for domestic and livestock wells, but raises the cap on production capacity from 25,000 gallons per day to 50,000 gallons per day. This increase in production capacity is a good example of a GCD's discretion in Section 36.117(a) to broaden the mandatory exemptions in Section 36.117(b).

Rule 8.1(b) of the Brazos Valley GCD exempts wells drilled or operated pursuant to a permit issued by the Texas Railroad Commission up to the amount of that underlying permit. This presumably captures both the oil and gas exploration exemption and the surface coal mining exemption of Sections 36.117(b)(2)-(3), as both are contingent on an underlying Texas Railroad Commission permit. A permit from the district is required for production exceeding the underlying Texas Railroad Commission permit.

b. Brewster County GCD (Jan. 18, 2018)

Brewster County GCD is located in the trans-pecos area of far west Texas, near Big Bend National Park. Rule 5.401 of the Brewster County GCD provides the exclusions and exemptions from permitting. While a drilling permit and well registration are required for all new wells, an operating permit is not required for an exempt well. Exempt wells that were drilled prior to the effective date of the district's rules are not required to be registered, although the rules encourage well owners to voluntarily register those wells.

Rule 5.401(9)(1)(A) defines an "exempt well" as "any well used solely for Domestic/Residential uses or for providing water for livestock and wildlife or poultry on a tract of land larger than ten (10) acres if the well is drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day." Rule 5.401(9)(1)(B) allows an exempt well on less than 10 acres if no retail water service is available, a distinctly practical modification of the Chapter 26 provision.

The definition of "domestic" highlights the common line between commercial and non-commercial uses of groundwater from exempt wells. For instance, a person can use water from an exempt well for growing a family pecan orchard or garden. But, if the person sells the pecans for profit or uses the vegetables at a local family restaurant, the exemption is likely lost because "consideration is given or received."

Wells required to be exempt under Section 36.117(b)(2)-(3) are described as being exempt using the exact statutory language, providing no guidance on whether water for fracking is exempt.

³⁰ The date next to each GCD represents the most recent revision to the GCD's rules as indicated by the GCD.

c. Cow Creek GCD (Dec. 11, 2017)

The Cow Creek GCD is located in the Hill Country Priority Groundwater Management Area of central Texas and covers Kendall County. Rule 3.5.A. of the Cow Creek GCD states that all wells capable of producing more than 25,000 gallons per day must obtain an operating permit and pay a production fee. Rule 3.5.B. states that all wells “incapable of producing more than 25,000 gallons per day (17.36 gallons per minute), except such wells used for domestic or livestock purposes as defined in Rule 2, shall be required to obtain an operating permit” but are not required to pay a production fee. So, while some wells with limited capacity are not subject to production fees, only domestic and livestock wells incapable of producing more than 25,000 gallons per day are exempt from both permitting and paying production fees. The district’s rules do not address the other exemptions required by Chapter 36 of the Texas Water Code; that is, they make no specific provision for wells drilled solely to supply water to a rig engaged in oil and gas drilling or exploration. Although this would not be clear from the GCD’s rules alone, those exemptions must apply to the minimum extent set out in the statute without regard to the district’s rules.

d. Glasscock GCD (Apr. 15, 1986, as amended)

The Glasscock GCD is located in west Texas roughly half way between the cities of San Angelo and Midland. The district covers Glasscock County and a northwest portion of Reagan County. Rule 3(a) of the Glasscock GCD exempts from permitting the drilling and operation of a well that is “exempt by the law or by these rules.” Rule 3(b) clarifies that “[n]o permit shall be required for the drilling of wells exempt by §36.117 of Chapter 36, Texas Water Code.” Rule 3(c) requires that exempt wells be registered before drilling and be equipped and maintained according to the district’s rules (i.e., with respect to installation of casing, pipe, and fittings).

