



# OWNING YOUR PIECE OF TEXAS:

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KEY LAWS TEXAS LANDOWNERS  
NEED TO KNOW

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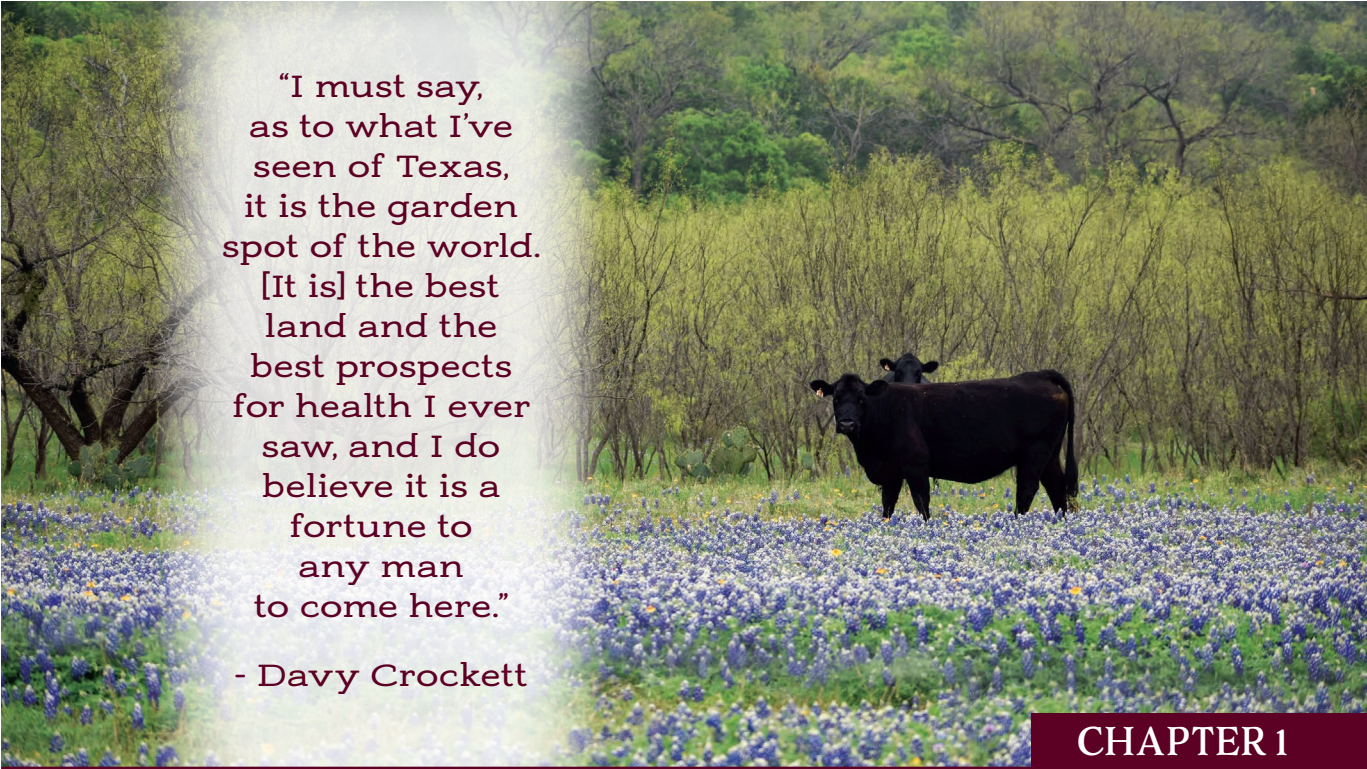
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“I must say,  
as to what I’ve  
seen of Texas,  
it is the garden  
spot of the world.  
[It is] the best  
land and the  
best prospects  
for health I ever  
saw, and I do  
believe it is a  
fortune to  
any man  
to come here.”

- Davy Crockett

## CHAPTER 1

# INTRODUCTION

Owning agricultural land in Texas is certainly a privilege and comes with great responsibility. All Texas landowners should take the time to investigate and understand the laws applicable to their property and operation. From ownership of water beneath the land to potential liability if a person is injured on the property to the best practices for negotiating a pipeline easement, several legal issues face agricultural landowners on a daily basis in the Lone Star State.


This handbook is designed to offer a basic overview of several of the legal issues facing Texas landowners. Agricultural law is broad and complex, and this handbook is no exception. By the time a person reads the entire book, it may feel like a law school diploma should be included.

Specifically, my goal is to write this handbook in a manner that is both understandable and practical for non-attorneys. Having grown up on a family farm and now owning one myself, it is always my goal to write something that can be understood and discussed by the farmers at the local coffee shop. Additionally, for each topic, I will include a list of additional resources where readers may find more detailed information on the various legal issues discussed.

With that, let’s get started looking at Texas agricultural law!







“For a few  
precious  
moments...  
I’m back in  
Old Texas,  
under a high  
sky, where  
all things are  
again possible,  
and the wind  
blows free.”

- Larry L. King

## CHAPTER 2

*Photo by Yanan Chen (Pixabay)*

# WHAT DO YOU OWN?

Although the question of “What do you own?” may seem ridiculous, the starting place for any Texas landowner in considering the legal issues he or she may face is to consider what the landowner actually owns and how that property is held from a legal standpoint.

## I. REVIEW DEED RECORDS

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When land is acquired, a good starting point for a new landowner is to take time to do a review of the deed records related to that property. These records are maintained in the courthouse and contain various documents related to the property such as deeds showing transfer of ownership from one party to another, any express reservations when property is transferred, any encumbrances such as mortgages or liens on the property, any easements burdening the property. These records are open to the public. Taking time to review the documents related to a property being purchased, inherited, or otherwise transferred is important and beneficial.

When reviewing records, there are a number of issues for a person to consider. First, the new landowner (or potential new landowner) should determine if the most recently filed deed shows the correct owner. When property is transferred by sale, this is generally not an issue as a title company often handles preparing and filing the deed documents to transfer ownership from the seller to the buyer.

If property is inherited, however, it may be that there was never a formal deed or other conveyance instrument transferring ownership to the new owner. Ensuring the property is listed as being held by the current owner is an important first step.

Second, deed records should be reviewed to determine if there have been any reservations recorded in the deed records. As discussed in detail below, there may be severances of estate that resulted from reservations. It is important to consider if there have been any reservations of rights on the property, such as mineral rights, groundwater rights, or even wind rights.

Finally, determine if there are any encumbrances on the property. This could include liens or mortgages on the property that have not been released. For agricultural land, there could also be lease agreements that have been recorded that would have to be honored by a new purchaser. Also important is to determine if there are any existing easements on the land, whether those be for existing pipelines, power lines, water lines, or access easements allowing another party to enter the land.

## II. SEVERANCE OF ESTATES

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In Texas, like most other states, one piece of property may have numerous owners because of the potential for the severance of estates. The most common example of this is the fact that the ownership of the mineral estate (sometimes called “mineral rights”) can be separated (“severed”) from the ownership of the surface estate. In other words, one person may own the rights to the surface of a piece of property while another person has the right to the minerals underneath the property. Further complicating matters is the fact that both the surface and the minerals may be owned by multiple people or entities simultaneously. For example, let’s consider a 100-acre property where Amy owns the surface estate and the mineral estate is owned by Brett, Cole, and Dan, each being a 33.3 percent owner of the minerals. Seeing multiple, fractional mineral owners is not uncommon in Texas.

Although mineral severances are the most common, other estates may be severed as well. In Texas, severed groundwater estates and severed wind estates have occurred.<sup>1</sup> There could be one person owning the surface estate, another person owning the mineral estate, and a third person owning the groundwater estate, which was severed off from the surface estate of which it is usually a part.

Severance usually occurs either by reservation or conveyance. A reservation severance occurs when a landowner holding both the surface and minerals (that is, a unified estate), sells the surface to a third party, but reserves ownership of the mineral estate. This type of reservation must be expressly stated in the sales contract and deed to be legally effective. Severance by conveyance occurs where a unified estate owner continues to own the surface estate but sells or otherwise conveys the mineral estate to another party. Again, that sale should be documented and recorded in the county deed records to be legally effective.

### III. DETERMINING OWNERSHIP OF VARIOUS ESTATES

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Unfortunately, determining whether any portion of the minerals have been severed may be a difficult (and expensive) task. Generally, title insurance commitments do not determine or insure mineral ownership. With regard to groundwater severances or wind right severances, those would be much more likely to show up in a title report, so long as they were properly recorded when executed.

For a person interested in determining mineral ownership for a certain piece of property, there are several options to consider.

First, if there is an oil or gas company seeking a lease on the property or that already has one in place, the landowner can request a copy of the title research done for that property. Some oil and gas companies are willing to share this information, while others are not. It is worth asking the question, particularly if the landowner and oil and gas company could end up in negotiations to lease the minerals at issue. Some mineral owners have included provisions in oil and gas leases that require the lessee to provide a copy of pages from the title opinion that reflect the mineral owners' interest. Similarly, if a person is receiving a royalty check or previously received a copy of a division order, that person's percentage mineral ownership may be reflected on these documents.

Second, a landowner should review the title insurance policy he or she got when purchasing the property. As noted above, title insurance commitments generally do not include mineral ownership. Nevertheless, checking to see if the title policy does mention minerals is a good idea. Historical oil and gas leases should be reflected on the report. If the immediate predecessor in title is listed as a lessor, that indicates he or she held at least some portion of the mineral estate prior to the sale. If the immediate predecessor owned some portion of mineral rights and did not expressly reserve those rights, they passed with the sale of the property.

Third, a landowner could do a deed record search on his or her own. This option may sound good in theory, but sorting through deed records to determine when, if, and how minerals may have been reserved or severed decades ago is a very complex process. In order to determine ownership, the chain of title has to be traced back to ensure that there were no mineral rights ever reserved or severed, which can be extremely time-consuming and often proves difficult for even experienced oil and gas attorneys.

Fourth, a landowner could seek to hire a landman to conduct the title research. Landmen spend their days in the courthouse researching deeds and records to determine mineral ownership. They are experienced and typically very efficient. It may be difficult to find a landman willing and able to do this for a couple of reasons. First, many good landmen work for oil and gas companies exclusively, meaning they are usually paid quite well and extremely busy. Second, many landmen are leery of working for individual landowners because oftentimes landowners do not understand the complexity of the research or the time and money it may cost to get an answer, leaving the landowner upset when a bill arrives. If, however, a landowner can find a landman willing to do the title search, this can be a good option.

Fifth, the landowner can hire an attorney to conduct the title research. Of course, as with most situations involving hiring legal counsel, this option can be quite expensive, depending on the complexity of the title documents at issue. Be sure to ask an attorney for an upfront estimate of what the cost might be to make a title determination and ensure payment terms are understood and agreed upon prior to the attorney beginning work.

## IV. CO-OWNERSHIP OF PROPERTY

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Although property is often owned by one person, it certainly may be owned by two or more people simultaneously. This can raise certain legal issues of which any co-owners should be aware.

Initially, it is important to determine exactly what type of co-ownership exists. The two most common are “tenancy in common” and “joint tenants with right of survivorship.” These are two distinct methods of ownership, each with very different legal implications, particularly with regard to the death of one of the co-owners. Note the use of the term “tenant” in this context refers to an owner, not a lessee, as would be more commonly understood.

### TENANTS IN COMMON

People who co-own property as tenants in common each own an undivided interest in the property, but there is no automatic right of survivorship. For example, if Amy and Brett co-owned 100 acres as tenants-in-common each holding a 50 percent undivided interest, and Amy died, her interest in the property would pass to her heirs identified in a will or by intestate succession law; it would not automatically pass to Brett by virtue of his status as co-owner. Tenancy in common is the default form of co-ownership in Texas, meaning unless a deed expressly states that some other ownership form applies, it will be presumed to be held as tenants in common.<sup>ii</sup>

Tenants in common each jointly hold an undivided interest in the property. This means they each own their portion of the whole, rather than owning some identifiable, specific part of the whole. Back to our example, Amy and Brett would each jointly own an undivided interest in the 100 acres, rather than Amy owning the easternmost 50 acres and Brett owning the westernmost 50 acres.

### JOINT TENANTS

The second most common form of joint ownership is a joint tenancy with right of survivorship. The key distinction between tenancy in common and joint tenancy with right of survivorship is, as the name suggests, joint tenancy does include the right of survivorship. This transfer occurs automatically, and nothing the deceased cotenant’s will says would impact the right of survivorship. Thus, unlike a tenancy in common, a person’s interest in a property owned as joint tenants with right of survivorship is not devisable in a will. Back to our example, if Amy and Brett each owned an undivided half of 100 acres, Brett would inherit Amy’s half upon her

death due to his status as joint tenant with right of survivorship. Essentially, the last surviving cotenant would end up owning the entire property.

In order for ownership to be considered as joint tenancy with right of survivorship, there must be a written agreement, signed by the deceased party expressly stating that the right of survivorship is included.<sup>iii</sup> Were a deed or agreement to merely say, “joint tenants,” or “joint owners,” Texas law would presume this was not intended to include the right of survivorship and would treat that property as being held by tenants in common.

## RIGHTS AND RESPONSIBILITIES OF CO-OWNERS

Whether property is held as tenants in common or joint tenants, there are a number of rights and responsibilities afforded to each co-owner.

*Right of Occupancy:* Each cotenant has the right to occupy and possess the property as a whole but may not do so to the exclusion of the other cotenants.<sup>iv</sup>

Thus, one tenant may not prevent another from using all (or any specific portion of) the property.

*Right to Share in Income:* With regard to the rights to share in the income made from the co-owned property, that depends on several facts. First, if income is made from the co-owned property being leased to a third party, each co-owner is entitled to his or her share of that income.<sup>v</sup> Back to our example; if Amy decided to lease the property she co-owns with Brett to Cole, Brett would be entitled to half of the rental income.

Second, if the income is generated by one of the cotenants using the property himself or herself, that cotenant is generally not required to account for the value of the land used.<sup>vi</sup> As one court described it, “A tenant in common may use jointly owned property without liability for its rental value.”<sup>vii</sup> If, however, the cotenant utilizing the property has denied access or use to the other cotenants (also known as “ouster”), then the ousted cotenants are entitled to payment for their interest from the ouster.<sup>viii</sup>

*Responsibility to Preserve and Protect Property:* Generally, cotenants are obligated to preserve the property. This includes making “reasonable and necessary repairs.”<sup>ix</sup> Thus, if one tenant were to make reasonable and necessary repairs to the property, even without the approval or consent from the cotenant, the non-acting cotenant would be required to share in the expenses of doing so.

*Right to Reimbursement for Improvements with Consent:* With regard to improvements, a cotenant who undertakes to improve property (as opposed to merely preserving or making necessary repairs) without the agreement of the other cotenants is not able to recover any portion of these expenses from the non-consenting cotenants. The potential recovery by a cotenant making improvements without consent is the entitlement to the value of the enhancement to the property at the time of partition.<sup>x</sup> Certainly, it is important for a cotenant intending to make improvements and expecting reimbursement to obtain consent for this in writing before beginning the project.

