

CONSTRUCTION

TIPS

Background: Water Rights in Texas

The legal issues of water rights can be very complicated and difficult to understand. The following information does not provide all of the details involved in water rights, but does provide an adequate general overview. The “rules” regarding water rights depend on whether you are discussing groundwater or surface water.

Groundwater – Historically, the laws for groundwater have allowed the landowner to pump as much water from their wells as they choose. This is allowed even if the pump captures groundwater from other landowners. In 1949, legislation was passed that created Water Conservation Districts (WCDs). These WCDs generally attempt to conserve water through limiting the minimum spacing of wells, but many have the authority to actually limit well production.

Surface Water - Unlike groundwater, all surface water in Texas is owned by the state. Section 11.021 of the Water Code states: “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.” The state grants the right to use this water.

With the exception of use, such as, domestic and livestock use, appropriated water rights must be obtained from the state before surface water is used. There are two types of appropriated water rights, *perpetual rights* or *limited-term rights*.

Perpetual rights are a true property interest and may be bought, sold or leased. *Limited-term rights* are not property interests and are basically surface water permits obtained from the Texas Commission on Environmental Quality (TCEQ). There is a hierarchy to appropriated water rights. When drought conditions limit the availability of surface water, perpetual rights prevail over limited-term rights.

In most areas west of Interstate 35, all the surface water has been appropriated. In addition, the management of the surface water in South Texas and along the Rio Grande River is the responsibility of regional *watermasters*. The watermaster is appointed by TCEQ and controls the daily pumping of water in their jurisdictions. The watermaster regions are shown on the following page.



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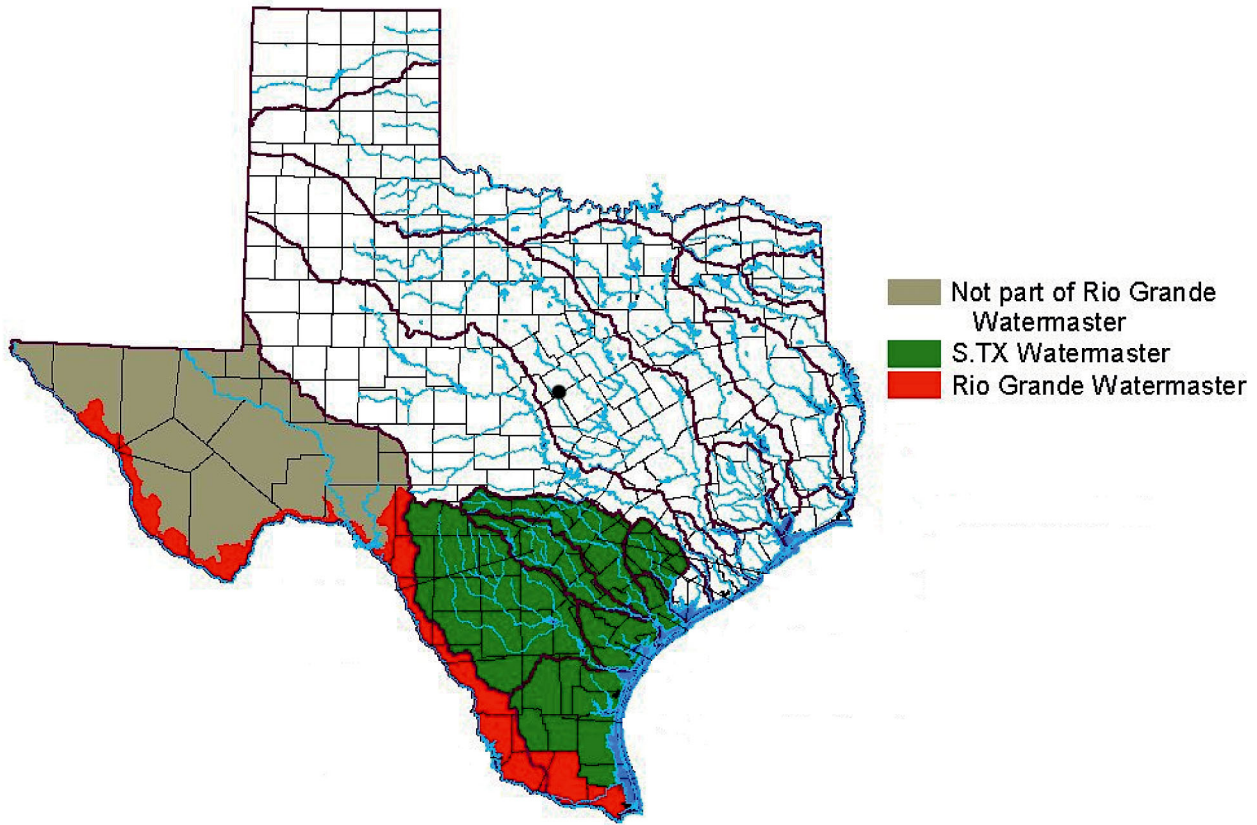
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Drought Impact on Construction