Rule 1(j) defines “exempt well” as “any well for which the District is prohibited to require a permit under Texas Water Code §36.117,” and then provides a general description of the language provided by the statute. Through this definition and the several references to Section 36.117 of the Texas Water Code, the Glasscock GCD essentially provides exemptions from permitting to the minimum extent required by statute.

e. High Plains Underground Water Conservation District No. 1 (Mar. 13, 2015)

The High Plains Underground Water Conservation District No. 1 is a massive district located in the Texas panhandle and headquartered in Lubbock, Texas. The district covers 10,728 square miles, including Bailey, Cochran, Hale, Lubbock, Lynn, and Parmer Counties, as well as portions of Armstrong, Castro, Crosby, Deaf Smith, Floyd, Hockley, Lamb, Potter, and Randall Counties.

Prior to amendments to its rules, the district had chosen to expand the statutory exemptions by not requiring a permit for the drilling or completion of any well not capable of producing more than 36,000 gallon per day, regardless of type of use. Rule 4.1(c) now follows Texas Water Code §36.117, generally wells drilled for domestic use and the production of oil, gas, or other minerals. The exception is that there is no minimum number of acres, so even a less than 10 acre tract is eligible for exempt well authorization.

Rule 10.4(b) also provides exemptions from permitting for the “construction, use, or operations of a new shaft,” which exemptions include penetrations for surface mines for oil and gas and other minerals regulated by the Texas Railroad Commission, penetrations authorized by the Texas Railroad Commission of less than 36 inches in diameter whose primary purpose is the ventilation of underground workings or

structures, and penetrations authorized by the Texas Railroad Commission for things such as transmission of fuels, concrete slurries, and muds.

f. Refugio GCD (Aug. 29, 2005)

The Refugio GCD is located on the south Texas gulf coast and covers all of Refugio County. According to Rule 5.1, all wells in the district must be registered and classified based on use, and a person cannot drill or operate a non-exempt well without a permit. Existing exempt wells can be registered on a voluntary basis. Rule 5.2 states:

An “Exempt Well” is a well that does not require a Permit and is used solely for domestic purposes or for providing water for livestock, poultry or environmental flows that is drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons (17.4 gpm) of groundwater per day; . . .

Rule 6.4 clarifies that exempt domestic and livestock wells and wells used to supply water for hydrocarbon production under a Texas Railroad Commission permit (both defined consistent with Section 36.117) are not subject to the permitting requirements in Rule 6.

Rule 1.1 defines “domestic use or purpose” as:

the use of groundwater by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold. Domestic use does not include use by or for a public water system.

This definition contains unique language regarding the use of water for “water recreation including aquatic and wildlife enjoyment.” However, the definition also contains the common prohibition against use of water for commercial purposes, again highlighting the line between recreation and for profit activities. Under this definition, a person could use water from an exempt well to fill a pond to draw in ducks for hunting purposes, but as soon as that person sells duck hunts on the property the exemption is lost.

An interesting aspect of these rules is the exemption for wells used to provide environmental flows. Rule 1.1 defines “environmental flow” as:

the streamflow necessary to sustain habitats (including channel morphology and substrate), encourage spawning and the migration of fauna species to previously unpopulated habitats, enable the processes upon which succession and biodiversity depend, and maintain the desired nutrient structure within lakes, streams, wetlands and riparian areas. Environmental flows may comprise elements from the full range of flow conditions which describe long term average flows, variability of flows including low flows and irregular flooding events.

This exemption is important given the district’s location to the Gulf of Mexico, and is a great example of a GCD’s discretion to exempt various types of wells under Section 36.117(a).

This sample of rules shows how GCDs across the state attempt to meet their local needs, even through exemptions. Some GCDs simply mirror or incorporate the language of Section 36.117. Some GCDs use Section 36.117(a) to expand the mandatory exemptions by relaxing the production caps or the purposes for which water can be used. Other GCDs seem more restrictive or don't even mention all the exemptions required by statute, in which cases Section 36.117 controls. Even when an exemption applies, GCDs usually require registration and appropriate equipping and maintenance of the well.

