TEXAS LAW AFFECTING THE PECOS RIVER

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It should be of no surprise that the second largest state in the United States, which covers an area of 268,820 square miles, includes a vast range of diverse landscapes and ecosystems. The Texas scenery stretches from the desert land in the west to the prairies, grasslands, forests in the east, and includes 600 hundred miles of coastline in the southeast. As a whole, these distinct regions of Texas come together to form a surface water system that consists of 15 major rivers and over 3,700 named streams. Many of the major rivers begin in neighboring states and make their way to Texas eventually reaching the Gulf of Mexico.

The Pecos River ("River"), which is located in West Texas, begins in New Mexico, winds its way down through the arid West Texas landscape, and eventually empties into the Rio Grande River at Amistad Reservoir, near Del Rio, Texas. The River's course is over 900 miles and is used primarily for irrigation of crops. The River is managed and regulated by an assortment of compacts and regulatory entities. The entities pertinent to the Texas portion of the Pecos River are the following: (1) the Texas Commission on Environmental Quality ("TCEQ") manages the River's water supply availability and is responsible for permitting all non-exempt diversions from the Pecos River, (2) the Red Bluff Water Power Control District manages the Red Bluff Reservoir, (3) the Rio Grande Watermaster Program, which is an extension of TCEQ, regulates the use of surface water in the Rio Grande basin, and (4) the Pecos River Compact controls how New Mexico and Texas share the River and how much water New Mexico is required to deliver to Texas.

A. PECOS RIVER COMPACT OF 1949

In order to begin a discussion of the Pecos River in Texas and the legal framework that surrounds it, it is important to discuss the water's origin. The Pecos River begins in Mora County, New Mexico and flows through West Texas, where it eventually joins the Rio Grande at the Amistad Reservoir.[1] Both states rely heavily upon the River for irrigation purposes and, to a limited extent, as a fresh water supply. Because of this dependence, and the River's highly variable flow, disagreements between the two states often arise regarding how much water each state is entitled; specifically, the states often argue about the amount of water New Mexico must deliver to Texas via the Pecos River.

Texas and New Mexico are not the only states who share a river. Many other states face the issue of apportioning a vital, fresh, water source. To remedy the problems this situation creates, states enter into interstate water compacts. The compacts "oversee water deliveries from one state to another, and work to prevent and resolve any dispute over water."[2] Once the compact is drafted, it is ratified by the U.S. Congress (thus making them federally enforceable) and approved by each state's legislature.[3] Commissions are created to administer the compacts and are composed of representatives from each state that includes the river.[4]

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[1] J. Evetts Haley, *Pecos River, Texas State Historical Association Online* (June 5 ,2010), http://www.tshaonline.org/handbook/online/articles/rnp02.
[2] Tex. Comm. On Environ. Quality, *If a River Runs Through It, Texas Shares the Water* (July 24, 2013) https://www.tceq.texas.gov/publications/pd/020/10-04/if-a-river-runs-through-it-texas-shares-the-water.
[3] *Id.*
[4] *Id.*

Texas is a member of five compacts that address the water management and use of the Canadian, Sabine, Red, Rio Grande, and Pecos River.[5] The Texas commissioners for each compact are appointed by the Governor, except for the Executive Director of TCEQ, who is statutorily required to be a member of each commission.[6] The Texas compact commissions receive legal support from the Attorney General's office and administrative/technical support from the TCEQ.[7]

In 1948, New Mexico and Texas attempted to resolve their water issues by entering into a compact titled the Pecos River Compact ("Compact").[8] The subsequent year, it was approved by Congress.[9] The crux of the Compact required New Mexico to ensure Texas received as much water as it did in 1947.[10] This amount of water, however, was not an exact amount but an equation promulgated from the Pecos River Joint Investigation ("Investigation").[11] The benefit of taking into account the Investigation's research and using its models/equations was that it allowed the appropriated amount of water for Texas be contingent upon factors out of New Mexico's control, such as extreme droughts.[12]

However, this agreement between the two states did not eliminate conflict over New Mexico's obligation to insure flows to Texas. After the Compact was signed, the states continued to disagree on how it should be applied and whether New Mexico was in compliance. One source of disagreement arose because the models were not advanced enough to take into account all factors necessary.[13] The drought of the 1950's rendered the models useless, thus leaving New Mexico with a question mark when it came to deciding how much water Texas was entitled to receive.[14] It further became apparent that the Investigation's models were based upon unusually wet years.[15]