*Responsibility to Pay Debts:* Generally, each cotenant is responsible to pay his or her share of any debts related to the property. This includes mortgages and property taxes. In the event that one cotenant fails to pay his or her part and another cotenant pays more than his or her share, the paying cotenant is entitled to reimbursement.<sup>xi</sup>

*Right to Grant Easement:* Generally, one cotenant may not impose an easement on the co-owned property in favor of a third person without consent of all co-owners.<sup>xii</sup>

*Right to Transfer Interest:* Each cotenant has the right to sell, devise, convey, or otherwise transfer his or her ownership interest, even without approval from the other cotenants. Of course, a cotenant can only transfer his or her ownership interest and cannot transfer more than his or her portion of the property.<sup>xiii</sup>

For parties holding property as tenants in common, this is straightforward—the new owner takes the exact same interest that the transferring cotenant had. If Amy decided to sell her interest in the property she held with Brett as tenants in common, the new purchaser would merely step into Amy’s shoes, and the cotenancy would continue.

For property held as joint tenants with right of survivorship, however, transfers become more complicated. One requirement of a joint tenancy is that each owner must obtain their interest at the same time.<sup>xiv</sup> Thus, the transfer of one’s joint tenancy interest breaks the joint tenancy and converts the interest to that of a tenant in common.<sup>xv</sup>

If Amy and Brett held property as joint tenants, but Amy then sold her interest to Cole, the joint tenancy would be broken, and Brett and Cole would then hold that property not as joint tenants, but as tenants in common. This, of course, greatly impacts what Brett receives upon the death of Cole, versus what would have occurred with the death of Amy.

With regard to the right to sell their interest, however, another important distinction arises. If one tenant sells his or her interest to another party, the joint tenancy is broken, and the ownership of the property changes from joint tenancy to tenancy in common for all parties involved.

## TERMINATING CO-OWNERSHIP

Perhaps not surprisingly, co-ownership of property can create various legal disputes among the co-owners. If co-owners cannot agree on how to jointly use the property or simply wish to terminate the co-ownership interest, they may do so through partition. Partition essentially changes co-ownership of property to sole ownership by dividing the property equitably and granting each co-owner the sole ownership of his or her designated portion of the land. For example, if Amy and Brett decided they no longer wished to be co-owners of their 100-acre tract, they could divide the tract in 50-acre parcels (assuming the value of each was the same) and designate 1 parcel as being solely owned by Amy and the other being solely owned by Brett. This would, of course, need to be changed and recorded in the county deed records.

Partition can be accomplished either by voluntary agreement between the parties or through a partition action filed in court. Partition by a court is only possible if the property could be divided equitably between the two owners. For example, if the property co-owned was a house, it would likely be impossible for the court to physically cut the house in half. Were no physical partition possible that would equitably divide the property, the court would likely order a public sale of the property with proceeds to be divided between the co-owners.

## V. CONCLUSIONS

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As this section likely makes clear, there are a number of potential legal issues that arise with co-ownership of property. Any person entering into co-ownership, or considering devising property in a will to co-owners, should carefully consider the potential ramifications and possible issues that could arise from doing so.


## VI. ADDITIONAL RESOURCES

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- Ag Law in the Field Podcast Episode #41 – David Waggoner (Buying and Selling Property), *available at* <http://aglaw.libsyn.com/episode-41-david-waggoner-buying-and-selling-property>.
- Judon Fambrough, *Cotenancy: Not So Cozy a Relationship*, Texas A&M Real Estate Center (2011), *available at* <https://assets.recenter.tamu.edu/documents/articles/1815.pdf>.

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- <sup>i</sup> *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.2d 53 (Tex. 2016) (severed groundwater estate); Alan J. Alexander, Note, *The Texas Wind Estate: Wind as a Natural Resources and a Several Property Interest*, 44 U. Mich. J.L. Reform 429, 433 (2011) (“Despite a lack of legislative and judicial guidance on this question, wind leases in Texas are typically written as if wind rights are severable. Yet it is unknown whether Texas courts will recognize the severability of a wind estate.”).
- <sup>ii</sup> Texas Estates Code § 111.001.
- <sup>iii</sup> *Ephran v. Frazier*, 840 S.W.2d 81 (Tex. Ct. App. – Corpus Christi 1992).
- <sup>iv</sup> *Murphey v. Murphey*, 131 S.W.2d 158 (Tex. Ct. App. – Waco 1939).
- <sup>v</sup> *I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467 (Tex. Ct. App. – Houston (14th Dist.) 2012); *Walston v. Walston*, 971 S.W.2d 687 (Tex. Ct. App. – Waco 1998).
- <sup>vi</sup> *Casso v. Fullerton*, 2006 WL 2612600 (Tex. Ct. App. – San Antonio 2006) (not reported).
- <sup>vii</sup> *Casso v. Fullerton*, 2006 WL 2612600 (Tex. Ct. App. – San Antonio 2006) (not reported).
- <sup>viii</sup> *Casso v. Fullerton*, 2006 WL 2612600 (Tex. Ct. App. – San Antonio 2006) (not reported).
- <sup>ix</sup> *Perez v. Hernandez*, 658 S.W.2d 697 (Tex. Ct. App. – Corpus Christi 1983); *Smith v. Smith*, 777 S.W.2d 798 (Tex. Ct. App. – Beaumont 1989).
- <sup>x</sup> *Williams v. Shambruger*, 638 S.W.2d 639 (Tex. Ct. App. – Waco 1982).
- <sup>xi</sup> *Wooley v. West*, 391 S.W.2d 157 (Tex. Ct. App. – Tyler 1965).
- <sup>xii</sup> *Elliott v. Elliott*, 597 S.W.2d 795 (Tex. Ct. App. – Corpus Christi 1980).
- <sup>xiii</sup> *Home Owners’ Loan Corp. v. Cilley*, 125 S.W.2d 313 (Tex. Ct. App. – Amarillo 1939).
- <sup>xiv</sup> *Calvert v. Wallrath*, 457 S.W.2d 376, 377-78 (Tex. 1970) (“(J)oint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.”); *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App. 1971).
- <sup>xv</sup> *Hoover v. El Paso Nat. Bank*, 498 S.W.2d 276 (Tex. Ct. App. – El Paso 1973).



A photograph of an oil rig silhouetted against a vibrant sunset sky with orange, yellow, and blue hues. The rig is the central focus, with its tall derrick and various structures visible. The background shows a flat landscape under the colorful sky.

“In Alabama  
and Mississippi  
and Louisiana  
and Texas,  
they think oil  
rigs are pretty.”

- Sen. Mitch  
McConnell

## CHAPTER 3

*Photo by Terry McGrow (Pixabay)*

# OIL AND GAS LAW

Oil and gas are an extremely complex and important area of the law for landowners, especially in Texas. Texas is the largest oil and gas producing state, reporting an all-time high of 1.54 billion barrels of oil produced in 2018.<sup>i</sup> This chapter will highlight some of the most common issues in oil and gas law. For additional, more detailed information, please read the oil and gas handbook I helped co-author, titled, “Petroleum Production on Agricultural Lands in Texas: Managing Risks and Opportunities”<sup>ii</sup> and review the other Additional Resources included below.

## I. THE MINERAL ESTATE—SUBSTANCES

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As was discussed in Chapter 2, mineral and surface estates are often severed, resulting in ownership by different parties. Often, the estates are separated when a landowner holding both the surface and minerals (that is, a unified estate) either sells the mineral estate to a party while retaining ownership of the surface estate, sells the surface estate to one party while selling the mineral estate to another party, or reserves mineral ownership as part of the sale. The mineral estate can be freely severed from the surface estate and divided amongst as many third parties as desired. However, the deed in such a transaction may only refer to “minerals” or “oil, gas, and other minerals” without defining what that term means.

Not surprisingly, Texas courts have been called on to help address disagreements in the meaning of the term “minerals.” To understand all the implications of

severing the mineral and surface estate, it is necessary to examine what substances are considered part of each of the two estates.

## THE MINERAL ESTATE

Under Texas law, there are certain substances deemed to be part of the mineral estate as a matter of law, meaning that is so in every case, unless the parties have expressly agreed otherwise. Those substances include oil, gas, salt, sulphur, and uranium.<sup>iii</sup> Thus, unless the parties expressly agree to treat one of these substances differently, they are judged to be a part of the mineral estate. Thus, when an oil and gas lease is signed, granting the company the right to produce all minerals, these substances are implicitly included unless the lease states otherwise. For this reason, many parties choose to address in writing what specific substances are and are not covered by the lease. Typically, the lease should only cover oil, gas, and its constituent hydrocarbon elements. The lessee may also want the right to substances produced in connection with the hydrocarbon stream, such as sulphur.

For other substances on which courts have not yet ruled as being either a mineral substance or surface substance as a matter of law, Texas courts apply one of two tests to determine which estate the substance is part of, depending on the date on which the mineral and surface estates were severed. For example, although most attorneys believe that the wind is part of the surface estate—and leasing has been handled under that assumption for years—the Texas Supreme Court has not expressly made that ruling. Should the Court be called to do so, it would apply one of the following tests.

For severances occurring prior to June 8, 1983, courts apply the “surface destruction test.”<sup>iv</sup> This test simply provides that substances for which surface destruction is required in order to extract the substance are part of the surface estate.<sup>v</sup> The analysis looks at whether destruction would occur based on using “any reasonable method” of extraction.<sup>vi</sup> The surface destruction determination is a fact issue for the court and must be applied to the particular characteristics of the property in question.

After following the surface destruction test for over a decade, the Texas Supreme Court abandoned this approach in 1984, finding it to be unworkable as it led to much uncertainty.<sup>vii</sup> The Court moved, instead, to the “ordinary meaning test.” Under this approach, a substance is considered part of the mineral estate if the substance is within the ordinary and natural meaning of the word mineral.<sup>viii</sup> Understanding this was a significant change in the law, the Court applied this new rule only for severances occurring after June 8, 1983.<sup>ix</sup>

Keep in mind that both of the above tests—as well as any ruling by Texas courts that a particular substance belongs to either the surface or to the mineral estate—can be negated by expressed intent to the contrary within a deed or other instrument. Where the parties discuss who will own or have rights to specific substances, the terms of the agreement will be the controlling factor.

## THE SURFACE ESTATE

As with the mineral estate, there are certain substances held to be, as a matter of law, part of the surface estate, absent an agreement to the contrary. These substances are building stone, limestone, caliche, surface shale, sand, gravel, groundwater, and “near surface” deposits of lignite, coal, and iron ore.<sup>x</sup> For all other substances, the surface destruction or natural meaning tests, as described above, would apply.

## II. THE MINERAL ESTATE - RIGHTS

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Mineral ownership in Texas includes a number of rights held by the mineral owner. These include five rights frequently referred to as the “bundle of sticks” when it is explained in law school, as well as the implied right to use the surface.

### THE BUNDLE OF STICKS

Law professors often explain mineral rights to students as being a bundle of sticks, whereas each stick constitutes one right. The owner may hold all of the sticks in the bundle himself or herself, or the owner may wish to grant certain sticks, or rights, to be held by others. Further, an owner may also grant some portion of each stick to be held by another, resulting in ownership of one right by multiple owners. This can make mineral ownership extremely complicated because frequently divisions of ownership and rights do occur. For example, a mineral owner could decide to leave his or her mineral interests to surviving children equally, meaning that upon the owner’s death, ownership of each stick would be one-third to each child. Another potential division could occur if a mineral owner determines he or she wants a different person to hold the right to negotiate and enter into a lease agreement and transfer that particular stick to another owner.

The rights included in the bundle of sticks include: (1) the right to develop the minerals; (2) the right to lease the minerals—known as the executive right; (3) the right to receive bonus payments; (4) the right to receive royalty payments; and (5) the right to receive delay rentals.<sup>xi</sup>

*Right to develop (“ingress and egress”).* A mineral owner has the right to develop the mineral estate—that means any mineral owner could obtain the necessary equipment to drill his or her own oil well without seeking the permission of any other mineral owner or the surface owner. On a practical level and as a result of potential expense and liability, this scenario is unlikely to occur. Instead, right is typically transferred to the oil and gas company when a lease is signed. Upon termination of the lease, the right reverts to the mineral owner along with the mineral estate.

*Right to lease (“executive right”).* Generally, unless an express reservation has been made within the prior chain of title, each mineral owner has the right to lease his or her portion of the minerals, regardless of the agreement of any other joint mineral owners. In other words, each mineral owner owns his or her portion of the executive right stick.

A mineral owner could, however, grant complete ownership of all of the executive rights to one person for the purpose of consolidating control of leasing and development. For example, assume a mineral owner writing a will had two children, one of whom was an oil and gas lawyer. The mineral owner might decide to leave the minerals equally to the children, with the exception of the executive rights pertaining to all of the minerals, which he might want to leave entirely to the lawyer for management purposes. In this instance, the other child would still receive his half of the remaining rights—the right to develop, and to receive to royalty, bonus payments, and delay rentals—but would not have the right to actually enter into a lease. The other child’s interest would be referred to as a “non-participating interest.”

Importantly, the executive right holder of the interest of another owes a specific duty of care to that person. In Texas, the executive rights holder must act with “utmost good faith and fair dealing” when negotiating and executing an oil and gas lease.<sup>xii</sup> This approaches the level of a fiduciary duty; however, it only requires the executive right holder put the interest of the non-executives on a level at least equal to his or her own interest. The exact definition and scope of this duty have resulted in several instances of litigation. It is clear, however, the executive is prohibited from engaging in self-dealing to the detriment of the non-executives.

*Right to bonus payments.* When offering an oil and gas lease, the company will often offer an up-front bonus payment to the mineral owners. Generally, this is calculated on a per-acre basis and is similar to a signing bonus in professional sports as it is an upfront payment made in exchange for executing a lease. Keep in mind, just because the mineral owner has the right to receive a bonus payment does not automatically require an oil or gas company to offer one. Although bonus payments are fairly standard in the industry, this is a term that must be negotiated by the mineral owner in order to receive a bonus payment. Also note, bonus payment language is virtually never included as part of the oil and gas lease itself. The lease will usually describe a nominal amount of consideration instead of divulging the size of the bonus payment within the agreement. Landowners should insist the lease bonus agreement be reduced to a written contractual agreement signed by both parties, even if not included in the actual lease itself.

*Right to royalty payments.* Royalty payments are the periodic payments made by the mineral lessee (the oil and gas company) for the ongoing use of the mineral estate and production therefrom. Essentially, it is a share in the revenue generated by the produced minerals, minus certain deductions as defined in the lease. Most often, royalty payments are calculated at a fraction of some form of proceeds in the lease. Royalty payments may also be tied to a certain measure of market value or even a published spot price. Commonly now, a landowner might see a one-quarter royalty on market value at the well, for example. As with the bonus payment, a landowner must negotiate this term for inclusion in a mineral lease.

It is important to recognize the negotiation of royalty payments and corresponding lease provisions is extremely complex, especially with regard to what costs and deductions a royalty owner may have to share in before his or her percentage is calculated. Sometimes, interpretation of the lease royalty provision depends not

only upon what is said, but what is unsaid within the written lease document. Hiring a knowledgeable oil and gas attorney to help with the negotiation and drafting of royalty clauses is highly recommended.

*Right to delay rentals.* Delay rentals are yearly payments made during the primary term of a lease when drilling has not yet commenced. While these types of payments used to be common in leases, nearly all new lease agreements are titled as “paid up” leases, meaning there will be no payments of delay rentals. Thus, a mineral owner obtaining an annual delay rental obligation now would be rare.