III. SURFACE WATER

Generally, surface water is either state-owned or diffused.³¹ The distinction between diffused surface water and state-owned surface water is important for a number of reasons, most notably permitting, ownership, and damages caused by diversion or impoundment. Part III of this paper addresses how to determine if surface water is diffused or state-owned, and what exemptions are available if the water is state-owned.

A. Distinguishing diffused surface water from state surface water

Section 11.021(a) of the Texas Water Code defines water owned by the state:

The water 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.³²

Consistent with this definition, Texas courts refer to state surface water as “water in a watercourse.”³³ Before using or “appropriating” state surface water, or beginning “construction on any project designed for the storage, taking, or diversion, of” state surface water, a person must obtain a permit from the Texas Commission on Environmental Quality (TCEQ).³⁴ As explained below, there are statutory exemptions from permitting.³⁵ In addition to the exemptions, a person can use diffused surface water without a permit if the water is not state-owned.

Before surface water becomes “water in a watercourse,” it usually spends time as diffused surface water. “Diffused surface water” is water from falling rains or melting snows that is diffused across the land surface and has not yet reached some bed or channel in which water is accustomed to flow.³⁶ Diffused surface water is the private property of the owner of the land on which it gathers, so if the landowner can capture or impound these “casual and vagrant” waters before they converge into a natural gully, stream, or other watercourse, they remain his property.³⁷ Because the state does not own diffused

³¹ *Dietrich v. Goodman*, 123 S.W.3d 413, 417-18 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

³² TEX. WATER CODE ANN. § 11.021(a) (Vernon 2008).

³³ *Citizens Against Landfill Location v. Tex. Comm'n on Env'tl. Quality*, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).

³⁴ TEX. WATER CODE § 11.121.

³⁵ *Id.* §§ 11.142, .1421, .1422.

³⁶ *Tex. Women's Univ. v. Methodist Hosp.*, 221 S.W.3d 267, 277–78 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Dietrich*, 123 S.W.3d at 417-18.

³⁷ *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221, 228 (1935); *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied); *Hoefs v. Short*, 190 S.W. 802, 806 (Tex. Civ. App.—El Paso 1916), *aff'd*, 114 Tex. 501, 273 S.W. 785 (1925).

surface water (that is, before it enters a natural watercourse), a private landowner can use, divert, or impound the water without a permit.³⁸ So long as the owner maintains physical control of the captured water, he may sell or further use the water.³⁹ But if captured water is abandoned into a natural watercourse, it becomes property of the state.⁴⁰

The key to owning and using diffused surface water without a permit is to capture, through some artificial means, diffused surface water before it enters a watercourse.⁴¹ The definition of “watercourse” is therefore critical to determining whether the water at issue is diffused and subject to use without permit.

1. What is a watercourse?

A watercourse is a physical feature with “(1) a bank and bed, (2) a current of water, and (3) a permanent source of supply.”⁴² These requirements need not be technically met. For instance, the bed and banks may be “slight, imperceptible, or absent,” and the current of water “need not be continuous” but can be “intermittent as to flow” or even “dry for long periods of time.”⁴³ As stated by the Texas Supreme Court in the seminal case of *Hoefs v. Short*, having a permanent source of supply “merely means that the stream must be such that similar conditions will produce a flow of water, and that these conditions recur with some regularity, so that they establish and maintain a running stream for considerable periods of time.”⁴⁴ Below are specific situations addressed by courts that assist in identifying watercourses, and thus state water.

When rainwater falls directly on wooded acreage or features such as tennis courts, it is diffused surface water. But when that water is concentrated and directed toward a storm sewer by a shallow, but

³⁸ See *Citizens Against Landfill Location v. Tex. Comm’n on Env’tl. Quality*, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).