In 1974, Texas filed suit against New Mexico in the Supreme Court of the United States claiming that New Mexico was in violation of the Compact because Texas was not receiving the requisite amount of water.[16] After fourteen years, the Court found New Mexico to be in violation of the Compact.[17] The Court held that between the years of 1950 until 1983, New Mexico had deprived Texas of 340,000 acre-foot of water.[18] The Court ordered New Mexico to

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[5] *Id*.
[6] *Id*.
[7] Tex. Comm. On Environ. Quality, *supra* note 2.
[8] *Id*.
[9] *Id*.
[10] Water Diplomacy, *The Pecos River Compact and Texas – New Mexico* Dispute, http://aquapedia.waterdiplomacy.org/wiki/index.php?title=The_Pecos_River_Compact_and_Texas_-_New_Mexico_Dispute (Sept. 9, 2014).
[11] *Id*. The Pecos River Joint Investigation was a "study conducted by the National Resources Planning Board from 1939 to 1942 to learn more about the highly complex water dynamics in the [Pecos] basin."
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] Tex. Comm. On Environ. Quality, *supra* n. 2.
[17] *Id*.
[18] *Id*.

pay Texas a $14 million settlement and deliver a minimum of 10,000 extra acre-feet of water per year to account for the lost 340,000 acre-feet.[19]

Parties affected by and interested in the River are still struggling to comply with the Compact and the subsequent Supreme Court opinion. In 2003, the Carlsbad Irrigation District, the Pecos Valley Artesian Conservancy District, the United States Bureau of Reclamation, and the State of New Mexico were able to reach a settlement agreement that outlines methods and strategies to assist New Mexico in complying with the Compact.[20]

Once the water in the Pecos River crosses the state line from New Mexico into Texas, the TCEQ has jurisdiction of all matters related to use of water from the River and protection of water quality.

B. TEXAS LAW OF SURFACE WATER

Generally, state surface water regimes follow a riparian system, a prior appropriation system, or a hybrid of the two. Under the riparian doctrine, a person who owns land that borders a watercourse has the right to make reasonable use of the water on his land but is limited to uses that are reasonable in comparison to uses by others. Under the prior appropriation doctrine, a person who diverts water from a watercourse (regardless of its location) and makes reasonable and beneficial use of the water may acquire a right to use the water. The prior appropriation system, however, limits users to a quantified amount of water secured by the user under a permitting process with a priority date. First in time is first in right; that is, those with water rights with a later priority date are junior to and may be curtailed to insure those with more senior or earlier water rights receive the water authorized under their permit.[21] States east of the Mississippi River typically follow some form of the riparian doctrine of water rights, while western states follow the prior appropriation doctrine. Texas has adopted a prior appropriation system, although there are some riparian rights recognized.

1. Surface Water in Texas

In Texas, surface water is either state-owned or diffused.[22] 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.

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.[23]

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[19] Water Diplomacy, *supra* note 7.
[20] *Pecos River Settlement*, U. S. DEPT. OF INTERIOR BUREAU OF RECLAMATION (Sept. 4, 2009), http://www.usbr.gov/uc/feature/pecos/.
[21] TEX. WATER CODE ANN. § 1.027.
[22] Dietrich v. Goodman, 123 S.W.3d 413, 417–18 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
[23] TEX. WATER CODE ANN. § 11.021(a) (2014).

Consistent with this definition, Texas courts refer to state surface water as "water in a watercourse."[24]

Before using or "appropriating" state surface water, or beginning "construction on any work 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").[25] There are some statutory exemptions from permitting; they are limited to riparian users for domestic, livestock and wildlife purposes, with a limited authorization to use and store water on a person's property.[26]

(a) Capturing Diffused Surface Water

Before surface water becomes "water in a watercourse," it is considered 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.[27] 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, the water remains his property.[28] Because the state does not own diffused surface water (that is, before it enters a natural watercourse), a private landowner can use, divert, or impound the water without a permit.[29] Additionally, as long as the owner maintains physical control of the captured water, he may sell or further use the water.[30] But if captured water is delivered into a natural watercourse, it becomes property of the state.[31] There are tens of thousands of "tanks" or "ponds" in Texas created by rural landowners to take advantage of what little rain does fall pursuant to an exception to the permitting requirements or collected as diffused surface water.

The key to using diffused surface water without a permit is to capture, through some means, diffused surface water before it enters a watercourse.[32] The definition of "watercourse"

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[24] Citizens Against Landfill Location v. Tex. Comm'n on Envtl. Quality, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).

[25] TEX. WATER CODE ANN. § 11.121 (2014).

[26] *Id*. §§ 11.142, .1421, .1422.

[27] Tex. Women's Univ. v. Methodist Hosp., 221 S.W.3d 267, 277–78 (Tex. App.—Houston [1st Dist.] 2006, no pet.); Dietrich v. Goodman, 123 S.W.3d 413, 417–18 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

[28] 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).