## THE IMPLIED RIGHT TO USE THE SURFACE

One of the most surprising pieces of Texas law may be the mineral owner’s implied right to use the surface estate. As discussed above, frequently in Texas, the mineral and surface estates have been severed and are owned by different people. For a mineral owner, this could be problematic. Imagine if a mineral owner owned all the mineral rights beneath a certain tract of land but did not own the surface of the land. How would that mineral owner be able to extract the oil or gas he or she owned?

To deal with this issue, Texas law regards the mineral estate as the dominant estate and the surface estate as the servient estate with regard to the extraction of minerals.<sup>xiii</sup> This means the mineral estate has certain rights—which are implied by law—that the surface estate must honor, including the development or “ingress and egress” right discussed above. Put another way, the surface estate must sometimes “serve” the mineral estate by allowing access and the use of certain resources that technically belong to the surface estate owner. One note here—in 2016, the Texas Supreme Court held a severed groundwater estate is also considered dominant over the surface estate.<sup>xiv</sup> This will be discussed more in Chapter 4, but the concepts related to implied use likely also apply to a severed groundwater owner.

### *Rights included*

This implied right provides a mineral owner has the right to use as much of the surface estate as is reasonably necessary to explore, develop, drill, produce, market, transport, and store the minerals from the land, with no corresponding obligation to compensate the surface owner at all.<sup>xv</sup>

Texas courts have interpreted “reasonable use” as allowing a mineral owner (or more frequently the mineral lessee) to:

- enter the property covered by the mineral lease,
- explore for the oil and gas by using seismic trucks or other exploration methods, construct roads, well sites, electric lines and gathering pipelines serving wells on the property at a location of the mineral owner’s choosing,
- dig pits for handling waste fluids,
- erect storage facilities,
- extract soil, caliche, gravel, and clay to build up the site and construct roads,

- use surface water and groundwater for production operations and construct impoundments for storage of water, even if it results in curtailment of the surface owner's water supply,
- inject water into a subsurface formation for pressure maintenance or secondary recovery operations,
- dispose of saltwater through subsurface injection or disposal wells.<sup>xvi</sup>

Keep in mind this right is implied, meaning it is included in every oil and gas lease and applies on every property in Texas, unless it is expressly modified or excluded from the written agreement by the parties. If the right exists, it allows the mineral estate holder to take the actions listed above without permission from or payment to the surface owner, unless such terms are negotiated between the parties. For many surface-only owners who may not be aware of this rule, it can be confusing and frustrating to realize the scope of the right of a mineral owner to use land and resources that it does not own.

#### *Limitations on implied right of surface use.*

While the implied right to use the surface is certainly broad, it is not unlimited. There are essentially five limitations on the scope of this implied right.

### **CONTRACTUAL LIMITATIONS**

First, the right is limited by any contractual agreements or limitations to which the mineral owner agrees. Generally, these types of agreements are found included in the oil and gas lease itself or in a surface use agreement, a contract between the surface owner and the oil and gas producer.

The best time to negotiate limitations on the implied right to use the surface is during the negotiation of the oil and gas lease. This is more easily done, of course, when the surface owner is also an owner of at least some portion of the minerals or has a good relationship with the mineral owner as it is the mineral owner with whom the company will need to reach an agreement before developing the mineral estate. Although the first draft of the oil and gas lease provided by the company will likely not include many of the available types of surface protection terms, a mineral owner can certainly negotiate to have them included regardless of whether the mineral owner owns any interest in the surface estate.

If an oil and gas lease has already been executed, or if the surface owner simply has no seat at the table or ability to request the mineral owner include protective terms, the surface owner can seek a surface use agreement (SUA). A SUA is simply a contractual agreement between the surface owner and the mineral lessee governing their interactions. In many oil and gas producing states such as Oklahoma and New Mexico, there is a statutory requirement for a mineral lessee to enter into this type of agreement, but Texas has no such statute. Thus, while many oil and gas companies are willing to enter into these types of agreements with a surface owner, there is no legal requirement that they do so in Texas.

So, for example, an oil and gas lease or a SUA could include terms allowing the surface owner to have some say in where drilling pads will be placed, requiring payment to the surface owner for any water usage by the oil and gas company, or prohibiting the drilling of disposal wells on the property. For more examples of terms that should be considered in order to protect the surface of the land, read Chapter 2 in “Petroleum Production on Agricultural Lands in Texas.”

## REASONABLENESS REQUIRED

As described above, there is a long-recognized limitation on the lessee’s surface uses in that they must be “reasonably necessary” to produce the mineral from the same leased premises or pooled unit.<sup>xvii</sup> This means the mineral owner and any operator of the property must not cause any unnecessary damage or make an unreasonable use of surface substances. For example, if an oil and gas company needs 1 million gallons of groundwater in order to produce oil on the property, they may not withdraw 2 million gallons and use the excess water for other projects located on outside lands or units.

Importantly, however, the Texas Supreme Court has held that a pooled unit is treated as one for the purpose of determining reasonable use.<sup>xviii</sup> Thus, if water is withdrawn from one pooled tract for use on another pooled tract, that would be considered reasonable use. Thus, the Supreme Court held a lessee may build a road across one pooled tract to access a well on another pooled tract.<sup>xix</sup> One tract with a pooled unit could conceivably be burdened with all of the operations and infrastructure for the entire unit.

## NEGLIGENCE NOT ALLOWED

Not surprisingly, Texas law does not allow a mineral owner’s negligent acts to be considered as part of the implied surface use right.<sup>xx</sup> Liability for negligence occurs when a person (here, the operator) acts unreasonably under the circumstances and causes damage. Thus, a surface owner always has a remedy against a mineral lessee if the lessee acts in a negligent manner.

For example, Texas courts have found negligence has occurred and liability was imposed where an operator polluted fresh groundwater with brackish water. However, Texas courts have found numerous instances of conduct which resulted in damages but did not constitute negligence, including failure to fence the area of operations to prevent harm to grazing livestock.<sup>xxi</sup> There is also the matter of proving negligence and causation of damages in a court of law, which can be difficult without extensive documentation and evidence.

## COMMON COURTESY ACT

The Common Courtesy Act statute in Texas requires oil and gas operators inform surface owners in writing of their intent to enter the property to drill a new well or to re-enter a plugged or abandoned well at least 15 days prior to entering the property.<sup>xxii</sup> It is unclear, however, what remedy is available to a landowner in the

event the operator violates this statute, as it expressly states it does not “restrict, limit, work as a forfeiture of, or terminate any existing or future permit issued by the commission or right to develop the mineral estate in land.”

## ACCOMMODATION DOCTRINE

Finally, Texas recognizes the “accommodation doctrine.” This common law legal doctrine provides a surface owner’s existing uses of the property are protected, and the mineral lessee must make certain accommodations for these existing uses if certain conditions are met. Importantly, over the years, case law has made it fairly clear the accommodation doctrine is not nearly as broad as landowners might expect or desire.

Essentially, the accommodation doctrine requires a mineral lessee accommodate an existing surface use if the following three conditions are met: (1) substantial impairment of an existing surface use; (2) no reasonable alternative method available to the surface owner that would permit the surface use to continue on the same tract; and (3) reasonable alternatives are available to the mineral lessee on the same tract of land which will allow discovery of minerals that would allow the surface use to continue.<sup>xxiii</sup> There is also a question as to what constitutes an “existing use,” as some courts have allowed planned future uses to qualify where the landowner has invested extensive time and effort documenting its planned operations for certain areas of the property.<sup>xxiv</sup>

By way of example, this doctrine was at issue in *Merriman v. XTO*, a case before the Texas Supreme Court.<sup>xxv</sup> There, the Court found the doctrine did not apply to a cattle rancher seeking to maintain his ability to use his corrals. The rancher argued: (1) he had an existing surface use—working cattle in the corrals; (2) he could not work his cattle elsewhere as he had no other corrals; and (3) the oil and gas company could still produce the minerals in another manner from the same property—by moving the drilling pad away from the corrals and using horizontal drilling methods. The Court reasoned the second factor was missing because the rancher could have built temporary pens to work cattle elsewhere on the property. So, it seems the surface owner must be the one to make the accommodation except in rare circumstances where the surface owner has no other alternative.

## III. OIL AND GAS LEASE CONTENTS

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Entire multi-volume treatises have been written on negotiating oil and gas leases. There are a number of issues for a mineral owner to consider, and this is an area of the law where consulting with an oil and gas attorney is extremely beneficial. For more information, and to see an example of a common oil and gas lease form proposed by a company and some suggested edits for a landowner to consider, see Chapter 3 of the *Petroleum Production in Ag Lands in Texas* handbook.

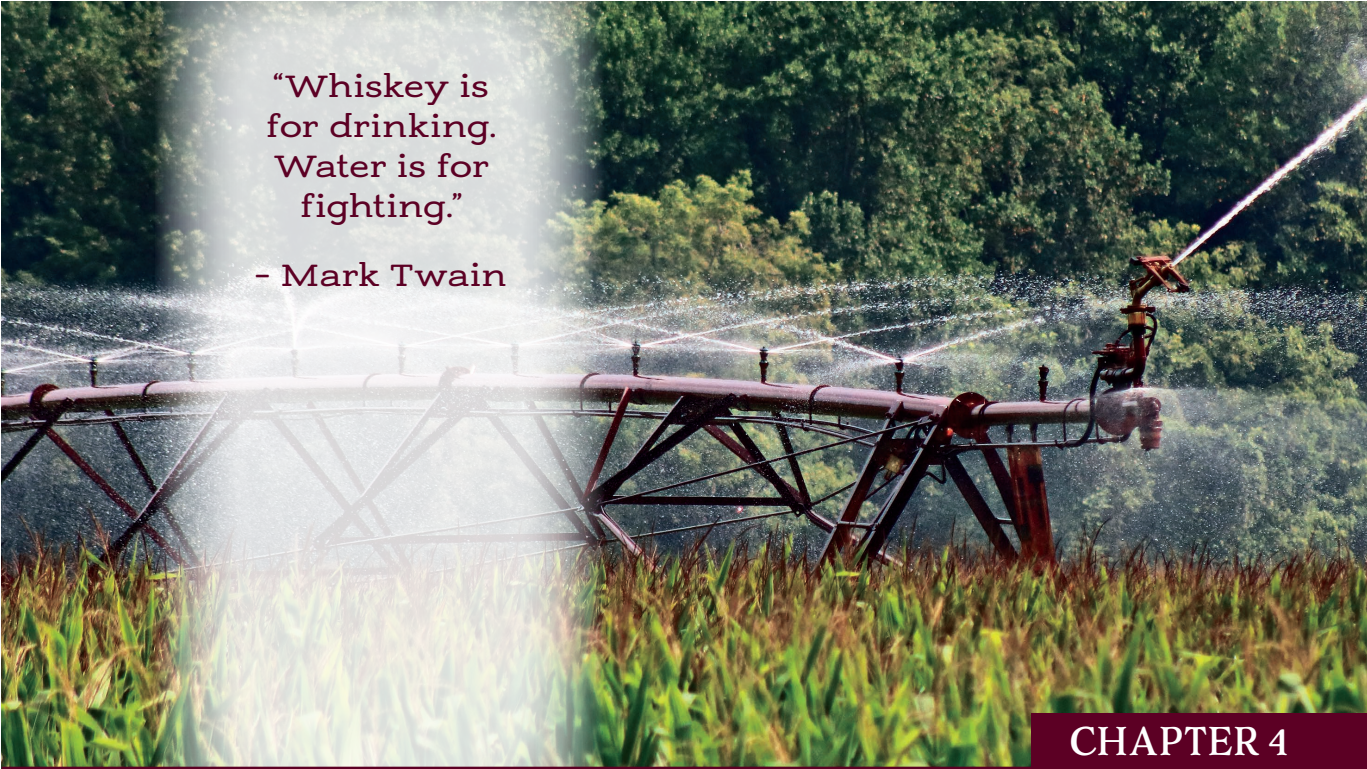


## IV. ADDITIONAL RESOURCES

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- <sup>i</sup> David Blackmon, *New Report Details Record Texas Oil Boom in 2018*, Forbes (February 2019).
- <sup>ii</sup> Shannon L. Ferrell, Tiffany Dowell Lashmet, and Rusty Rumley, *Petroleum Production on Agricultural Lands in Texas: Managing Risks and Opportunities*, available at <https://agriflfeecd.n.tamu.edu/texasaglaw/files/2018/12/Petroleum-Production-on-Agricultural-Lands-in-Texas.pdf>.
- <sup>iii</sup> *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 102-03 (Tex. 1984); Marcy L. Rothman & Charles E. Aster, American Railway Development Association Mineral Rights Panel, available at <http://www.amraildev.com/files/Presentations/AM2015/2015%20AM%20CS%202%20-%20Rothman%20-%20Mineral%20Rights.pdf>, last accessed February 15, 2016.
- <sup>iv</sup> *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971).
- <sup>v</sup> *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971).
- <sup>vi</sup> *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980).
- <sup>vii</sup> *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984).
- <sup>viii</sup> *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984).
- <sup>ix</sup> *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984).
- <sup>x</sup> *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984). For purposes of this rule, “near-surface” exists where the substances are located within 200’ of the surface. *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980).
- <sup>xi</sup> *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, 797 (Tex. 1995); Earnest Smith & Jacqueline Lang Weaver, “Texas Law of Oil and Gas” Section 2.1[A][1] at 2-10 (2013).
- <sup>xii</sup> *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015).
- <sup>xiii</sup> Earnest E. Smith, “The Growing Demand for Oil and Gas and the Potential Impact on Rural Land,” 4 Texas J. Oil, Gas & Energy L. 1 (2008-2009).
- <sup>xiv</sup> *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016).
- <sup>xv</sup> Earnest E. Smith, “The Growing Demand for Oil and Gas and the Potential Impact on Rural Land,” 4 Texas J. Oil, Gas & Energy L. 1 (2008-2009).
- <sup>xvi</sup> Earnest Smith & Jacqueline Lang Weaver, “Texas Law of Oil and Gas” Section 2.1[B][1] at 2-15 (2013).
- <sup>xvii</sup> *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013).
- <sup>xviii</sup> *Key Operating & Equip., Inc. v. Hegar*, 435 S.W.3d 794 (Tex. 2014).
- <sup>xix</sup> *Key Operating & Equip., Inc. v. Hegar*, 435 S.W.3d 794 (Tex. 2014).
- <sup>xx</sup> *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 855 (Tex. Civ. App. – Eastland 1970).
- <sup>xxi</sup> *Baker v. Davis*, 211 S.W.2d 246 (Tex. Civ. App. – Eastland 1948).
- <sup>xxii</sup> Texas Natural Resources Code Section 91.751-91.755.
- <sup>xxiii</sup> *Merriman v. XTO*, 407 S.W.3d 244 (Tex. 2013).
- <sup>xxiv</sup> *Texas Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118 (Tex. Ct. App. – Waco 2006).
- <sup>xxv</sup> *Merriman v. XTO*, 407 S.W.3d 244 (Tex. 2013).



“Whiskey is  
for drinking.  
Water is for  
fighting.”

- Mark Twain

## CHAPTER 4

*Photo by Joseph Fulgham (Pixabay)*

# WATER LAW

Water law is one of the most contentious and frequent legal issues Texas landowners face. Texas property owners need to understand the basics of Texas water law as well as their rights and legal limitations related to the use of water on their property.