³⁹ See *Citizens Against Landfill Location*, 169 S.W.3d at 274; *Guelker v. Hidalgo County WCID No. 6*, 269 S.W.2d 551 (Tex. Civ. App.—San Antonio 1954, writ ref’d n.r.e.); *South Tex. Water Co. v. Bieri*, 247 S.W.2d 268 (Tex. Civ. App.—Galveston 1952, writ ref’d n.r.e.); see also *Dalon v. City of DeSoto*, 852 S.W.2d 530, 538-39 (Tex. App.—Dallas 1992, writ denied) (“When rainfall is under control, either by ditches, tanks, ponds, or pipes, it no longer is considered surface water.”).

⁴⁰ See *City of San Marcos v. Tex. Comm’n on Env’tl. Quality*, 128 S.W.3d 264, 276–77 (Tex. App.—Austin 2004, pet. denied).

⁴¹ Anyone diverting or impounding diffused surface water must be wary of damages that might be caused to other landowners as a result of that diversion or impoundment. Section 11.086 of the Texas Water Code provides that no person may divert or impound the natural flow of surface waters, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded. TEX. WATER CODE § 11.086. A person injured by an overflow of water caused by an unlawful diversion or impoundment may recover damages occasioned by the overflow. *Id.* It is well established that the term “surface water” as used in Section 11.086 refers to diffused surface water. See *Dietrich v. Goodman*, 123 S.W.3d 413, 418-19 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

⁴² *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied) (quoting *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785 (1925)).

⁴³ *Id.* (quoting *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785 (1925)).

⁴⁴ *Hoefs*, 273 S.W. at 788. The creek in *Hoefs* ran for “a day or two” after a big rain, but would run immediately off after a light rain; it ran an average of five or six times annually, with as little as one time and as many as 22 times in a year. *Hoefs v. Short*, 190 S.W. 802, 804 (Tex. Civ. App.—El Paso 1916), *aff’d*, 114 Tex. 501, 273 S.W. 785 (1925).

readily visible, natural gully, that extends sixty feet or more up into a wooded area, the water changes character and is under the control of a watercourse.⁴⁵

A relatively dry, unnamed, natural drainage area may be a watercourse if a current of water sometimes flows through the area in a pattern that is well-defined and relatively static, even though the course may shift over time due to erosion and flooding.⁴⁶

A “natural depression” in which rainwater or floodwater pools or collects is likely to be a watercourse.⁴⁷ As soon as diffused surface waters enter a natural basin in “the usual course of [their] migration,” the waters change character and become state-owned surface water.⁴⁸ However, a different result may be reached for surface water settling or flowing through a natural draw on lands granted prior to 1921.⁴⁹ In *Turner v. Big Lake Oil Co.*, the Texas Supreme Court held that water pooling in a natural draw was not a watercourse, but critical to the holding was the fact that the land at issue was granted to the owner prior to the enactment of the uncodified version of Section 11.021 in 1921.⁵⁰ The difference is that grants of land after 1921 are subject to the broad statement in Section 11.021(a) that “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.”⁵¹

If a body of water was artificially created, or if water never accumulated in the area before modifications were made to the landscape for the purpose of capturing the water, the artificial conveyance or impoundment system is probably not a watercourse, and the water within it is not state-owned.⁵² This assumes, of course, the water did not first come from a natural watercourse. For instance, a landowner could build a stock tank to capture rainwater flowing down a hill without a permit, but if the flow of water forms a channel or converges in some manner to create a defined bed as it moves down the hill before it reaches the stock tank, the person may be capturing state-owned surface water from a watercourse, which the landowner cannot do without a permit or an exemption from permitting.

The simplest method of determining whether a channel is a water course is to consult United States Geological Survey maps of drainage. If it is shown on a USGS map as a blue line (which

⁴⁵ *Dietrich v. Goodman*, 123 S.W.3d 413, 419-20 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

⁴⁶ *Domel*, 6 S.W.3d at 353-56 (referring to physical measurements, survey maps, and aerial photographs that identified well-defined banks in the drainage area); see also *Watts v. State*, 140 S.W.3d 860, 865 (Tex. App.—Houston [14th Dist.] 2004, pet. ref’d) (stating in this water pollution case that “[d]iffused surface water (belonging to the land owner) becomes a natural watercourse (belonging to the State) at the point where it begins to form a reasonably well-defined channel, with bed and banks, or sides and current, although the stream itself may be very small and the water may not flow continuously”).