[29] *See* Citizens Against Landfill Location v. Tex. Comm'n on Envtl. Quality, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).

[30] *See id.* at 274; Guelker v. Hidalgo Cnty. WCID No. 6, 269 S.W.2d 551 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.); S. 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.").

[31] *See* City of San Marcos v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 264, 276–77 (Tex. App.—Austin 2004, pet. denied).

[32] 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 ANN. § 11.086. A person injured by an overflow of water caused by an unlawful diversion or

is therefore critical to determining whether the water at issue is diffused and subject to use without permit.

(b) 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."[33] 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."[34] 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."[35] 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 readily visible, natural gully, that extends sixty feet or more up into a wooded area, the water changes character and is considered to be in a watercourse.[36]

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.[37]

A "natural depression" in which rainwater or floodwater pools or collects is likely to be a watercourse.[38] 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.[39] However, a different result may be reached for surface water settling or flowing through a natural draw on lands granted prior to 1921.[40] In *Turner v. Big Lake Oil Co.*, the Texas Supreme

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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.).

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

[34] *Id.* (quoting *Hoefs v. Short,* 273 S.W. 785 (Tex. 1925)).

[35] *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*, 273 S.W. 785 (Tex. 1925).

[36] *Dietrich*, 123 S.W.3d at 419–20.

[37] *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").

[38] *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.").

[39] *Id.* (quoting Humphreys-Mexia Co. v. Arsenaux, 297 S.W. 225, 229 (Tex. 1927)).

[40] *See* Turner v. Big Lake Oil Co., 96 S.W.2d 221, 228 (Tex. 1936).

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.[41] 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."[42]

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.[43] 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.

(c) Statutory Appropriation Process

While Texas had long followed the prior appropriation doctrine, the historic drought in Texas in the 1950s revealed the fragmented and incomplete record of all claims by those diverting water from the state's rivers and streams. The state has also recognized, in some instances, a riparian right, primarily for domestic livestock. In 1967, the Texas Legislature adopted the Water Rights Adjudication Act.[44] The Act established a process under which all those claiming water rights were required to file claims with the state and prove the nature and extent of the claimed historic use. After evidentiary hearing, the State Administrative Agency (now the Texas Commission on Environmental Quality, or "TCEQ") entered into an administrative order determining water rights in the basin. The Commission's order were then referred to a state district court, providing disaffected parties the opportunity to reassert their claims. The court then made the final decision. The process took decades to complete and was finally concluded with the adjudication of the upper Rio Grande in 2007. The Texas Supreme Court upheld the constitutionality of the 1967 Act.[45]

Chapter 11 of the Texas Water Code outlines the statutory provisions detailing the process for obtaining or amending a water rights permit, regulatory and reporting requirements and enforcement provisions. Basically, a applicant must demonstrate that unappropriated water is available, that the water will be put to a beneficial use, does not adversely affect existing water rights and is not detrimental to the public welfare.[46] Generally, each water right in Texas

[41] *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 it is "certain" a different result would have been reached in *Turner* had the court been dealing with land granted subsequent to 1921).
[42] TEX. WATER CODE ANN. § 11.021(a) (West 2014).
[43] Citizens Against Landfill Location v. Tex. Comm'n on Envtl. Quality, 169 S.W.3d 258, 274 (Tex. App.—Austin 2005, pet. denied).
[44] TEX. WATER CODE ANN. §§ 11.301–341.
[45] In re Adjudication of Water Rights of the Lower Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438 (Tex. 1982).
[46] TEXAS WATER CODE ANN. § 11.134(b).

contains fundamental provisions that determine its priority in the river system and limitations on use. Specifically, all water rights in Texas have a priority date, locate the proposed diversion, outline the amount and rate at which water may be diverted and specifies the purpose and place of use of the water. Authorizations to divert state water are subject to cancelation if not used for continuous period of ten (10) years. This is so even though a perfected water right is considered a vested property right in Texas.[47]

The TCEQ is the state administrative agency responsible for all matters related to both water rights permitting and water quality protection. The TCEQ is a successor to a series of state agencies responsible for water rights administration. TCEQ is governed by three commissioners appointed for six year terms by the Governor. While the TCEQ is responsible for regulation and enforcement of all permitted water rights, it has virtually no jurisdiction or regulatory authority over use of state surface water for domestic, livestock and wildlife purposes. This is particularly relevant on the Pecos River, since permitted use is limited to a collection of irrigation districts which collectively benefit from the maintenance and operation of the Red Bluff Reservoir in the area immediately downstream of the state line between Texas and New Mexico. Other than these permitted rights, all water used from the Pecos River is used pursuant to exemptions for permitting authorizing use of water for domestic, livestock and wildlife purposes. Remarkably, there is no limit on the amount of water that may be used for these purposes without a permit, although there are limits on the size of storage facility for such water.