Texas water law divides water into two broad categories: groundwater and surface water. Different legal frameworks and regulatory structures apply to each category, making Texas water law more complex than other states that follow a single legal approach for all waters.

## I. GROUNDWATER

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The Texas Water Code defines groundwater as “water percolating below the surface of the earth.”<sup>i</sup> Nine major aquifers hold much of this groundwater: Cenozoic Pecos Alluvium, Seymour, Gulf Coast, Carrizo-Wilcox, Huaco–Mesilla Bolson, Ogallala, Edwards–Trinity Plateau, Edwards BFZ, and Trinity.

### OWNERSHIP

Absent an agreement otherwise, Texas landowners own the groundwater beneath their property.<sup>ii</sup> Texas courts are clear that a landowner has a vested property right in groundwater.<sup>iii</sup> Although a landowner has the right to capture water

from beneath his or her property, this right does not ensure the right to capture a specific amount of groundwater.

Like other estates such as minerals, the groundwater estate may be severed from the surface estate of the property. The groundwater estate can then be reserved (the seller of the property retains the groundwater ownership and sells his or her remaining interest) or conveyed (a property owner sells or otherwise transfers the groundwater ownership but retains ownership of the rest of the property). If a property owner sells his or her property but retains the groundwater rights, the new purchaser owns the surface estate but not the groundwater. The seller who reserved that interest still owns the groundwater. Importantly, any such reservation of groundwater must be expressly stated in the sales contract and in the recorded document in order to be effective. In addition, any time a groundwater interest is separated from the surface, properly defining the surface rights to access that groundwater is critical.

In 2016, the Texas Supreme Court ruled that a severed groundwater estate—like a severed mineral estate—is dominant over the surface estate.<sup>iv</sup> This ruling is crucial for anyone owning or considering purchasing property with severed groundwater rights. The result of this ruling is absent an express agreement to the contrary, an owner of a severed groundwater right has the automatic, implied right to use as much of the surface of the land as is reasonably necessary to produce the severed groundwater. The concept of this implied right and the applicable limitations were discussed in more detail in Chapter 3.

This right is limited by the accommodation doctrine, which requires a dominant estate holder to accommodate an existing surface owner if the surface owner can prove: (1) mineral production substantially interferes with an existing surface use, (2) minerals can be produced another way, and (3) existing surface use cannot be conducted in another way. Although Texas Courts have yet to interpret the accommodation doctrine with regards to groundwater, in the oil and gas context, it has historically been extremely difficult for a surface owner to successfully prove a violation of the accommodation doctrine.

## APPLICABLE LAW

The Rule of Capture governs groundwater law and provides a landowner has the right to pump water from beneath his or her property, even at the expense of his or her neighbor. The Texas Supreme Court<sup>v</sup> established this rule in 1904 when it found a landowner had no legal remedy when a railroad company moved in next door, drilled a bigger, deeper well, and made the landowner's well go dry. The landowner's remedy, explained the Court, was to drill his own bigger, deeper well.

Despite this approach, certain limitations on the Rule of Capture apply: Common law rules and Groundwater Conservation Districts (GCDs).

First, some common-law limitations on the Rule of Capture have developed through court cases. These limitations, which apply state-wide, regardless of whether a GCD is in place in an area, prohibit a landowner from (1) maliciously taking water for the sole purpose of injuring his or her neighbor, (2) willfully or

wantonly wasting groundwater, (3) negligently drilling or pumping from a well in a manner that causes subsidence, (4) pumping from a contaminated well, or (5) trespassing in order to pump groundwater.<sup>vi</sup> Legal disputes involving these common law rules are uncommon.

Second, Groundwater Conservation Districts are the “preferred method of groundwater management in Texas.”<sup>vii</sup> Although the Texas Constitution tasks the Texas Legislature with managing the State’s natural resources, the Legislature determined allowing local control through GCDs would be a better approach to groundwater management. Currently, there are 98 GCDs across the state. A map showing the jurisdiction of each GCD is included as Appendix I. These districts manage groundwater within their bounds by developing plans and implementing rules related to groundwater production. The rules differ by GCD but often include a permitting process for most groundwater wells, some form of reporting requirement, and production rules such as spacing rules, pump size limits, or production limits. As you will notice on the map, not all counties are under the jurisdiction of a GCD, and for those that are not, there are no regulatory authority managing groundwater withdrawals.

In addition to the rules for each district, a state statute, which is applicable across Texas, makes specified wells exempt from the GCD permitting process. Wells exempt under this statute are not required to obtain permits to drill from the local GCD but may need to register and follow other district requirements. Exempt well categories in Texas statute include: (1) wells drilled for domestic use or for providing water for livestock or poultry if the well is located on a tract of land 10 acres or larger; and drilled, completed, or equipped to be incapable of producing more than 25,000 gallons per day; (2) wells used solely to supply water for a rig actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas; or (3) wells authorized by the Railroad Commission of Texas or for production from the well to the extent mining activities require withdrawals.<sup>viii</sup> GCDs may not narrow any of these statutory exceptions but can broaden them. For example, a GCD could have a rule all domestic and livestock wells are exempt from permitting, regardless of the size of the tract or the pump involved. Each GCD has its own set of rules to address these issues.

Thus, as a first step, all Texas landowners should determine whether their property is located within a GCD and, if so, obtain a copy of the GCD local rules to ensure compliance when drilling a well and producing groundwater. If a landowner is not in the bounds of a GCD, he or she need not worry about these types of regulations. If the landowner’s property is within the jurisdiction of GCD, the landowner needs to be sure to comply with the District’s rules.

One important concept to note is Texas courts have found where regulations go too far, a permit denial can constitute a regulatory taking requiring compensation to the landowner.

Please note cases are very fact-specific, and it is usually difficult for a landowner to successfully prove a regulatory taking has occurred. In *Edwards Aquifer Authority v. Bragg*, the San Antonio Court of Appeals found when a pecan farmer was denied

a permit to pump water from the Edwards aquifer to water the trees he planted decades ago when there was no regulation of pumping in the aquifer, a taking occurred, and the farmer was entitled to just compensation.<sup>ix</sup> Certainly not every permit denial will constitute a regulatory taking; to the contrary, most will not. However, the *Bragg* case makes clear this type of claim can be viable under the right factual circumstances.

## II. SURFACE WATER

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Surface water includes all water “under ordinary flow, underflow, and tides of every flowing river, stream, lake, bay, arm of the Gulf of Mexico, and stormwater, floodwater or rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state.”<sup>x</sup> A subcategory of surface water is diffused surface water, also known as sheet flow or storm runoff of rain or snow. The distinction between these categories is critical as the law as to use is wholly opposite.

The key difference between surface water and diffused surface water is whether a “defined watercourse” exists. Under Texas case law, a defined watercourse is made up of three elements: (1) bed and banks, (2) current, and (3) permanent source and supply.<sup>xi</sup> The application of this test has been extremely broad, with the Texas Supreme Court holding a defined watercourse existed where the bed and banks were “slight, imperceptible, or absent,” the current of water was not “continuous, and the stream may be dry for long periods of time.”<sup>xii</sup>

Landowners should carefully consider whether runoff on their property is truly diffused surface water or if it meets the liberal definition of surface water.

### OWNERSHIP

The State of Texas owns surface water, held in trust for the citizens.<sup>xiii</sup> The Texas Commission on Environmental Quality (TCEQ) manages it. In most cases, to use surface water, even water on private property, the landowner must obtain a permit from the TCEQ allowing the landowner to use a designated amount of water for a designated purpose. TCEQ will consider a number of issues, including whether there is unappropriated water available in the basin, how the proposed diversion will impact other surface water permit holders, and whether the proposed diversion will be put to beneficial use. Diffused surface water, however, is the property of the landowner as long as it remains on the landowner’s property and may be used how he or she wishes until it reaches the defined watercourse, at which time it becomes state-owned water.<sup>xiv</sup>

Diffuse surface water, on the other hand, is not owned by the state. Any landowner upon whose property diffuse surface water falls has the right to use that water for any purpose desired. One statutory exception does exist, prohibiting a landowner from diverting or impounding the natural flow of waters in a manner which damages the property of another by the overflow of water impounded or diverted.<sup>xv</sup>

## APPLICABLE LAW

The legal doctrine of prior appropriation governs the use of surface water, following the principle of “first in time, first in right.”<sup>xvi</sup> Essentially, prior appropriation means “first come, first served.” When a person obtains a permit from the TCEQ, that permit has a “priority date.” The TCEQ maintains a database of all water rights. In times of shortage, senior water users—those with the oldest priority date—receive all of the water to which they are entitled before junior users receive any. A water rights holder concerned there will not be enough water to allow his or her permitted withdrawal may contact TCEQ and request a priority call, which is an order from TCEQ to junior water rights holders to stop diverting water.

Certain diversions of water are exempt from the TCEQ permitting process, meaning landowners may make these diversions of surface water without obtaining a TCEQ permit. The following diversions do not require a permit: (1) Domestic or livestock users can build a tank or reservoir of fewer than 200-acre-feet capacity for a noncommercial purpose; (2) Commercial or noncommercial wildlife management, including fishing, is allowed if a tank or reservoir is less than 200-acre-feet in capacity; (3) Diversions used for drilling or producing petroleum may take water from the Gulf of Mexico and adjacent bays and arms of the Gulf of Mexico; and (4) Reservoirs may be constructed as part of a surface coal mining operation if they are used for sediment control and are in compliance with applicable laws related to dust suppression.<sup>xvii</sup>

Importantly, these exemptions apply only to a non-navigable stream.<sup>xviii</sup> For any navigable stream, all diversions require a permit from the TCEQ. Under Texas law, there are two alternative tests for navigability. To be deemed navigable, a watercourse need satisfy only one. First, a watercourse can be “navigable in fact”—it can be used as a “highway for commerce.”<sup>xix</sup> Courts have stated that waterways capable of floating logs and travel by any boat are “navigable in fact,” despite “occasional difficulties in navigation.”<sup>xx</sup> Second, a watercourse can be “navigable in law”—it maintains an average width of 30 feet from gradient boundary line to gradient boundary line.<sup>xxi</sup>

A second issue arises with regard to the navigability of a stream. Generally, under Texas law, the streambed of a navigable stream is deemed owned by the State and, as such, are open to the public.<sup>xxii</sup> Thus, if a navigable stream flows across private property, a person could travel down the state-owned streambed across the private land. Importantly, the person may not cross private property to access the stream, and the person may not get out of the streambed and come up onto the surrounding private property, but access to the streambed itself is permitted. Further, a landowner is not permitted to fence across or otherwise prevent travel down a navigable stream even on private property.

## III. CONCLUSIONS

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Because legal issues surrounding water will not go away anytime soon, landowners should educate themselves on the laws and their rights related to water use. The first step in analyzing water law issues in Texas is to understand the different

categories of water and the legal approaches to each. In Texas, the landowner owns the groundwater, subject in many areas to rules created by Groundwater Conservation Districts. Landowners should determine whether they are in a GCD and, if so, review and understand the rules of that district. When buying or selling property, all Texas landowners should be careful to determine whether groundwater rights have been severed. The State of Texas owns surface water, and a permit from the TCEQ is generally required to divert state-owned surface water. Diffused surface water is storm runoff and may be captured and used by a landowner before it reaches a defined watercourse and becomes state-owned water.

## IV. ADDITIONAL RESOURCES

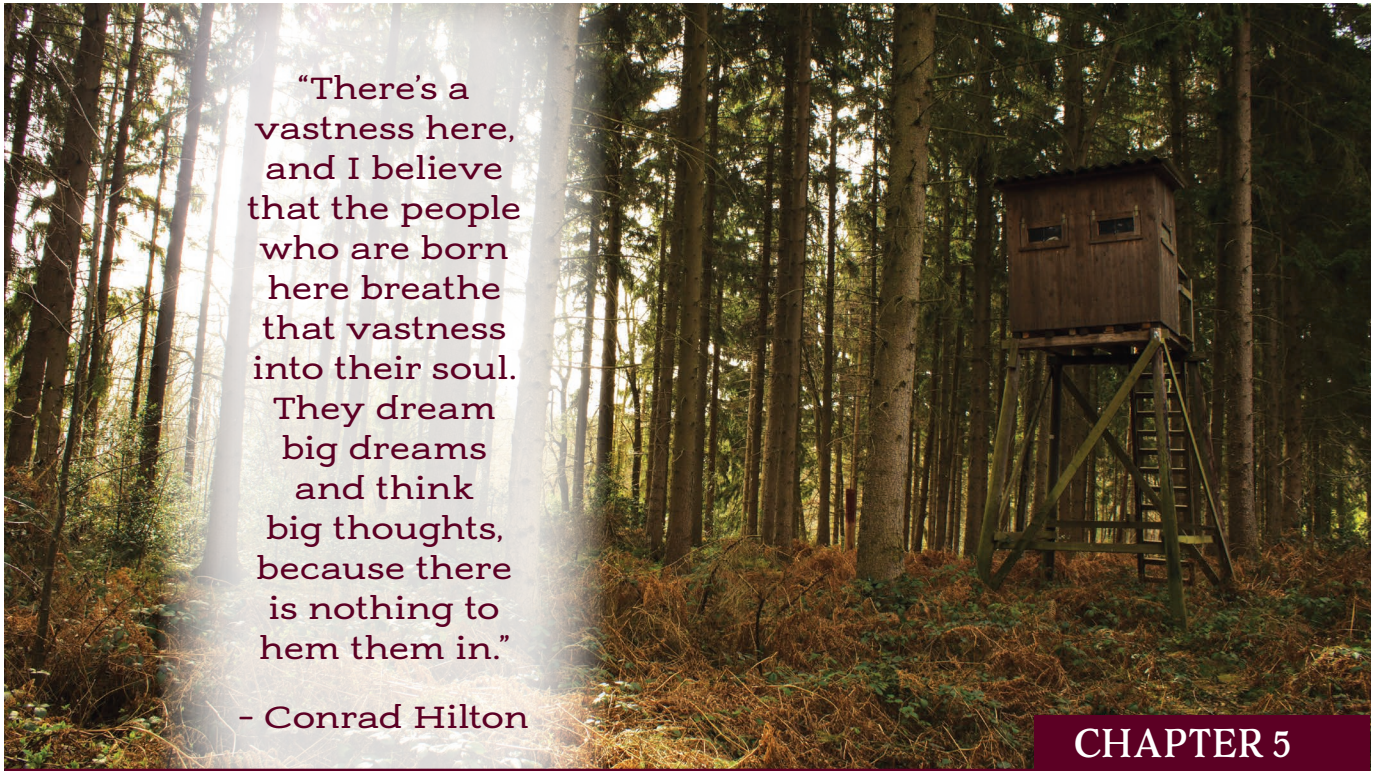
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- Ag Law in the Field Podcast Episode #21 – Doug Caroom (Texas Groundwater Law), *available at* <http://aglaw.libsyn.com/episode-21-doug-caroom-texas-groundwater-law>.
- Ag Law in the Field Podcast Episode #22 – Carlos Rubenstein (Texas Surface Water Law), *available at* <http://aglaw.libsyn.com/episode-22-carlos-rubenstein-texas-surface-water-law>.
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- Ronald A. Kaiser, *Handbook of Texas Water Law: Problems and Needs*, *available at* [https://texaswater.tamu.edu/resources/2002-037\\_waterlaw.pdf](https://texaswater.tamu.edu/resources/2002-037_waterlaw.pdf) (last accessed August 23, 2018).
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<sup>i</sup> Texas Water Code §36.001(5).  
<sup>ii</sup> Texas Water Code §36.002.  
<sup>iii</sup> *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012).  
<sup>iv</sup> *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016).  
<sup>v</sup> *Houston & T.C. Ry. V. East*, 81 S.W.279 (Tex. 1904).  
<sup>vi</sup> *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999).  
<sup>vii</sup> Texas Water Code §36.0015(b).  
<sup>viii</sup> Texas Water Code §36.117.  
<sup>ix</sup> *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118 (Tex. Ct. App. – San Antonio 2013).  
<sup>x</sup> Texas Water Code §11.021.  
<sup>xi</sup> *Hoefs v. Short*, 273 S.W.785 (Tex. 1925).  
<sup>xii</sup> *Hoefs v. Short*, 273 S.W.785 (Tex. 1925).  
<sup>xiii</sup> Texas Water Code § 11.021.  
<sup>xiv</sup> *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. Ct. App. – Austin 1999).  
<sup>xv</sup> Texas Water Code § 11.086.  
<sup>xvi</sup> Texas Water Code §11.027.  
<sup>xvii</sup> Texas Water Code §11.142.  
<sup>xviii</sup> 30 *Texas Admin. Code* 297.21(c).  
<sup>xix</sup> *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Ct. App. – Waco 1935).  
<sup>xx</sup> *Orange Lumber Co. v. Thompson*, 126 S.W. 604 (Tex. Ct. App. 1910).  
<sup>xxi</sup> *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Ct. App. – Waco 1935).  
<sup>xxii</sup> *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935).