During the course of most construction projects, large quantities of water are used by our contractors. The water is needed for dust control, compaction and revegetation. When drought conditions exist, contractors can experience difficulty obtaining water needed for construction. As the supply of water decreases, limits may be imposed. Some examples of limits:

- ➔ A public water system may be forced to reduce supplies. A current list of the systems limiting water is located at: http://www.tceq.state.tx.us/permitting/water_supply/pdw/trot/droughtw.html
- ➔ A WCD may limit well production.
- ➔ The water level of aquifers may drop below the level of the well or the well owner may limit production.
- ➔ Owners of perpetual water rights with senior (older) rights may force those with junior (newer) rights to reduce pumping.
- ➔ In areas of the state controlled by watermasters, the allowed pumping may be reduced.

Possible Sources of Relief

The limited availability of water for construction is a concern to TxDOT. However, in accordance with our contract, the contractor is responsible for acquiring water for the project. There are really only a few ways we could assist:

1. The best (but geographically limited) situation is when the district actually owns perpetual water rights. In Pharr, the district owns water rights from the Rio Grande River. The Pharr district issues a notice to the local watermaster confirming contractor "X" as our agent and allow the contractor to remove a certain amount of our water allotment.
2. In areas where the district does not own water rights, our ability to assist the contractor is limited. TxDOT is allowed by a water right issued by TCEQ to "take and use public waters of the State in small amounts (truck tanks), as necessary for its Maintenance Operations Division to repair and maintain the public highways without impairment of use by existing water rights...." Therefore, the district could only approach the local watermaster to allow a contractor

to take small amounts (probably not a sufficient amount required for the project) on our behalf for purposes other than maintenance. This would only be a request and TxDOT would have no ability to act without the watermaster's approval.

3. Districts could assist contractors by meeting with the contractor and local water suppliers in a show of support for a contractor's efforts to complete a project. A district could explain the negative impacts of delayed construction.

Options available to contractors are listed below:

- The contractor could contact a watermaster (or the local TCEQ office if there is no watermaster) for information on any perpetual water rights not being used. In these cases limited-term rights might be obtained from the watermaster or TCEQ. A temporary permit would allow the contractor to obtain as much as 325,851 gallons for a year.
- The contractor could attempt to purchase water from someone with perpetual water rights.
- The contractor could attempt to make an arrangement with a landowner to drill a well on private property. They could offer the well as compensation, offer to dig a stock tank, pave a driveway, pay cash, etc.

A district's knowledge of local water rights may be of assistance to the contractor; districts are encouraged to make contractors aware of possibilities.

TxDOT Action

The inability for a contractor to acquire water for project purposes can be considered an excusable delay, but, generally not compensable. For time extensions to be allowed, a contractor should demonstrate to the district's satisfaction that they are making diligent attempts to acquire water, but are unsuccessful, the unavailability is unusual for the area, and the unavailability has occurred over an extended time period.

There may be very rare cases of extreme drought conditions when completing the work becomes unattainable due to the total unavailability of water (water is not available from any source, within considerable distance, and the unavailability is highly unusual for the area). If this occurs, contact the Construction Division, Field Engineering Branch at 512/416-3301 to obtain guidance before taking action.