2. Exemptions Pursuant to Chapter 11

Chapter 11 of the Texas Water Code provides numerous exemptions from TCEQ's surface water permitting requirements, however the exemptions that are most applicable limit the purposes for which water can be used and the capacity of a storage reservoir for such uses to 200 AF. The following are the exemptions provided by Chapter 11:

(a) Domestic and Livestock Exemption

The domestic and livestock exemption provides that a person may divert state water into a dam or reservoir on the person's property for domestic and livestock purposes, as long as the capacity of the reservoir or dam is no greater than 200 AF.[48] In its regulations, TCEQ differentiates between the two Texas Water Code provisions (Section 11.303(l) and Section 11.142(a)) that provide this exemption.[49] The Regulations state that Section 11.303(l) 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."[50]

On the other hand, the TCEQ Regulations regarding Water Code Section 11.142(a) incorporate additional restrictions.[51] For example, the Regulations prohibit the location of the dam or reservoir on a navigable stream, and require it to be located either "on-channel, adjacent to the stream, or on a contiguous piece of property through which flows the stream from which

[47] TEXAS WATER CODE ANN. § 11.172.
[48] TEX. WATER CODE ANN. §§ 11.142(a), .303(a)(2), .307(a); 30 TEX. ADMIN. CODE § 297.21.
[49] 30 TEX. ADMIN. CODE § 297.21(a)–(b).
[50] 30 TEX. ADMIN. CODE § 297.21(a).
[51] 30 TEX. ADMIN. CODE § 297.21(b).

the water is diverted."[52] The Regulations also state the use of a reservoir or dam pursuant to this Water Code Section may not be used for commercial livestock or domestic purposes.[53]

Not all dams or reservoirs exempt pursuant to Water Code Section 11.142(a) must remain either at the 200 AF capacity or below.[54] TCEQ Regulations provide that a person may temporarily store more than 200 AF of water in their exempt dam or reservoir, without obtaining a permit, as long as the person can prove with historical data that the reservoir or dam has not stored more than 200 AF of water on average during a 12-month period. This type of leniency, however, is not afforded to landowners who change the use of the reservoir or dam.

TCEQ has provided some guidance regarding an owner changing the use of a dam or reservoir that was originally exempt. The default rule states that if the owner uses the dam or reservoir for a use that is not exempt pursuant to either the domestic and livestock exemption or another exemption, then he must obtain a permit.[55] However, if the use only slightly differs, then a permit may not be necessary.

The TCEQ Regulations provide the following explanation:

> 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.[56]

Thus, the owner of an exempt dam or reservoir is not required to obtain a permit if he decides to begin receiving compensation in lieu of allowing hunters on his property to hunt for wild game, which may use the reservoir or dam as a source of water. Additionally, an owner is not required to obtain a permit if he wishes to sale or use products which were grown from water stored in the reservoir or dam; however, the sale or trade those products must be minimal in order for the exemption to continue.

(b) Fish and Wildlife Exemption

A person is not required to obtain a TCEQ permit if he wishes to construct a dam/reservoir "for fish and wildlife purposes" on his property (not in the river bed) and limits the capacity of the reservoir or dam to 200 AF.[57] This exemption is somewhat convoluted by the fact that the Texas Legislature erroneously adopted two different subsection (b)s. The first subsection (b) provides a person with the right to build a dam or reservoir on his property for non-commercial fish and wildlife purposes, as long as the dam/reservoir's capacity is limited to

[52] 30 TEX. ADMIN. CODE § 297.21(b)–(c).
[53] 30 TEX. ADMIN. CODE § 297.21(b).
[54] 30 TEX. ADMIN. CODE § 297.21(b).
[55] TEX. WATER CODE ANN. § 11.142(a).
[56] 30 TEX. ADMIN. CODE § 297.21(d).
[57] TEX. WATER CODE ANN. § 11.142(b) (2014).

200 AF, is built upon "qualified open-space as defined by Section 23.51" of the Texas Tax Code, and cannot hold more than 200 AF.[58] The second subsection (b) provides an exemption for a dam/reservoir that is built upon "an unincproprated area," has a "normal storage of not more than 200 AF of water for commercial or noncommercial wildlife management, including fish, but not including fish farming."[59] The TCEQ Regulations speak to this issue:

> 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 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, §22.51, including using a photograph in advertising, does not constitute a use for which a permit must be obtained for an otherwise exempt reservoir.[60]

In essence, TCEQ included the terms "aquaculture" and "fish farming" into the definition of a "commercial operations," and excluded them from the meaning of the phrase "fish and wildlife management" so that both subsection (b)s in Section 11.142 could be given effect.