“There’s a vastness here, and I believe that the people who are born here breathe that vastness into their soul. They dream big dreams and think big thoughts, because there is nothing to hem them in.”

- Conrad Hilton

## CHAPTER 5

Photo by Pascal Treichler (Pixabay)

# LANDOWNER LIABILITY

A common concern for most Texas landowners is when they may be held liable if someone is injured on their property and what landowners can do to protect themselves in the event this occurs. It is important for landowners to understand the duty the law imposes on them for each person entering onto their land. Additionally, there are a number of steps landowners can take in order to protect themselves and their operations from liability.

## I. MOST COMMON LEGAL CLAIMS

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When a plaintiff is injured on a defendant’s land, he or she has two potential legal causes of action: a negligent act claim or a premises liability claim. The two claims each have a separate applicable legal framework. Thus, the threshold issue is to determine which of these two claims the plaintiff’s case falls under.

### NEGLIGENT ACT

A negligent act occurs when there is an “ongoing activity” that led to the plaintiff’s injury. For example, in *Wal-Mart Stores, Inc. v. Garza*,<sup>1</sup> a plaintiff was injured when a box being moved by employees was dropped on the plaintiff’s head. In this case, because the plaintiff was injured by an ongoing act—the moving of the box—it was a negligent act case.

In order to succeed in a negligent act case, a plaintiff must prove the following elements: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's action caused the plaintiff's injury; and (4) the plaintiff suffered damage.<sup>ii</sup> This is the analysis in a normal negligence case, like in a car accident, for example. Essentially, in a negligent act case, a plaintiff must prove the defendant acted unreasonably under the circumstances and such action caused the plaintiff's injury. Negligence is one of the more common legal claims and can be made in a variety of different circumstances, including a negligent act, a car accident, or pesticide drift. Regardless of the factual circumstances, every negligence case is analyzed utilizing these elements.

## PREMISES LIABILITY

A premises liability case arises when a plaintiff is injured by a condition on the land, as opposed to an ongoing activity. In *Keetch v. Kroger Co.*,<sup>iii</sup> the plaintiff sued Kroger grocery store for a slip and fall. The grocery store sprayed a substance on the plants in the store about a half-hour before the plaintiff fell. The court found this to be a premises liability case, rather than a negligent act, because there was no “ongoing activity” involved. Specifically, the court explained the plaintiff was injured not by the actual act of spraying, but by a condition created after the completion of the act. Therefore, the plaintiff could only recover under a premises liability cause of action.

In general, it is more difficult to prove the elements of a premises liability claim than a negligent act claim. For premises liability, an injured party must prove: (1) the defendant had actual or constructive knowledge of some condition on the premises (requirement depends on the category of person injured, as discussed below); (2) the condition posed an unreasonable risk of harm; (3) the defendant did not exercise reasonable care to reduce or eliminate the risk; and (4) the owner's failure proximately caused the plaintiff's injuries.<sup>iv</sup>

Texas law divides people into three categories, and a landowner owes a different duty to each. Thus, anytime someone is injured on the land of another, it is important to determine which of these categories the injured party would fall.

- *Trespasser*: Anyone who enters the property without permission falls into the trespasser category. The landowner owes the lowest duty of care to a trespasser.<sup>v</sup> A landowner's only obligation to a trespasser is not to intentionally injure the trespasser and not to injure the trespasser by gross negligence.<sup>vi</sup> Gross negligence involves an act or omission involving an extreme degree of risk, of which the defendant had actual awareness but proceeded in conscious indifference to the rights, safety, and welfare of others. Put another way, “what separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care.”<sup>vii</sup> This is a very high standard and is difficult for a plaintiff to prove.

A landowner has no duty to maintain his or her land in a safe condition for persons entering without permission. Thus, so long as a landowner does not

intentionally injure a plaintiff or act with gross negligence, he or she will not be liable for injuries to a trespasser under a premises liability claim.

- *Licensee*: A person who enters the land with permission for his or her own benefit is a licensee.<sup>viii</sup> The most common example is a social guest or a salesman.

Landowners must warn or make safe any condition posing an unreasonable risk of harm that is actually known to the landowner and is not similarly known by the plaintiff.<sup>ix</sup>

Unreasonable Risk: Not all conditions create an unreasonable risk of harm. Merely presenting a risk does not mean something is unreasonably dangerous. Liability is imposed only where a plaintiff can show an *unreasonable* risk exists.<sup>x</sup> For example, Texas courts have found the following conditions not to create an unreasonable risk: mud and dirt on a concrete slab, rocks in a rodeo arena, and natural accumulation of ice.<sup>xi</sup>

Further, in order for a landowner to be liable, the plaintiff must show the risk was a general danger to all persons on the property, rather than a specific danger to a person performing a certain activity.<sup>xii</sup>

Actual Knowledge: A plaintiff must show the landowner had *actual* knowledge of the unreasonably dangerous condition. If a landowner did not actually know of the condition, he or she cannot be liable. Actual knowledge can be shown in a number of ways, including evidence the landowner has seen or been told of the condition, proof of prior incidents, proof the landowner created the condition, or the fact the landowner attempted to remedy or prevent the condition.<sup>xiii</sup>

Plaintiff Did Not Have Similar Knowledge: A landowner does not have to warn or make safe a dangerous condition actually known to the licensee.<sup>xiv</sup> Oftentimes, similar knowledge of the licensee is proven where the dangerous condition was visible to the licensee. Thus, generally, a landowner has no duty to warn visitors of dangerous conditions that are open and notorious.<sup>xv</sup>

Duty to Warn or Make Safe: The duty required of a landowner to a licensee is to either warn a potential plaintiff or to make the condition safe. A warning may occur any way, including telling people, providing written notice, or posting a sign. The warning must notify the visitor of the particular dangerous condition; a mere “be careful” is insufficient.<sup>xvi</sup>

- *Invitee*: A person who enters the land with the owner's knowledge and for the mutual benefit of both parties is an invitee.<sup>xvii</sup> Examples include business patrons, owner's employees, mailmen, and meter readers.

Landowners owe the greatest duty to an invitee. A landowner must warn or make safe any condition posing an unreasonable risk of which the landowner has actual or constructive knowledge.

Actual or Constructive Knowledge: A landowner is responsible not only for conditions of which he or she has actual knowledge, but also those of which he or she is deemed to have constructive knowledge. This means the landowner *could* have discovered the condition with a reasonable inspection, even if the

landowner failed to make such an inspection. Consider a classic slip and fall case in a grocery store. If a plaintiff slipped on a grape that had been on the floor for only 5 minutes, the grocery store likely would not be found to have constructive knowledge because it would not be reasonable to expect them to inspect the entire store every 5 minutes. If, on the other hand, a customer slipped on a grape that had been on the floor for 5 hours, constructive knowledge would be more likely to exist.

Unreasonable Risk: As noted in the prior section related to licensees, not all conditions create an unreasonable risk of harm. Merely presenting a risk does not mean something is unreasonably dangerous. Liability is imposed only where a plaintiff can show an *unreasonable* risk exists.<sup>xviii</sup> For example, Texas courts have found the following conditions not to create an unreasonable risk: mud and dirt on a concrete slab, rocks in a rodeo arena, and natural accumulation of ice.<sup>xix</sup> Further, in order for a landowner to be liable, the plaintiff must show the risk was a general danger to all persons on the property, rather than a specific danger to a person performing a certain activity.<sup>xx</sup>

Duty to Warn or Make Safe: Where a landowner has actual or constructive knowledge of a condition creating an unreasonable risk, he or she has a duty to use reasonable care to either warn the invitee or to make the condition safe. The warning must notify the visitor of the particular dangerous condition; a mere “be careful” is insufficient.<sup>xxi</sup>

## II. STEPS FOR LANDOWNER LIABILITY PROTECTION

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There are a number of steps for a landowner to consider in order to protect himself or herself from liability. Importantly, there is no silver bullet that will ensure a landowner will not ever be liable for injury. Further, there is nothing a landowner can do to prevent a person from filing suit against the landowner. These steps, however, allow a landowner the best opportunity to avoid being held liable.

### CARRY LIABILITY INSURANCE

This is the most important step a landowner can take to protect his or her operation. Every landowner needs to have a liability insurance policy covering every activity taking place on the property. For example, if a landowner has a farm and ranch policy but also conducts other activities like a roadside fruit stand or guided hunts, the landowner should confirm the additional activities are covered by the farm and ranch policy's provisions.

The amount of insurance a landowner should carry depends on the activity happening on the property. Landowners should consider the amount of risk associated with their operation. For example, a farm in the middle of nowhere that does not host any sort of events or have any guests would likely need a lower coverage amount than a farm that has a pumpkin patch and corn maze every fall with thousands of guests. Talking through the details of an operation with an insurance agent will allow a landowner to determine the right coverage level.

A landowner should also take care to review any endorsements or exclusions to the policy. An endorsement, sometimes called a “rider” is an amendment to the insurance contract changing the original policy in some way. Endorsements may be used to add coverage, delete or limit coverage, or otherwise alter the terms of the policy. For example, many homeowners insurance policies have a fairly low coverage level for jewelry. If a person wanted to add additional coverage for a specific item, such as a wedding ring, an endorsement scheduling the item would be used to do so.

Exclusions are policy provisions that limit the coverage for certain risks by narrowing the scope of the policy coverage. For example, most insurance policies exclude losses the insured intentionally caused. Thus, even if a person carried an automobile liability policy, if the driver injured someone intentionally, the exclusion would allow the insurance company to deny coverage.

## **IDENTIFY DANGEROUS CONDITIONS ON THE LAND AND EITHER PROVIDE WARNINGS OR MAKE THEM SAFE**

As discussed in detail above, a landowner owes certain duties to persons on his or her property. Although a landowner is only required to conduct a reasonable inspection and make safe or warn of dangerous conditions for an invitee, doing so for all persons may help to avoid an injury altogether. Landowners should think about their properties and seek to identify any potentially dangerous conditions. Once these conditions have been identified, landowners should take care to warn guests about them or to make them safe.

## **OBTAIN WRITTEN LIABILITY WAIVERS FROM ANYONE COMING ON THE PROPERTY**

Liability waivers (also called liability releases) are simply documents signed by guests agreeing that they will not hold a landowner liable for injuries that occur on the property. Texas courts will generally enforce this type of waiver if drafted in a manner comporting with Texas law.<sup>xxii</sup>

Texas courts require liability waivers to be conspicuous and to comply with the express negligence doctrine.<sup>xxiii</sup> These requirements are in place in order to ensure a person signing a waiver has fair notice and understands what he or she is agreeing to.

The “express negligence doctrine” states a waiver must contain an express statement in specific terms within the four corners of the contract that the signor waives any claim of negligence against the landowner.<sup>xxiv</sup> The conspicuous requirement mandates, “There must be something on the face of the agreement to attract the attention of a reasonable person when he looks at it.”<sup>xxv</sup> In other words, language purporting to waive or limit liability cannot be buried in the fine print of a contract.

There are some unsettled questions under Texas law regarding the enforceability of certain releases. Some appellate level courts have refused to enforce a liability waiver signed by a parent on behalf of a minor child, although the Texas Supreme Court has never ruled on this issue.<sup>xxvi</sup> Additionally, Texas law is unclear on whether courts will allow a liability waiver to waive claims for conduct deemed

grossly negligent.<sup>xxvii</sup> Given the unsettled nature of the law, landowners certainly may consider obtaining these types of releases but should at least be aware they may not be deemed enforceable.

Releases usually identify the activity involved, list common dangers associated with the type of activity, state the signor understands those risks, and that the signor agrees not to sue the landowner for negligence. Given the complex nature of these releases and the importance of having one that is enforceable, it is recommended that a landowner seek the assistance of an attorney to draft a proper waiver. Spending the money upfront to do so can certainly pay off in the long run if a lawsuit can be avoided.

## **CONSIDER THE USE OF A LIMITED LIABILITY BUSINESS ENTITY STRUCTURE**

Another way to limit potential liability exposure is to consider putting one's land (and/or other assets) into a business entity which offers limited liability. This could include a limited liability company, limited partnership, corporation, or trust. When formed correctly and managed properly, these types of entities can provide limited liability for a landowner if an injury occurs on property owned by the entity. For example, if someone gets injured on property owned by an LLC of which Bob is a member, Bob would not be personally liable for the injuries. Conversely, if Bob owned the land in his own name, his personal assets could be subject to liability if an injury were to occur.

There are a number of considerations as to whether a business entity is right for an operation and, if so, which entity to select. Factors including ease of creation, complexity of management, and tax liability should all be carefully considered. Landowners should consult with an accountant and attorney in their area to help make the right decision for their operation.

## **ENSURE ALL AVAILABLE LIMITED LIABILITY STATUTES APPLY TO THE OPERATION**

Many states have limited liability statutes protecting landowners from liability if certain conditions are met. In Texas, three such statutes exist: Recreational Use Statute, Texas Agritourism Act, and Texas Farm Animal Liability Act. Although they may overlap in some factual situations, meaning there could be instances where more than one might serve as a defense to liability, they are separate statutes with differing requirements for landowners to qualify.

### *Recreational Use Statute*

Understanding the vast majority of Texas land is privately owned and hoping to encourage landowners to allow recreation on their land, the 1965 Texas Legislature passed the Recreational Use Statute, codified at Texas Civil Practice and Remedies Code Chapter 75.<sup>xxviii</sup> Although portions of the Recreational Use Statute apply to nonagricultural land, to government entities, and to certain utilities and electric

companies, the scope of this section will focus only on the portions applicable to agricultural land.