⁴⁷ *In re Adjudication of Water Rights of the Lower Guadalupe River Segment*, 730 S.W.2d 64, 67 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.) (“When surface waters or flood waters permanently come to rest in a natural depression, they lose their characteristics as surface or flood waters and become the waters of a lake or pond.”).

⁴⁸ *Id.* (quoting *Humphreys-Mexia Co. v. Arsenaux*, 116 Tex. 603, 297 S.W. 225, 229 (1927)).

⁴⁹ See *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221, 228 (1936).

⁵⁰ *Id.*; see also *In re Adjudication of Water Rights of the Lower Guadalupe River Segment*, 730 S.W.2d at 66-67 (making this distinction and stating that its is “certain” a different result would have been reached in *Turner* had the court been dealing with land granted subsequent to 1921).

⁵¹ TEX. WATER CODE § 11.021(a).

⁵² *Citizens Against Landfill Location v. Tex. Comm’n on Env’tl. Quality*, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).

designates a watercourse), TCEQ considers it a watercourse. It is not clear what criteria is used, but it is safe to say that not all “channelized” flow is state water.

B. Exemptions under Chapter 11

If the water is state-owned, then permitting is required prior to appropriation of the water, unless an exemption applies. Following are the exemptions from permitting provided in Chapter 11 of the Texas Water Code. In addition to exemptions, the TCEQ is authorized to issue restrictive permits, such as seasonal permits;⁵³ temporary permits;⁵⁴ contractual permits or amendments under a base permit;⁵⁵ permits converting an exempt reservoir to other beneficial uses;⁵⁶ storage permits for reservoir development;⁵⁷ term permits;⁵⁸ and emergency permits.⁵⁹ Although beyond the scope of this paper, it is worth noting that these restrictive permits may be useful to persons who cannot meet the requirements of an exemption. They do, however, require the more laborious process of permitting.

1. Domestic and livestock purposes

The domestic and livestock exemption allows a person, without obtaining a permit or going through the water rights adjudication process, to construct on her property a dam or reservoir up to 200 acre-feet in capacity for domestic and livestock purposes.⁶⁰ In its rules the TCEQ distinguishes between use of water under the exemption provided in Section 11.303(l) and the use of water under the exemption provided in Section 11.142(a).⁶¹ Pursuant to Section 11.303(l), the TCEQ allows a person to “directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit.”⁶²

The TCEQ places a few more restrictions on the Section 11.142(a) exemption. For instance, the reservoir or dam cannot be located on a navigable stream, but may be on-channel, adjacent to a stream, or on a contiguous piece of property through which a stream flows.⁶³ While the Section 11.142(a) exemption does not apply to commercial operations,⁶⁴ the TCEQ has clarified that use of land for livestock purposes is not a commercial operation.⁶⁵

Although the domestic and livestock exemption is limited to a dam or reservoir of 200 acre-feet in capacity, a person temporarily storing more than this amount can still avoid permitting if she

⁵³ TEX. WATER CODE § 11.137; 30 TEX. ADMIN. CODE § 297.12.

⁵⁴ TEX. WATER CODE § 11.138; 30 TEX. ADMIN. CODE § 297.13.

⁵⁵ 30 TEX. ADMIN. CODE §§ 297.14, 297.101 *et seq.*

⁵⁶ TEX. WATER CODE § 11.143; 30 TEX. ADMIN. CODE § 297.15.

⁵⁷ TEX. WATER CODE § 11.140.

⁵⁸ TEX. WATER CODE § 11.381; 30 TEX. ADMIN. CODE § 297.19.

⁵⁹ TEX. WATER CODE § 11.139; 30 TEX. ADMIN. CODE § 297.17.