3. Surface Water Permits of the Pecos River

Permits issued by the TCEQ and those recognized by the state through the water rights adjudication process undertaken in the 1960s are permanent in Texas and only subject to cancelation for non-use over a period of ten (10) years. Texas applies a number of criteria and assessments in determining whether a permit should be issued; primary among those issues is the potential impact on any water rights holder in the river system. Typically, a water rights permit application requires notice to all affected downstream water rights holders and the opportunity to protest the proposed appropriation. Since the Pecos River flows into the Rio Grande River in Texas, which is subject to the treaty with the bordering nation of Mexico, TCEQ takes the position that a water rights permit application in the Pecos River would require notice to all water rights holders in the Rio Grande River Basin downstream of Amistad Reservoir. By putting other water right holders on notice, you in essence are allowing any of those permit holders an opportunity and notice to protest your application. In short, the process of obtaining a permit in the Pecos River would require an extraordinary examination of the impact of the permit on the entirety of the flows in the Rio Grande downstream of Amistad Reservoir.

The only permitted diversions in the Pecos River in the State of Texas belong either to the Red Bluff Irrigation District, which manages the Red Bluff Reservoir through a permit

[58] *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).
[59] *Id*.
[60] 30 TEX. ADMIN. CODE § 297.21(e) (2014).

authorized by the TCEQ, or the five irrigation districts created prior to creation of the Red Bluff Irrigation District, who obtain permits for use of Pecos River water for irrigation purposes within their defined territories.

In short, the only authorized non-domestic livestock and wildlife diversions from the Pecos River, in Texas, belong either to the Red Bluff Irrigation District through its impoundment permit or through permits issued to the five irrigation districts, dependent upon the Red Bluff Reservoir through their run of river permit rights previously issued. For this and many other reasons, it is extremely unlikely that major diversions from the Pecos River in the future will be sought from Texas landowners.

4. Spring Flow and the Pecos River

As early as 1927, the Texas Supreme Court recognized that spring water, which is neither surface water nor water in a subsurface stream with defined channels, was the exclusive property of the landowner under Texas law.[61] The first court decision directly addressing the conflict between landowners who used percolating groundwater which ultimately emerged at springs and landowners who had historically benefited from and used downstream flows from a spring was *Pecos County Water Control & Improvement District No. 1 v. Williams*.[62] The defendant owned large areas of land over groundwater formations that had historically provided flow to Comanche Springs in Fort Stockton, Texas. The plaintiff was the owner of surface water permits issued by the State of Texas authorizing the diversion and use of historic spring flows. During the 1950s drought, the defendant's extensive groundwater use was alleged to have caused the cessation of spring flows from Comanche Springs. The downstream plaintiff, as the owner of the surface water permits, filed suit seeking an injunction and a declaration that their more senior appropriative rights for the surface water flowing from Comanche Springs had priority.

The district court refused to enjoin the groundwater use because it was not wasteful and refused to judicially declare correlative rights in the groundwater and surface water at issue. On appeal, the appellate court declined to recognize the surface water rights predating the groundwater usage by the defendant as justification for injunctive relief against the groundwater use. The court held that the plaintiff's rights to the water only extended to the waters of Comanche Springs after they emerged from the springs and refused to extend those rights to the water underground.[63]

The court also rejected the plaintiff's claim that, because the water supplying Comanche Springs flowed in well-defined underground channels, it was not groundwater but rather surface water.[64] This decision has particular relevance to the Pecos River since the water from Comanche Spring ultimately flowed to the Pecos River. The actions of the groundwater user (and other groundwater users in the area) have caused a loss of flow to the Pecos River for which there is no remedy under Texas law. While groundwater is subject to regulation in Texas by local groundwater conservation districts, which are supposed to consider the impact of surface

[61] *See* Tex. Co. v. Burkett, 296 S.W. 273, 278 (Tex. 1927).
[62] Pecos Cnty. Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).
[63] *See Pecos County*, 271 S.W.2d at 506–07.
[64] *Id*. at 271 S.W.2d at 506.

flows in permitting groundwater production, the reality in Texas law is that surface water flows are generally not protected from groundwater production. While this has already had a substantial impact on Pecos River flows in Texas, the principle that groundwater use impacts surface water flows could continue to diminish Pecos River flows as groundwater use increases in Texas.