The Recreational Use Statute provides a landowner, tenant, or occupier of land is liable only for intentional acts or gross negligence, so long as three requirements are satisfied: (1) the injury occurred on agricultural land; (2) the plaintiff was there for a recreational purpose; and (3) the landowner satisfies one of three monetary requirements.<sup>xxix</sup> Note the standard included here—liability only for intentional acts or gross negligence—is the same as the standard of care owed to a trespasser. Essentially, this statute allows a landowner, tenant, or occupier of agricultural land to treat all recreational users as trespassers for liability purposes.

Let’s walk through each of the three requirements.

First, let’s look at the definition of “agricultural land.” Under this statute, there are three types of land that are considered agricultural land.<sup>xxx</sup> First, land suitable for “use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed” is included. Second, land suitable for “forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber, or other items used for industrial, commercial, or personal consumption” is deemed to fall within the definition. Finally, land suitable for domestic or native farm or ranch animals to be kept for use or profit is covered. This seemingly broad definition covers not only land where production agriculture is taking place but also any place that is found “suitable for” the specified activities listed.

Next, the statute sets forth what is deemed a “recreational purpose.” Again, the statutory definition is quite broad, including activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving (including ATVs and off-road vehicles), nature study (including bird watching), cave exploration, water skiing and other water sports, biking, disc golf, walking dogs, radio control flying, and any other activity associated with nature or the outdoors.<sup>xxxi</sup>

Texas courts have made clear the relevant activity is the one that the plaintiff was undertaking at the time of injury, rather than what they may have intended to do on the property.<sup>xxxii</sup> Activities constituting “recreation” include sitting on a swing, playing outdoor volleyball, walking on a marina to a boat, playing an informal soccer game, playing on playground equipment, visiting a zoo, and biking to work.<sup>xxxiii</sup> Conversely, spectating at a competitive sporting event, attending an outdoor wedding, and walking through an outdoor area to reach a parking lot did not fall under the definition.<sup>xxxiv</sup>

Finally, the landowner, tenant, or occupier of land must meet one of the next three monetary requirements in order to fall within the protections of the Recreational Use Statute:

- **No fee is charged.** This first option is the simplest. For landowners allowing persons to enter their agricultural land for recreational purposes free of charge, the Recreational Use Statute protections apply, and the landowner is liable only for intentional acts or gross negligence.<sup>xxxv</sup>

- Property taxes paid are sufficiently greater than fees charged. The second option applies where a landowner charges a fee to enter the property, but where the “total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than 20 times the total amount of ad valorem taxes imposed on the premises for the previous calendar year.”<sup>xxxvi</sup> Said more simply, a landowner should first calculate all income received from recreational users for the past calendar year. Next, the landowner should calculate the total ad valorem taxes paid for the entire premises the past calendar year. Importantly, courts have made clear that this includes all property owned by the landowners, not just property where recreation occurs.<sup>xxxvii</sup> Therefore, as long as the total income calculated is not 20 times higher than the total taxes paid, the landowner qualifies for the limited liability afforded by the Recreational Use Statute.
- Adequate insurance is maintained. The final option provides that if a landowner carries liability insurance coverage of equal or greater to that described in Texas Civil Practice and Remedies Code 75.004(a), he or she is covered under the statute, regardless of compensation received by recreational users. The required coverage level is \$500,000 for each person, \$1 million for each occurrence of bodily injury, and \$100,000 for each occurrence of property damage.

Agricultural landowners who elect to meet this option are afforded an additional benefit. The statute provides a limit on the damage amount that may be awarded in cases where an agricultural landowner, lessee, or occupant carried this level of insurance. “The total liability of an owner, lessee, or occupant for a single occurrence is limited to \$1 million, and the liability is also subject to the limits for each single occurrence of bodily injury or death and each single occurrence for injury to or destruction of property stated in this subsection.” This is important, as this cap means damages assessed against an agricultural landowner could not be more than his or her insurance coverage.

Unlike the other statutes, there is no long list of exceptions to the Recreational Use Statute. If the requirements above are satisfied, the statutory limited liability applies unless the landowner, tenant, or occupier acted with intent or gross negligence.

### *Texas Agritourism Act*

The Texas Agritourism Act is the newest limited liability statute in Texas. Passed in 2015, the statute offers important protections to Texas landowners opening up their agricultural land for recreational or educational purposes. Essentially, this statute provides an “agritourism entity” is not liable for damage or injury to a person engaged in an “agritourism activity” if either the required signage is posted or a written agreement containing the required language is signed prior to the activity. Again, let’s walk through these requirements.<sup>xxxviii</sup>

An “agritourism entity” is any person “in the business of providing an agritourism activity.”<sup>xxxix</sup> Compensation is irrelevant when determining if a person qualifies under this statute. Based on that, next we must consider what constitutes an



“agritourism activity.” This is any activity occurring on agricultural land for the purpose of recreational or educational purposes.<sup>x1</sup> Continuing on in our following these terms, we must consider what constitutes “agricultural land” and “recreational or educational purposes.”

“Agricultural land” is similar—but not identical to—the definition of the same term in the Recreational Use Statute. Here, the definition includes land suitable for “use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed” or “domestic or native farm or ranch animals kept for use or profit.”<sup>xii</sup> The only difference is that the Agritourism Act definition does not include land suitable for “forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber, or other items used for industrial commercial, or personal consumption,” whereas the Recreational Use Statute does.

Finally, a recreational purpose has the exact same statutory definition as the Recreational Use Statute, which includes activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving (including ATVs and off-road vehicles), nature study (including bird watching), cave exploration, water skiing, other water sports, biking, disc golf, walking dogs, radio control flying, and any other activity associated with nature or the outdoors.<sup>xlii</sup>

As the preceding definitions show, the scope of this statute is likely more broadly reaching than might typically be thought of as “agritourism” such as corn mazes and pumpkin patches. For example, it appears likely allowing someone to hunt on agricultural land could fall under the Agritourism Act protections if the landowner complied with the sign or release requirement.

Importantly, in order to receive the protections of the Agritourism Act, a landowner must either hang a sign or obtain signed release language from the injured party prior to the activity. Without taking this step prior to injury, the statutory limited liability protections are inapplicable. Landowners are only required to do one or the other, either the sign or the release language, but the safest approach might be to adopt both practices.

The first option in order to qualify for limited liability under the Agritourism Act is for a landowner to post warning signs.<sup>xliii</sup> Under the statute, the signs must be clearly visible on or near any premises where an agritourism activity occurs. The sign must contain the following language: “WARNING: UNDER TEXAS LAW (CHAPTER 75A, CIVIL PRACTICE AND REMEDIES CODE), AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AN AGRITOURISM ACTIVITY.” Landowners can make their own signs, or there are a number of groups that sell them, including Texas & Southwestern Cattle Raisers, Texas Farm Bureau, Texas Sheep and Goat Raisers, Texas Wildlife Association, and South Texans for Property Rights. The obvious benefit of electing to utilize the required signage is that once the signs are posted in the proper place, the landowner’s work is done. He or she is not required to obtain signatures on releases before persons enter the property for a recreational or educational activity. Further,

if a person brings an unexpected guest with him or her, the sign will likely be sufficient warning to that person of limited liability, regardless of the lack of a signed waiver or agreement.

The alternative option is for the agritourism entity to obtain a signed, written agreement from participants.<sup>xliv</sup> The agreement must be: (1) signed before participation in an agritourism activity; (2) signed by the participant or the participant's parent, guardian, or managing conservator if the participant is a minor; (3) separate from any other agreement between the participant and entity except a different warning, consent, or assumption of risk, (4) printed in at least 10-point bold type; and (5) contain the following language: "AGREEMENT AND WARNING: I UNDERSTAND AND ACKNOWLEDGE THAT AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AGRITOURISM ACTIVITIES. I UNDERSTAND THAT I HAVE ACCEPTED ALL RISK OF INJURY, DEATH, PROPERTY DAMAGE, AND OTHER LOSS THAT MAY RESULT FROM AGRITOURISM ACTIVITIES."

Although this option will require more paperwork on the part of the agritourism entity, it may provide an important protection in the event minor children are injured on the property. The Texas Supreme Court has not ruled on whether a general liability release signed by a parent on behalf of a minor child is enforceable. And, in fact, least one Texas appellate court has held that they are not.<sup>xlv</sup> The rationale behind this decision is Texas law seeks to be especially protective of children, and parents should not be able to waive a child's personal injury claims. Given this unsettled legal question, the fact that the Agritourism Act expressly states a parent, guardian, or managing conservator may release liability on behalf of a minor if the written release option is used may be the best chance a landowner has to seek to enforce a release against an injured minor.

Keep in mind, the Agritourism Act's liability limitation is not, however, unlimited. Numerous exceptions apply which will likely result in many case-by-case determinations as to whether the Agritourism Act will apply. These exceptions are as follows: (1) The protections do not apply if the injury was proximately caused by the entity's "negligence evidencing a disregard for the safety of the agritourism participant"; (2) The protections do not apply if the injury is proximately caused by a dangerous condition of which the entity had actual knowledge or reasonably should have known on the land, facilities, or equipment used in the activity; (3) No limited liability exists if the injury is proximately caused by the dangerous propensity of a particular animal used in the activity not disclosed to the participant of which the entity has actual knowledge or reasonably should have known; (4) Protections do not apply if the injury is proximately caused by the entity's failure to adequately train an employee actively involved in an agritourism activity; and (5) No limited liability exists for injuries intentionally caused by the agritourism entity.<sup>xlvi</sup>

Because this statute is still relatively new, there are no published cases interpreting its provisions. Nevertheless, given its broad applicability to activities on agricultural land and the relative ease of complying with the statutory

requirements, landowners should certainly consider taking the steps necessary to receive protection.

## FARM ANIMAL LIABILITY ACT

The Texas Farm Animal Liability Act (formerly known as the Equine Act) offers important liability protection to farm animal owners in Texas when injuries are caused by inherent risks of farm animal activities. Again, starting with various definitions is important.

First, the list of “farm animals” to which this statute applies includes horses, ponies, mules, donkeys or hinnys, bovines, sheep, goats, pigs, hogs, ratites (including ostriches, rheas, and emus), and chickens or other fowl.<sup>xlvii</sup>

Second, a “farm animal activity” includes farm animal shows, fairs, competitions, performances, rodeos, events, or parades involving a farm animal; training or teaching activities involving farm animals; boarding farm animals; riding, inspecting, evaluating, handling, loading, or unloading farm animals belonging to another; permitting a prospective buyer to ride, inspect, evaluate, handle, load, or unload a farm animal; or informal activities such as riding trips or hunts; shoeing horses; and veterinarians examining or administering medical treatments.<sup>xlviii</sup>

Third, to define the term “inherent risk,” the statute expressly identifies certain examples of what qualifies. This includes damages caused by a propensity of a farm or livestock animal to behave in ways that may result in personal injury or death to a person around it and injuries caused by the unpredictability of an animal’s reaction to sound, sudden movement, or unfamiliar location, person, or other animal are also listed as examples. Also included are damages caused by land conditions and hazards when the activity involves an equine animal, collisions between the animal and another animal or object, and the potential of a participant to act negligently that could contribute to injury of another participant.<sup>xlix</sup>

The Texas Supreme Court has taken an expansive view with regard to the inherent conditions for which limited liability is available, stating this list is not exclusive.<sup>1</sup> Courts have found that inherent risks were involved when a horse collided with a tree and when fire ants bit a horse causing him to throw his rider.<sup>li</sup>

Finally, the definition of “farm animal professional” is important to review as well. This term means persons engaged in compensation for the instruction of a participant or rent to a participant of the animal for the purpose of riding, driving, or being a passenger on the animal; renting equipment or tack to a participant; examining or administering medical treatment to a farm animal as a veterinarian, and providing veterinarian and farrier services.<sup>lii</sup>

This definition is important because farm animal professionals are required to display a sign and to include certain written language in any contractual agreements in order to receive statutory protection. For farm animal professionals, the statute requires a sign be posted and maintained in a clearly visible location if the person manages or controls a stable, corral, or arena where the professional conducts a farm animal activity.<sup>liii</sup> The same language must be clearly readable in

every written contract the farm animal professional enters into with a participant for professional services, instruction, or rental of equipment, tack, or a farm animal.

The required language is as follows: WARNING UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE AND REMEDIES CODE), A FARM ANIMAL PROFESSIONAL IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN FARM ANIMAL ACTIVITIES RESULTING FROM THE INHERENT RISKS OF FARM ANIMAL ACTIVITIES.

Finally, the Farm Animal Liability Act does include a list of exceptions.<sup>liv</sup> If an injured party can prove one of these listed exceptions applies, the limited liability does not apply, and the farm animal owner can be held liable, even for injuries resulting from inherent risk. These include situations where: (1) Injury or death was caused by faulty equipment or tack that was provided by the defendant and the defendant knew or should have known it was faulty; (2) The defendant provided the farm animal to the participant and the defendant failed to make a reasonable effort to determine the ability of the participant to safely engage in the activity; (3) The injury was caused by a latent condition of the land and the defendant knew of such condition but failed to warn the participant; (4) The defendant committed an act or omission with willful or wanton disregard for the safety of the participant, which caused the injury; (5) The defendant acted intentionally in causing the injury; or (6) The defendant allowed or invited a noncompetitor to participate in an activity connected with livestock and the injury resulted from this participation.

By far, the most litigated of these exceptions is the second, relating to the reasonableness of the defendant's effort to determine the ability of the participant. The Texas Supreme Court clarified the Act does not require "a formal, searching injury."<sup>lv</sup> In *Loftin v. Lee*, the fact the defendant knew the plaintiff raised horses for years, had no trouble mounting the horse, and seemed to be getting along fine on the ride was sufficient inquiry to defeat the application of this exception.

One additional issue has frequently made its way to the courts. Does the Farm Animal Liability Act apply if the injured party is an employee or independent contractor of the farm animal or livestock professional? Again, the Texas Supreme Court has yet to address this question directly, but appellate-level courts have generally found the statute inapplicable when the injured party is an employee but applicable when the injured party was an independent contractor.

Given the potential for injuries when animals are involved, anyone owning a farm animal should carefully consider this statute and ensure its application.

### III. CONCLUSIONS

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All landowners should be aware of the potential risk of liability if someone is injured on their property. A personal injury lawsuit can be difficult, time-consuming, and expensive to defend. However, there are a number of steps that can be taken in order to prevent injuries from occurring in the first place and to limit potential exposure in the event one does occur.

## IV. ADDITIONAL RESOURCES

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- Ag Law in the Field Podcast Episode #45 – Trace Blair (TX Landowner Limited Liability Statutes), *available at* <http://aglaw.libsyn.com/episode-45-trace-blair-tx-landowner-limited-liability-statutes>.
- Ag Law in the Field Podcast Episode #5 – Amber Miller (Business Entity Considerations for Farms and Ranches), *available at* <http://aglaw.libsyn.com/episode-5-amber-miller-should-your-ranch-be-incorporated-or-not>.
- Amber Miller & James Decker, *Should your ranch be incorporated or not?*, *available at* <http://www.cdmlaw.com/should-your-ranch-be-incorporated-or-not/>.
- Tiffany Dowell Lashmet, *Texas Agritourism Act: Frequently Asked Questions*, *available at* <https://agrilife.org/wp-content/blogs.dir/510/files/2016/08/Agritourism-Act-FAQ.pdf>.
- Texas Secretary of State, *About the Corporations Section*, *available at* <https://www.sos.state.tx.us/corp/index.shtml>.
- Tiffany Dowell Lashmet, *Landowner Liability Protections* (State Bar of Texas 2016), *available at* <https://agrifecdn.tamu.edu/texasaglaw/files/2016/08/Landowner-Liability-Statutes.pdf>.
- Tiffany Dowell Lashmet, et al., *Ranchers' Agricultural Leasing Handbook*, *available at* <https://agrifecdn.tamu.edu/texasaglaw/files/2016/08/Ranchers-Agricultural-Leasing-Handbook.pdf> (Chapters IV and V).