⁶⁰ TEX. WATER CODE §§ 11.142(a), .303(a)(2), .307(a); 30 TEX. ADMIN. CODE § 297.21.

⁶¹ 30 TEX. ADMIN. CODE § 297.21(a)-(b).

⁶² 30 TEX. ADMIN. CODE § 297.21(a).

⁶³ 30 TEX. ADMIN. CODE § 297.21(b).

⁶⁴ TEX. WATER CODE 11.142(a).

⁶⁵ 30 TEX. ADMIN. CODE § 297.21(a).

demonstrates she has not stored in the dam or reservoir more than 200 acre-feet of water on average in any 12-month period.⁶⁶ The same leniency is not given for changes in type of use. When the owner of a dam or reservoir exempted under Section 11.142(a) or (b) uses the dam or reservoir for a nonexempt purpose, the owner must obtain a permit, either through Section 11.143 or the other permit provisions in Chapter 11.⁶⁷

The TCEQ has clarified that:

The use of a reservoir by free-ranging wild game and fur-bearing animals that may be harvested by hunters and trappers who pay a fee or other compensation to hunt or trap on the property does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir. Additionally, the use of water that is used in making products from a family garden or orchard that are traded with a neighbor or used in a local bake sale or potluck dinner does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir.⁶⁸

This means that an exempt reservoir remains exempt even if a deer drinks from the reservoir and the reservoir is located on property leased for hunting that deer. It also means that occasional sales of products grown using water from an exempt reservoir will not undermine the exempt status of that reservoir; however, the more often those sales occur the less likely the use remains exempt. In this respect, the domestic and livestock exemption in Chapter 11 is somewhat broader than the manner in which GCDs implement the analogous exemption in Chapter 36. GCD rules typically prohibit any type of commercial use of the water.

2. Fish and wildlife purposes

Section 11.142 allows a person, without obtaining a permit, to construct on her property a dam or reservoir up to 200 acre-feet in normal storage capacity for fish and wildlife purposes.⁶⁹ The legislature erroneously added two subsection (b)'s applicable to this exemption in Section 11.142.⁷⁰ The first subsection (b) relates to use of water for "fish and wildlife purposes," and states that the property on which the dam or reservoir will be constructed must be "qualified open space land, as defined by Section 23.51, Tax Code" and that the operations cannot be commercial.⁷¹ The second subsection (b) relates to use of water for "commercial or noncommercial wildlife management, including fishing, but not including fish farming," and states that the dam or reservoir must be constructed on the person's property "in an unincorporated area." The TCEQ reconciles this exemption as follows:

In accordance with TWC, §11.142(b), a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for wildlife management as defined in Texas Tax Code (TTC), §23.51(7), and for fish management purposes, excluding aquaculture or fish farming purposes, if the property on which the

⁶⁶ *Id.*

⁶⁷ *Id.* § 11.143(a).

⁶⁸ 30 TEX. ADMIN. CODE § 297.21(d).

⁶⁹ TEX. WATER CODE § 11.142(b)

⁷⁰ *Id.* (reflecting text of subsection (b) as inserted by Acts 2001, 77th Leg., ch. 966, § 2.09 and text of subsection (b) as inserted by Acts 2001, 77th Leg., ch. 1427, § 1).

⁷¹ *Id.*

dam or reservoir will be constructed is qualified open-space land, as defined by TTC, §23.51. . . . This exemption does not apply to a commercial operation. For the purposes of this subsection, commercial operation means the use of land for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. The incidental use of the reservoir in a manner that does not remove the land from the definition of qualified open-space land as defined by TTC, §23.51, including using a photograph in advertising, does not constitute a use for which a permit must be obtained for an otherwise exempt reservoir.⁷²

By excluding aquaculture and fish farming from the meaning of wildlife and fish management, and including those terms within the definition of commercial operations, the TCEQ has given effect to both subsection (b)'s in Section 11.142.