5. Entities that Affect the Pecos River

As stated, the regulation of Texas surface water is vested in the TCEQ. Apart from TCEQ, the two other entities with the most impact on the River are the Red Bluff Water Power Control District and the Rio Grande Watermaster.

(a) Red Bluff Water Power Control District

The Red Bluff Water Power Control District ("Red Bluff") was created in 1928 as a water improvement district to help supply water to the arid north-west region of Texas.[65] When Red Bluff was created, it encompassed seven other water districts: "Loving County Water Improvement District No. 1, Reeves County Water Improvement District No. 2, Ward County Water Improvement District No. 3, Ward County Irrigation District No. 1, Ward County Improvement District No. 2, Pecos County Water Improvement District No. 2, and Pecos County Water Improvement District No. 3."[66]

Around the time that Red Bluff was created, the federal government was in discussions to increase and assist the arid portions of the state with water supplies.[67] The result of this effort was the creation and planning of a dam and reservoir called the Red Bluff Dam Project.[68] However, before the government would approve financing the dam and reservoir, it wanted a master district in place to oversee the reservoir's operations and the other affected water districts.[69] As a result, in 1934, Red Bluff Water Power Control District was reorganized as a "water power control district with authority to construct and maintain the Red Bluff Dam" on the Pecos River and the seven other districts "became its members" and are to operate "under the law applicable to water improvement districts."[70] When the member districts joined the Red Bluff District master contracts were entered into that specifically defined the amount of water each member district would receive from the reservoir and "the rights and obligations of the parties." [71] However, each entities' water rights are limited by the amount of water that Texas receives from New Mexico pursuant to the Compact.

Red Bluff's operations are supported by its member districts and the money received by the State of Texas after the settlement of the United States Supreme Court case between New Mexico and Texas.[72] After September 1, 1991, the Texas Water Development Board transferred

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[65] Ward Cnty. Irrig. Dist. No. 1 v. Red Bluff Water Power, 170 S.W.3d 696, 701 (Tex. App.—El Paso, 2005).
[66] *Id*. at 701–702.
[67] *Id*. at 702.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*. at 698.
[72] TEX. WATER LAW CODE ANN. § 8280-16.

the settlement money from the lawsuit to the Red Bluff District.[73] Red Bluff, and its member districts, are statutorily limited in what the funds may be used for: "only for agriculture or irrigation projects, including associated water quality improvement projects that affect surface water irrigators in the counties of Loving, Ward, Reeves, and Pecos." [74]

The following summarizes Red Bluff's and its member district's surface water permits:

- Water Right Number: 5438
- Water Right Issue Date: 3/28/1988
- Diversion Amount: 292,500 acre feet/year*
- Priority Date:
  - Red Bluff: 1/1/1980
  - Loving: 4/11/1908
  - Reeves Water Improvement District 2: 6/20/1908
  - Ward Water Improvement District 3: 6/18/1906
  - Ward Water Improvement District 1: 4/30/1988
  - Ward Water Improvement District 2: 6/1/1990
  - Ward Water Improvement District 2: 6/1/1990
  - Pecos Water Improvement District 2: 1/1/1980
  - Pecos Water Improvement District 3: 1/1/1980
- Acreage Authorized for Irrigation: 145,000
- Reservoir Capacity: 300,000 acre-feet

*The only entity who has a diversion amount is Red Bluff; the seven member districts do not.

(b) Rio Grande Watermaster

Watermaster programs were created to assist TCEQ with the management of the state's surface water.[75] In essence, a watermaster is an extension of TCEQ with the authority to "ensure compliance with water rights" in his designated jurisdiction.[76] Watermasters are charged with "monitoring stream flows, reservoir levels, ...water use," coordinating diversions, and regulating reservoirs.[77] Currently, there are three watermasters in Texas: Concho River Watermaster, Rio Grande Watermaster, and the South Texas Watermaster; however, the TCEQ Commissioners recently directed the appointment of a new watermaster for the Brazos River Basin, which shall include Possum Kingdom Lake.[78]

Watermasters divide the surface water in their designated jurisdiction based upon adjudicated water rights. However, before a water right holder may divert water, he must notify the watermaster of his intent to divert, the amount he wishes to divert and the time that the water will be diverted. Once the watermaster receives this notice, he then assess the current state of the water in the basin to determine if there is enough for the diversion.

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[73] *Id*.
[74] *Id*.
[75] Tex. Comm. On Env. Quality, *Watermasters*, http://www.tceq.texas.gov/permitting/water_rights/wmaster (Sept. 9, 2014).
[76] *Id*.
[77] *Id*.
[78] *Id*.