- <sup>i</sup> 27 S.W.3d 64 (Tex. Ct. App. – San Antonio 2000).
- <sup>ii</sup> *IHS Cedars Treatment Ctr. of DeSoto, Texas v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004).
- <sup>iii</sup> 845 S.W.2d 262 (Tex. 1992).
- <sup>iv</sup> *LMB, Ltd. v. Moreno*, 201 S.W.3d 686 (Tex. 2006).
- <sup>v</sup> *Mayer v. Willowbrook Plaza Ltd.*, 278 S.W.3d 901 (Tex. Ct. App. – Houston (14th) 2009).
- <sup>vi</sup> *Texas Utilities Elec. Co. v. Timmons*, 947 S.W.2d 191 (Tex. 1997).
- <sup>vii</sup> *Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 245 (Tex. 1999).
- <sup>viii</sup> *Mayer v. Willowbrook Plaza Ltd.*, 278 S.W.3d 901 (Tex. Ct. App. – Houston (14th) 2009).
- <sup>ix</sup> *Am. Indus. Life Ins. v. Ruvalcaba*, 64 S.W.3d 126 (Tex. Ct. App. – Houston (14th) 2001).
- <sup>x</sup> *Brown v. Miguez*, 2007 WK 2874306 (Tex. Ct. App. – Beaumont 2007).
- <sup>xi</sup> M. Gaddy Wells, *Premises Liability*, State Bar of Texas (2017).
- <sup>xii</sup> *Coastal Corp v. Torres*, 133 S.W.3d 776 (Tex. Ct. App. – Corpus Christi 2004).
- <sup>xiii</sup> *Univ. of Tex-Pan Am v. Aguilar*, 215 S.W.2d 511 (Tex. 2008).
- <sup>xiv</sup> *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.2d 706 (Tex. 2003).
- <sup>xv</sup> *Austin v. Kroger Tex.*, 465 S.W.3d 193, 201 (Tex. 2015).
- <sup>xvi</sup> *Austin v. Kroger Tex.*, 465 S.W.3d 193, 201 (Tex. 2015).
- <sup>xvii</sup> *Am. Indus. Life Ins. v. Ruvalcaba*, 64 S.W.3d 126 (Tex. Ct. App. – Houston (14th) 2001).
- <sup>xviii</sup> *Brown v. Miguez*, 2007 WL 2874306 (Tex. Ct. App. – Beaumont 2007).
- <sup>xix</sup> M. Gaddy Wells, *Premises Liability*, State Bar of Texas (2017).
- <sup>xx</sup> *Coastal Corp v. Torres*, 133 S.W.3d 776 (Tex. Ct. App. – Corpus Christi 2004).
- <sup>xxi</sup> *Austin v. Kroger Tex.*, 465 S.W.3d 193, 201 (Tex. 2015).
- <sup>xxii</sup> *Dresser Indus. v. Page Petrol.*, 853 S.W.2d 505 (Tex. 1993).
- <sup>xxiii</sup> *Dresser Indus. v. Page Petrol.*, 853 S.W.2d 505 (Tex. 1993).
- <sup>xxiv</sup> *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990).
- <sup>xxv</sup> *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 843 (Tex. 1972).
- <sup>xxvi</sup> *Munoz v. II Jaz Inc.*, 863 S.W.2d 207 (Tex. App. Houston (14th Dist.) 1993).
- <sup>xxvii</sup> Doyce Cotton, *Do Texas Courts Enforce Waivers for Gross Negligence?*, available at <https://www.sportwaiver.com/do-texas-courts-enforce-waivers-for-gross-negligence/> (September 2018).
- <sup>xxviii</sup> *University of Texas at Arlington v. Williams*, 459 S.W.3d 48, 54 (Tex. 2015).
- <sup>xxix</sup> Texas Civ. Practice & Remedies Code § 75.001-.004.
- <sup>xxx</sup> Texas Civ. Practice & Remedies Code § 75.001.
- <sup>xxxi</sup> Texas Civ. Practice & Remedies Code § 75.001(3).
- <sup>xxxii</sup> *City of Bellmead v. Torres*, 89 S.W.3d 611, 614 (Tex. 2002).
- <sup>xxxiii</sup> Tiffany Dowell Lashmet, *Landowner Liability Statutes*, State Bar of Texas (2016).
- <sup>xxxiv</sup> Tiffany Dowell Lashmet, *Landowner Liability Statutes*, State Bar of Texas (2016).
- <sup>xxxv</sup> Tex. Civ. Practice & Remedies Code § 75.003(c)(1).
- <sup>xxxvi</sup> Tex. Civ. Practice & Remedies Code § 75.003(c)(2).
- <sup>xxxvii</sup> *Howard v. East Texas Baptist Univ.*, 122 S.W.3d 407 (Tex. Ct. App. – Texarkana 2003) (“encompasses the property opened to the public for recreational use and any other real property owned by the party seeking limited liability under the statute; that is, the owner’s entire premises.”).
- <sup>xxxviii</sup> Tex. Civ. Practice & Remedies Code 75A.
- <sup>xxxix</sup> Texas Civ. Practice & Remedies Code § 75A.001(3).
- <sup>xl</sup> Texas Civ. Practice & Remedies Code § 75A.001(2).
- <sup>xli</sup> Texas Civ. Practice & Remedies Code § 75A.001(1).
- <sup>xlii</sup> Texas Civ. Practice & Remedies Code § 75.001(3).
- <sup>xliiii</sup> Texas Civ. Practice & Remedies Code § 75A.002(1).
- <sup>xliiv</sup> Texas Civ. Practice & Remedies Code § 75A.004.
- <sup>xlv</sup> *Munoz v. II Jaz Inc.*, 863 S.W.2d 207 (Tex. App. Houston (14th Dist. 1993).
- <sup>xlvi</sup> Texas Civ. Practice & Remedies Code § 75A.002(b).
- <sup>xlvii</sup> Tex. Civ. Practice & Remedies Code § 87.001.
- <sup>xlviii</sup> Tex. Civ. Practice & Remedies Code § 87.001(3).
- <sup>xlix</sup> Tex. Civ. Practice & Remedies Code § 87.003.
- <sup>1</sup> *Loftin v. Lee*, 341 S.W.3d 352 (Tex. 2011).
- <sup>li</sup> *Little v. Needham*, 236 S.W.3d 328 (Tex. Ct. App. – Houston (1st Dist.) 2007); *Gamble v. Peyton*, 182 S.W.1 (Tex. Ct. App. – Beaumont 2005).
- <sup>lii</sup> Tex. Civ. Practice & Remedies Code § 87.001(5).
- <sup>liiii</sup> Tex. Civ. Practice & Remedies Code § 87.001(5)(a-c).
- <sup>liiv</sup> Tex. Civ. Practice & Remedies Code § 87.001(4).
- <sup>lv</sup> *Loftin v. Lee*, 341 S.W.3d 352 (Tex. 2011).



“Good fences  
make good  
neighbors.”

- Robert Frost

## CHAPTER 6

Photo by Texas A&M AgriLife

# FENCE LAW

Fence law is a topic of frequent interest and confusion for landowners in Texas. Much of what may seem intuitive or “the way it should be” may not actually be what the law actually is. This chapter will highlight some of the key issues related to Texas fence law. For more detailed information, be sure to get a copy of *Five Strands: A Landowners’ Guide to Fence Law in Texas*, which is listed in the Additional Information section below. It is a handbook for landowners I co-authored with fellow attorneys Jim Bradbury and Kyle Weldon, based upon frequently asked questions we receive related to fence law.

## I. OPEN RANGE VERSUS CLOSED RANGE.

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The threshold question for any fence law question in Texas is to determine whether the area at issue is open range or closed range. The answer to this inquiry will guide the resolution to most legal issues related to fences.

### OPEN RANGE

When a location is “open range,” the owner of livestock has no legal obligation to prevent his or her animals from running at large. This is also sometimes referred to as a “fence out” area, as it is the obligation of a neighboring landowner to fence the animals out of his or her property, not the duty of the livestock owner to fence his animals in. As described by the Texas Supreme Court, “it is the right of every owner of domestic animals in this state...to allow them to run at large.”<sup>1</sup>

Importantly, Texas law does impose certain limitations on this open range approach. There are three scenarios in which, even in an open range area, a livestock owner could be liable for damage caused by his or her animal on the property of another, which will be discussed in more detail below.

## CLOSED RANGE

Conversely, when an area is “closed range,” the opposite is true. In a closed range area, a livestock owner does have a legal obligation, referred to as a duty, to prevent his or her animals from running at large. This would be deemed a “fence in” area, as the obligation to fence rests with the livestock owner.

In a closed range area, there are different levels of duty that may apply for a livestock owner. For example, certain closed range areas may require a livestock owner not “knowingly permit” his or her animals from running at large, while other areas may require a less exacting standard, imposing a duty that the livestock owner may not “permit” an animal to run at large. For any closed range area, it is important to determine the exact duty imposed upon a livestock owner.

## WHICH IS TEXAS?

The default rule in Texas is the state is open range, meaning that absent an exception discussed below, land in Texas is considered to be open range.

Where confusion sets in, however, is when Texas landowners consider two exceptions to the open range rule, which make the majority of Texas closed range. Those exceptions, found in Texas statute, are the State and U.S. Highway Exception and Local Stock Laws.

### *State and U.S. Highways Exception*

The Texas Agriculture Code modifies the status of land abutting a U.S. or state highway by deeming the land closed range.<sup>ii</sup> Specifically, the statute provides that the owner or person in control of a horse, mule, donkey, cow, bull, steer, hog, sheep, or goat may not “knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway.”<sup>iii</sup> The term “highway” is defined to mean a U.S. highway or state highway in Texas, but not to include numbered farm-to-market roads.<sup>iv</sup> The violation of this statute can result in civil liability for the livestock owner, as discussed below, but can also result in a criminal penalty, as the violation of this statute constitutes a Class C misdemeanor.<sup>v</sup>

What expressly satisfies whether a livestock owner “knowingly permits” his or her animals to run at large has been the subject of several court opinions. Courts have described a person “knowingly permitting” as someone who “has or shows an awareness or understanding,” acts “deliberately,” or “consciously.”<sup>vi</sup> Further, “knowingly permit” requires actual knowledge; it is not sufficient that a livestock owner should have known, or that a prudent livestock owner would have known.<sup>vii</sup> This requires a very fact-specific analysis, and common considerations by courts include the number of times the animals have been out before, how long they



were out, the condition and quality of fences, and whether gates had been left open. Examples of how this standard has been applied to actual situations will be discussed below.

### *Local Stock Laws*

The second major exception to the general rule of open range is that the Agriculture Code allows counties to hold local elections to deem all or a portion of the county closed range.<sup>viii</sup> Essentially, this provision allows local landowners to vote to modify the legal standard for their area. The statute allows a local election to be held for the purpose of determining whether “horses, mules, jacks, jennets, donkeys, hogs, sheep, or goats” or cattle are to be “permitted to run at large in the county or area.”<sup>ix</sup>

One interesting note is in 1981, the Texas Legislature identified 22 counties that were prohibited from passing local stock laws related to cattle. The counties included are: Andrews, Coke, Culberson, Hardin, Hemphill, Hudspeth, Jasper, Jefferson, Kenedy, Kinney, La Salle, Loving, Motley, Newton, Presidio, Roberts, Schleicher, Terry, Tyler, Upton, Wharton, and Yoakum.<sup>x</sup> Thus, while these counties may pass stock laws for other species, they are not allowed to pass laws for cattle, essentially mandating they be open range as related to cattle.

The duty imposed on a landowner in an area with a local stock law is he or she may not “permit” livestock to run at large.<sup>xi</sup> As compared with the “knowingly permit” standard of the State and U.S. Highway Exception, this is a lower standard, meaning a party alleging breach of duty will likely be able to prove “permit” more easily than “knowingly permit.” In other words, the local stock law is a less livestock owner-friendly standard than the U.S. and State Highways exception. Nevertheless, the same factual considerations as noted above would be considered by a court.

Again, Texas courts have analyzed what is meant by “permit” on a number of occasions. Definitions adopted in opinions include the following standards: “to consent expressly or formally,” “to give leave,” and “conscience or knowing conduct on the part of the individual.”<sup>xii</sup> The application of these standards to real-life scenarios will be included below.

One additional issue may cause some confusion with regard to local stock laws. Under the statute, if a person “knowingly permits” livestock to run at large in a county that has a local stock law, that person is guilty of a Class C misdemeanor.<sup>xiii</sup> Thus, in an area with a local stock law, while the standard for civil liability is “permit.” There is a higher “knowingly permit” standard in order to impose criminal liability.

Determining whether one’s county has passed a local stock law is, unfortunately, not an easy task. There is no readily available database or website a person can go to look up local stock laws. Many of these laws were passed in the early 1900s and are recorded in Commissioner’s Court records from that time. The best option for landowners is likely to contact the county sheriff’s office, county attorney, county judge, or county court clerk to determine if they have dealt with this issue and if they may be able to provide an answer. If they are not able to assist, one may need to search through the County Commissioner’s Court records to determine if any such

laws were ever passed. If a local stock law is found, a landowner should carefully review it to determine to which species it applies and whether it applies to all or only part of the county.

Understanding this background related to open versus closed range and how these rules apply in Texas is critical to answering any fence law question that may arise.

## II. COLLISIONS ON ROADWAYS

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The majority of reported fence law cases in Texas involve collisions between livestock and vehicles on a roadway. Analysis of which party may be held liable in those cases depends on whether the collision occurred in an open range or closed range area. For both scenarios, the cases make clear the analysis undertaken by the courts is extremely fact-specific.

### OPEN RANGE

As noted above, an open range area means a livestock owner has no obligation to prevent his or her animals from running at large. In other words, no legal obligation requires the owner to fence his or her animals in. When a collision occurs in an open range area, generally, the livestock owner will not be held liable, as he or she did not owe a duty, and therefore, could not have breached any duty.

For example, in *Gibbs v. Jackson*, a horse named Tiny was hit on a farm-to-market road in a county that had passed no stock law, which was an open range area.<sup>xiv</sup> The driver filed a negligence action against the horse owner, arguing the fence was in disrepair and the horse may have been out previously. The horse owner responded by arguing these facts were inaccurate, but also irrelevant as he had no duty to keep the horse off the farm-to-market road. The Texas Supreme Court expressly held there were only two situations where a duty could be imposed on an animal owner—the U.S. and state highway exception and local stock laws. As neither of these existed, the horse owner was not liable. Thus, in an open range area, there can likely be no liability for a livestock owner whose animal is hit by a motorist.

### CLOSED RANGE

In a closed range area, the question when a collision arises is which standard applies and whether the livestock owner met the duty owed.