3. Petroleum and surface coal mining purposes

Section 11.142(c) provides a limited exemption for using state water for petroleum operations. The exemption states:

Without obtaining a permit, a person who is drilling and producing petroleum and conducting operations associated with drilling and producing petroleum may take for those purposes state water from the Gulf of Mexico and adjacent bays and arms of the Gulf of Mexico in an amount not to exceed one acre-foot during each 24-hour period.⁷³

The exemption relating to petroleum in Chapter 11 is more limited than the exemption relating to oil and gas in Chapter 36. Where the Chapter 36 exemption broadly describes hydrocarbon activities and places no limit on the amount or rate of water that can be withdrawn, the Chapter 11 exemption limits the use of water to “petroleum” operations, limits the rate at which water may be taken (1 AF/24 hrs.), and limits the location from where water may be taken (Gulf of Mexico and adjacent bays and arms).

Section 11.142(d) allows a person, without obtaining a permit, to construct or maintain a reservoir “for the sole purpose of sediment control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act.”⁷⁴ Similar to the exemption for petroleum, the exemption for surface coal mining is more limited in Chapter 11 than it is in Chapter 36. In Chapter 11 the reservoir must be for the “sole purpose of sediment control.”

4. Mariculture activities

Without obtaining a permit, a person engaged in mariculture operations on land may take water from the Gulf of Mexico and adjacent bays and arms of the Gulf of Mexico in an amount appropriate for those mariculture activities.⁷⁵ The term “mariculture” means “the propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.”⁷⁶

⁷² 30 TEX. ADMIN. CODE § 297.21(e).

⁷³ TEX. WATER CODE § 11.142(c); *see also* 30 TEX. ADMIN. CODE § 297.25.

⁷⁴ TEX. WATER CODE § 11.142(d); 30 TEX. ADMIN. CODE § 297.27(b).

⁷⁵ TEX. WATER CODE § 11.1421(b).

⁷⁶ *Id.* § 11.1421(a).

Before the person takes water under this exemption, the person must notify the TCEQ of the proposed appropriation in the manner provided in the TCEQ rules.⁷⁷ The person must also submit annual water use reports in the manner provided in the TCEQ rules.⁷⁸

The TCEQ is commanded to issue an order interrupting or reducing the appropriation of water for mariculture activities if, after notice and hearing, the TCEQ determines that the appropriation would interfere with natural productivity of bays and estuaries because of low freshwater inflows.⁷⁹

5. Historic Cemeteries.

Without obtaining a permit, a tax-exempt nonprofit corporation that owns a cemetery may divert from a river not more than 200 acre-feet of water each year to irrigate the grounds of the cemetery if the cemetery borders the river and is more than 100 years old.⁸⁰ A watermaster having jurisdiction over the river from which the cemetery diverts water may restrict the diversion if the diversion will harm a downstream user who acquired a water right before this exemption took effect on May 23, 1995.⁸¹

IV. CONCLUSION

Although there are exempt uses of groundwater and surface water, the term “exempt” is somewhat of a misnomer. The exemptions themselves can be quite limiting, and a person must be diligent in ensuring the use initially qualifies and maintains its characterization as exempt. As demand increases and supply decreases, these exemptions will become more important. It behooves every water practitioner to become familiar with exempt uses of water.

⁷⁷ *Id.* § 11.1421(c); 30 TEX. ADMIN. CODE § 297.24(a)(1)(A)-(E).

⁷⁸ TEX. WATER CODE § 11.1421(d); 30 TEX. ADMIN. CODE § 297.24(a)(2).

⁷⁹ TEX. WATER CODE § 11.1421(e); 30 TEX. ADMIN. CODE § 297.24(b).

⁸⁰ TEX. WATER CODE § 11.1422(a); 30 TEX. ADMIN. CODE § 297.27(a)(1).

⁸¹ TEX. WATER CODE § 11.1422(b); 30 TEX. ADMIN. CODE § 297.27(a)(2).