The Pecos River falls within the Rio Grande Watermaster's jurisdiction. If a water right holder within the area of the Rio Grande Watermaster's jurisdiction wishes to divert water, he must notify the watermaster, and the requested water will be released from Amistad Reservoir for diversion downstream.

6. Navigability

Texas law makes a distinction between rivers that are navigable in fact or law and rivers that are not navigable under either criteria. A river in Texas is navigable in fact if it is capable of being used in commerce or transportation. A river is navigable at law in Texas if it retains an average width of 30 feet from its origin to its mouth. The original statutory provision, adopted when Texas was a republic in 1837, provides that:

> "All streams of an average width of 30 feet shall be considered navigable streams within the meaning of this Act, so far up as they retain that average width, and that they shall not be crossed by the lines of the survey."

The current statute in Texas, Texas Natural Resources Code Section 21.001, defines a navigable stream as a stream, which retains an average width of 30 feet from the mouth up. While the language is slightly different from the original 1937 definition, commentators have stated that the intent was still to include rivers only to the extent that they retain the average width upstream.

Texas does not maintain a registry of those rivers which the state has deemed to be navigable by law nor is there any particular reference or place where a definitive determination can be obtained. Despite this, it is clear that the Pecos River is considered in Texas to be a navigable river.

Under Texas law, the state retains ownership of the bed of all navigable rivers in the state. The public is entitled to access the public waters of the state so long as access is attained from an access point available to the public. While this seems simple in principle, it raises a number of legal questions in its actual application to the river. Among those questions are: What exactly is the bed of the river owned by the state? Where are the rivers banks that establish the boundary of the state's ownership of the river bed and what happens when this boundary is changed by erosion, accretion or reliction when naturally or artificially caused?

7. The Pecos River is "Navigable" Under Texas Law

As explained below, Texas law has, since 1837, specifically provided that surveys for patents or conveyances of land from the state must not cross navigable rivers. Research at the General Land Office of Texas (the state agency which manages all state owned real property) reveals that all original patents on the Pecos River in Texas were issued with surveys that do not cross the Pecos River. As a consequence, the state explicitly retained ownership of the bed of the river as well as the public waters of the state in the Pecos River. The state's reserved ownership in the bed of the River includes ownership of the sand, gravel and minerals below the surface of the bed of the river, with income or revenue generated from these properties dedicated to the state.

Under Texas law, while riparian landowners may access the waters of the river for the limited purposes outlined in Chapter 11, the State prohibits the construction of any facilities, obstructions, fencing or impoundments on or in the bed of the river. Any such obstruction, dam, impoundment or other impediment in the riverbed is subject to the jurisdiction of the TCEQ and may result in the property owner being required to remove the obstruction and pay applicable enforcement penalties.

(a) The State's Ownership of the River Bed

Both by statute and case law, the State of Texas owns the real property located in the beds of navigable rivers and streams in Texas. The Texas Supreme Court in *State v. Bradford*[79] held that the land underlying navigable waters was held in trust by the state for the use and benefit of all the people. The General Land Office considers the Pecos River to be a navigable river in Texas. As such, the state has retained ownership of the bed of the Pecos River from its entry into the state at the New Mexico border to its discharge into the waters of Lake Amistad on the Rio Grande River.

So where, precisely, does the state's ownership end and private property ownership begin along the Pecos River in Texas? Generally, the boundary of the land bordering the river is on the water line at the mean or average level attained under "normal" conditions. It is described as being located midway between the lower level of the flowing water that reaches the bank and the highest level of the flowing water that reaches the top of the bank, but not including any overflow.[80]

The cut banks of a stream, also known as a river cliff, are generally described as the watershed surface of the stream, which begin at the water level during normal flow and extend outward and upward to a point that is halfway washed away during the year by the various variations in flows caused by normal rains. Some describe this as the area ordinarily washed free of vegetation along the bank of the stream or river.[81] It has also been described as the area of the soil which is alternately covered and left bare based on the varying supply of water when it is adequate to contain the water at its average stage.[82] These boundaries can be changed by accretion, erosion and reliction. Thus, as the Pecos River changes over time and the bed of the River shifts by any of these means, Texas, like most states, follows the general rule that holds when the location of the boundary of a river is gradually and imperceptibly shifted by accretion, erosion and reliction the boundary, as so changed, is the boundary line between state ownership and private ownership of the land.[83]

Texas courts have described the ownership interest of the adjacent landowner as "a base fee, determinable upon the occupancy of his soil by the river," as is the title held by the state.[84] This is also true when a rivers course changes due to actions of man. Artificially affecting the

[79] Tex. v. Bradford, 50 S.W. 2d 1065 (Tex. 1932).
[80] Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W. 2d 441 (Tex. 1935).
[81] Tex. v. Heard, 199 S.W. 2d 191 (Tex. Civ. App. - 1946) aff'd, 146 Tex. 139, 204 S.W.2d 344 (Tex. 1947).
[82] Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (Tex. 1926).
[83] *Bradford*, 50 S.W2d. at 1065.
[84] Maufrais v. Tex., 180 S.W.2d 144 (Tex. 1944); Manry v. Robison, 56 S.W.2d 438 (Tex. 1932); Tex. v. R.E. Jones Gravel Comp., 175 S.W.2d 739 (Tex. Civ. App.—Austin 1943) rev'd in part on other grounds *sub nom.*

flow of a navigable river was the primary issue decided by the Supreme Court in *Brainerd*,[85] where the change in the river resulted from the construction and closing of a dam on the Canadian River many years before. The Supreme Court ignored the state's argument that the change was artificial and therefore did not change the boundary of ownership, and instead determined that the general rule of boundary change should apply.[86]

Under Texas law obstructions, dams, impoundments or improvements in the river bed of a navigable river such as the Pecos cannot be undertaken by the landowner without a permit from the State of Texas. Fencing or creating obstructions to public access to the waters of a navigable river is likewise prohibited. Despite the general recognition of public access to the river beds of navigable rivers in the State of Texas, the state, out of concern about the use of river beds for four-wheel and motorized vehicle activity has adopted a statute that prohibits operation of such vehicles in the state's river beds.

(b) Public's Right to Use the Water in the Pecos River for Recreational Purposes

Texas courts have long recognized that members of the public have the right to the use and enjoyment of the waters of the navigable rivers and streams of Texas and may engage in a number of activities in, on and along the river. In addition to boating, canoeing or kayaking, citizens may swim, float, walk, wade, fish and camp on and in the navigable waters of the state.[87] This right, however, does not include the right to traverse private property to gain access to the public waters of the state. Access must be obtained by the public across through or on public property. The right to use and recreate on navigable waters includes the right to exercise these privileges when the navigable waters of the state cover privately owned property.[88]

(c) Use of River Bank to Scout and Portage

There are no Texas cases or statutes which specifically deal with the right to leave the state owned river bed and enter on private property for the purpose of scouting or portage when obstructions in the river exist. Other states have, however, recognized this right as a corollary to the right to use the public waters. Portaging obstructions is traditionally viewed as a corollary to the right of navigation and use and it is extremely likely that Texas courts would recognize a similar right. There is one Texas case that determined that the state's authorization of a dam on a navigable river does not include permission to preclude use of the waters over the private property. The Texas Parks & Wildlife Code § 90.007 provides that "a prescriptive easement over private property cannot be created by recreational use of a protected fresh water area, including by portage over or around barriers, scouting of obstructions, or crossing a private property to or from a protected fresh water area, and that nothing in this section of the law is intended to limit the right of a person to navigate in, on or around a protected fresh water area."[89] The natural conclusion is that Texas courts would recognize the right of a user of public waters to portage or scout for obstructions on private property as a corollary to the public's right of access to those waters in navigable streams.

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[85] Maufrais v. Tex., 180 S.W.2d 144 (Tex. 1944) (*citing* Brainaird v. Tex., 12 S.W.3d 6 (Tex. 1999)).
[86] *Id*.
[87] Tex. Atty. Gen. Op. No. S-208 (1956).
[88] Diversion Lake Club v. Heath, 120 Tex. 129; 86 S.W.2d 441 (Tex. 1935).
[89] TEX. PARKS AND WILDLIFE CODE § 90.001.

(d) Hunting in River Beds

Hunting or shooting in the bed of the Pecos River is generally permitted, with some express limitations. Specifically, Texas law makes it unlawful to discharge a bullet across a property line.[90] More importantly, the hunter may not enter onto private property to retrieve an animal that has been lawfully shot but escapes onto private property. Driving any type of motor vehicle in the bed of the Pecos River is prohibited and offenders are subject to criminal penalties.[91]

8. Conclusion

The Pecos River in Texas is used primarily for agricultural purposes. Its flow is controlled substantially by flow released by New Mexico. Agricultural use is supported by storage in the Red Bluff Reservoir. No major diversions are authorized below this agricultural use. Increased diversions in the future are extremely unlikely given the variable flow and connection to the Rio Grande.

The waters of the Pecos River and its bed are owned by the State of Texas and the public is authorized to use these waters for recreation and access the river bed. Riparian landowners can divert river water for domestic, livestock and wildlife purposes, with some limitations.

[90] TEX. PARKS AND WILDLIFE CODE § 62.0121.
[91] TEX. PARKS AND WILDLIFE CODE §§ 90.002, .003.