There is one important case currently pending before the Texas Supreme Court that could potentially impact this analysis. Which standard applies when a collision occurs on a state or U.S. highway within a county that has passed a local stock law? Is the livestock owner held to both the “permit” and “knowingly permit” standard, or does one trump the other? At the date of publication of this book, the law is unsettled, pending a potential ruling by the Texas Supreme Court.

### *U.S. and State Highway Exception*

Again, for collisions on a U.S. or state highway, the livestock owner may not “knowingly permit” the animal to run at large. Comparing two Texas cases may help to illustrate this analysis. In *Evans v. Hendrix*, cattle were hit by a tractor-trailer on a state highway.<sup>xv</sup> Evidence showed the cattle were kept on the back portion of the landowner’s property, on the opposite side from the highway, the owner kept the gate both chained and locked, and the owner was never told nor saw his cattle being out on the highway. Under these facts, the court found that the cattle owner did not “knowingly permit” the cattle to run at large on the highway.

Conversely, in *Weaver v. Brink*, the court did find the landowner knowingly permitted livestock to run at large when they were hit by a tractor-trailer on I-45.<sup>xvi</sup> In that case, the evidence showed that the owner of the cattle knew the cattle had previously escaped fences 5 to 6 times in the past 15 years, he knew fences failed during hard rains, and he knew there was a good chance the fences would fail that day, yet he did not go back to repair the fence on the day of the accident. Additionally, there was evidence that he knew the night before the accident the cattle were out, yet did not get them off the highway.

### *Local Stock Laws*

For collisions occurring in counties with local stock laws, the standard for a livestock owner is an owner may not “permit” the animal to run at large. For example, in *Rodriguez v. Sandhill Cattle Co.*, a driver collided with cattle on a farm to market road.<sup>xvii</sup> The cattle had been in a pasture surrounded by a one-strand electric fence. Although the fence had previously worked, it was found non-operational after the accident occurred. The plaintiff argued the livestock owner “permitted” the cattle to run at large because there was only a one-strand fence, the cattle weighed 500 pounds, and there were 80 head on 60 acres. The Court rejected this analysis, finding these facts insufficient to impose liability for “permitting” the cattle to run at large. The court noted no evidence existed that a single strand electric fence was less sufficient than a multi-strand barbed wire fence, or that the cattle were not hotwire broke, or that the cattle had previously escaped the fence, or that the owners failed to inspect or had knowledge of the operational nature of the fence.

## III. ANIMALS ON PROPERTY OF ANOTHER

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Another issue that frequently arises with regard to fence law is what can be done if another’s livestock enter onto the property of another. Again, determining whether the area is open range or closed range is critical.

### OPEN RANGE

Generally speaking, a landowner may not recover damages caused by another’s livestock entering the landowner’s property in an open range area. Again, this is due to the fact that there is no legal duty for the livestock owner to fence in his

or her animals. Rather, the obligation rests with the neighboring landowner to fence the livestock out. As the Texas Supreme Court explained, “It follows that one who desires to secure his lands against the encroachments of livestock running at large, either upon the open range or in an adjoining field or pasture, must throw around it an enclosure sufficient to prevent the entry of all ordinary animals of the class intended to be excluded. If he does not, the owner of the animals that may encroach upon it will not be held liable for any damage which may result from such encroachment.”<sup>xviii</sup>

For example, in *Hicks v. Lee*, a landowner brought a negligence and trespass suit against a cattle owner when the cattle got onto the landowner’s property and destroyed his hay crop.<sup>xix</sup> In the absence of a local stock law, the court held there is no duty owed to form the basis of a negligence claim, and there can be no trespass as a matter of law.

There are, however, a handful of exceptions to this rule which could allow a neighboring landowner to recover damages even in an open range area.

First, in the event the livestock owner intentionally drives the animals onto the neighboring landowner’s property, the owner may be held liable for trespass.<sup>xx</sup>

Second, if the cattle are known to the owner to be diseased, breachy, or viscous (fence breaking or otherwise), the owner may not permit them to run at large and may be held liable for damages if he or she does so.<sup>xxi</sup>

Finally, if a landowner in an open range area builds a fence sufficient to keep out ordinary livestock of the class at issue, yet the animals still get into the property, the animal owner may be held liable. As the Amarillo Court of Appeals has explained, “When the open-range doctrine applies, a landowner is required to fence out particular livestock with a sufficient fence; otherwise, the landowner would not be able to recover from the livestock owner for any property or crop damage done by the livestock.”<sup>xxii</sup> The Texas Agriculture Code provides a non-exclusive list of fences qualifying as “sufficient” under these circumstances, requiring them to be at least 4 feet high and comply with the following: (1) A barbed wire fence must consist of three wires on posts no more than 30 feet apart, with one or more stays between every two posts; (2) A picket fence must consist of pickets not more than 6 inches apart; (3) A board fence must consist of three boards not less than 5 inches wide and 1-inch thick; and (4) A rail fence must consist of four rails.<sup>xxiii</sup>

## CLOSED RANGE

In a county having passed a local stock law, animals entering the property of another may be trespassing and the owner liable for any ensuing damage, but only if the owner “permitted” them to run at large. The mere fact animals are on the property of another does not impose liability.<sup>xxiv</sup> Thus, it would be a similar fact-specific inquiry as courts have undertaken with regard to collisions to determine if the livestock owner violated a duty and damages could be recovered. Common factors to be evaluated include if the animals had been out before, how long they were on the property of another, and the quality and condition of boundary fences.

## ESTRAY LAWS

One additional statutory provision for Texas landowners to be aware of is Texas Agriculture Code Section 142, which governs “estrays.” This statute provides the procedure by which a landowner can seek the removal of stray livestock from his or her property. Contrary to the school-yard rules of “finders keepers” should apply, the law does not take that approach. Instead, the statute requires a landowner upon whose property the stray livestock are located to contact the sheriff’s office in order to begin the process of removing the animals from the landowner’s property.

## IV. BUILDING, REPLACING, AND MAINTAINING FENCES

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Another area of dispute in Texas is building, replacing, and maintenance of fences on rural property. Landowners should keep in mind the following key issues.

### NO OBLIGATION TO SHARE COSTS

First, Texas law does not require neighboring landowners to share in the costs or future maintenance of a boundary fence, unless a landowner has agreed to do so. As explained by the Texas Supreme Court, “If one proprietor encloses his land, putting his fence upon his line, the owner of the adjacent land may avail himself of the advantage thereby afforded him of enclosing his own land without incurring any liability to account for the use of his neighbor’s fence.”<sup>xxv</sup> Thus, while landowners certainly can seek compensation from neighbors in building or repairing fences, a landowner may not force cost sharing if the neighbor is unwilling to do so.

The result of a neighboring landowner refusing to share in costs of erecting a boundary fence is the landowner who paid to build the fence becomes the sole owner of the fence itself; it no longer remains jointly-owned property.<sup>xxvi</sup> Landowners who do pay all expenses to erect a dividing fence should take care to document this fact in order to prove ownership of the fence should it be called into question.

### REMOVAL OF ADJOINING FENCES STATUTE

The Removal of Adjoining Fences statute addresses when jointly-owned fences may be removed and when fences attached to jointly-owned fences can be removed.<sup>xxvii</sup> Although there have been no appellate level cases applying these provisions, it is important for landowners to be aware of these rules.

First, the statute states a person may not remove a fence that is a separating or dividing fence in which the person is a joint owner absent mutual consent from both parties.<sup>xxviii</sup> Generally, unless one party paid the costs to have a dividing fence built without any contribution from the neighboring owner, dividing fences would be considered jointly owned. This means if a landowner wishes to remove a fence dividing his property from his neighbors, consent from the neighbor would be required.

Second, the statute states a person may not remove a fence which is attached to a fence owned or controlled wholly or partially by another person, absent consent

from the owner of the fence or upon giving 6-months' notice.<sup>xxix</sup> One way this could occur is if one landowner solely paid to build a dividing fence, making that fence his own property. If a neighboring landowner wished to remove a fence on that neighboring landowner's own property that was attached to the dividing fence, he would have to obtain permission from the owner of the dividing fence or give 6-months written notice prior to the removal.

Third, a person who owns a fence wholly on his or her own property may require an owner of an attached fence to disconnect the fence by giving 6-months written notice.<sup>xxx</sup> An example where this could arise is if a person built a dividing fence not on the property line, but inside his or her own property. In that situation, the property owner would own the fence and could require disconnection of adjoining fences by giving such notice.

## V. ADDITIONAL RESOURCES

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- Tiffany Dowell Lashmet, Jim Bradbury, & Kyle Weldon, *Five Strands: A Landowner's Guide to Fence Law in Texas* (2017), available at <https://agrifliferdn.tamu.edu/texasaglaw/files/2016/08/Five-Strands-for-Download.pdf>.
- Ag Law in the Field Podcast (Fence Law), (forthcoming Summer 2019), available at [www.aglaw.libsyn.com](http://www.aglaw.libsyn.com).

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<sup>i</sup> *Gibbs v. Jackson*, 990 S.W.2d 745, 747 (Tex. 1999).

<sup>ii</sup> Texas Agric. Code § 143.101 – 143.108.

<sup>iii</sup> Texas Agric. Code § 143.102.

<sup>iv</sup> Texas Agric. Code § 143.101.

<sup>v</sup> Texas Agric. Code § 143.108.

<sup>vi</sup> *Garcia v. Pruski*, No. 04-17-00632-CV, 2018 WL 4096392 (Tex. App.—San Antonio Aug. 29, 2018, pet. filed).

<sup>vii</sup> *Garcia v. Pruski*, No. 04-17-00632-CV, 2018 WL 4096392 (Tex. App.—San Antonio Aug. 29, 2018, pet. filed).

<sup>viii</sup> Texas Agric. Code § 143.021-143.027; § 143.071-143.075.

<sup>ix</sup> Texas Agric. Code § 143.021; § 143.071.

<sup>x</sup> Texas Agric. Code § 143.072.

<sup>xi</sup> Texas Agric. Code § 143.021; § 143.071.

<sup>xii</sup> *Rose v. Herbert Heirs*, 305 S.W.3d 874 (Tex. Ct. App. – Beaumont 2010); *Rodriguez v. Sandhill Cattle Co.*, 427 S.W.3d 507 (Tex. Ct. App. – Amarillo 2014).

<sup>xiii</sup> Texas Agric. Code § 143.034; § 143.082.

<sup>xiv</sup> *Gibbs v. Jackson*, 990 S.W.2d 745, 747 (Tex. 1999).

<sup>xv</sup> *Evans v. Hendrix*, No. 10-10-00356-CV, 2011 WL 3621337 (Tex. Ct. App. – Waco Aug. 17, 2011).

<sup>xvi</sup> *Weaver v. Brink*, 613 S.W.2d 581 (Tex. Ct. App. – Waco 1981).

<sup>xvii</sup> *Rodriguez v. Sandhill Cattle Co.*, 427 S.W.3d 507 (Tex. Ct. App. – Amarillo 2014).

<sup>xviii</sup> *Clarendon Land, Investment & Agency Co. v. McClelland*, 23 S.W. 576, 577 (Tex. 1893).

<sup>xix</sup> *Hicks v. Lee*, No. 04-02-00049-CV, 2003 WL 1090599 (Tx. Ct. App. – San Antonio 2013).

<sup>xx</sup> *Clarendon Land, Investment & Agency Co. v. McClelland*, 23 S.W. 576, 577 (Tex. 1893).

<sup>xxi</sup> *Clarendon Land, Investment & Agency Co. v. McClelland*, 23 S.W. 576, 577 (Tex. 1893).

<sup>xxii</sup> *Harlow v. Hayes*, 991 S.W.2d 24 (Tex. Ct. App. – Amarillo 1998).

<sup>xxiii</sup> Texas Agric. Code § 143.028.

<sup>xxiv</sup> *Texas & P. Ry. Co. v. Webb*, 102 Tex. 210 (Tex. 1908).

<sup>xxv</sup> *Nolan v. Mendere*, 14 S.W. 167 (Tex. 1890).


<sup>xxvi</sup> *Conner v. Joy*, 150 S.W. 485 (Tex. Ct. App. – Ft. Worth 1912).

<sup>xxvii</sup> Texas Agric. Code § 143.121-143.123.

<sup>xxviii</sup> Texas Agric. Code § 143.121.

<sup>xxix</sup> Texas Agric. Code § 143.121; § 143.122.

<sup>xxx</sup> Texas Agric. Code § 143.123.



“No place  
but Texas  
would I ever  
roam. No place  
but Texas;  
my home,  
sweet home.”

- Willie Nelson

## CHAPTER 7

*Photo by Mandy Quinn Photography*

# ACCESS TO PROPERTY

There are many legal issues related to accessing rural property. This chapter will offer an overview of some of the most frequent issues facing rural landowners related to this topic.

## I. EASEMENTS

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An easement is a means by which a landowner grants another person the right to use the landowner’s property for a specific purpose.<sup>i</sup> The land on which the easement is granted is referred to as the “servient estate,” and the land the easement benefits is referred to as the “dominant estate.” For example, if Amy granted Brett an easement to cross her land to reach his own property, Amy’s land would be the servient estate, and Brett’s would be the dominant estate.

An easement does not convey ownership of the property itself but instead conveys the right to do what is expressly granted and any rights reasonably necessary thereto.<sup>ii</sup> Generally, unless otherwise modified by the parties, the person to whom an easement is granted owes a duty to use ordinary care in using the easement and a duty to maintain the easement.<sup>iii</sup> The party who granted the easement owes a duty to not interfere with the dominant estate holder’s use of the easement.

Generally, there are two categories of easements: Express and Implied. An express easement is affirmatively granted by the servient estate owner. The terms of this easement are governed by the language creating the easement, rather than by the

actions of the parties.<sup>iv</sup> Landowners granting an easement should be careful in the exact wording included in the granting document, as this could greatly impact the rights of the servient estate. For example, in one Texas case, the dominant estate owners granted an easement deemed a “ranch road” and tried to limit use when the servient estate owners built a development on their property and allowed residents to utilize the roadway.<sup>v</sup> The court held merely using the term “ranch road,” without offering a more detailed limitation, was insufficient to limit the use of the road. Working with an attorney familiar with these issues is advised to ensure the easement reflects the intent of the parties.

Importantly, express easements should always be reduced to writing and, in order for them to be enforceable against third parties such as new owners of one of the properties at issue, should be recorded in the county deed records.

An implied easement is an easement created not by express grant, but instead one implied by law when certain conditions are satisfied. In this situation, the landowner of a servient estate does not have to agree to give an easement. Instead, the law will imply an easement exists. In order to obtain an implied easement, the party seeking the easement is required to go to court, prove each of the required elements for the type of implied easement sought, obtain a court order granting the easement, and file the court order in the county deed records. As noted above, express easements are always recommended given the ability to avoid the expense, time, and uncertainty of the process to obtain an implied easement. The various types of implied easements include easements by necessity, prior use easements, easements by prescription, and easements by estoppel.

Easement by necessity. An easement by necessity arises when a grantor either conveys or retains a parcel of land and fails to expressly provide for a means of access. In this situation, courts have made an assumption that the initial landowner had intended to so do and will imply an access easement. For example, assume Amy owned 100 acres and offered to sell the back 50 acres, which had no other means of access, to Brett. This is the type of scenario where a court would likely conclude an easement by necessity should be implied.

In order to prove an easement by necessity to cross another’s property, the party seeking the easement must prove: (1) unity of ownership of the alleged dominant and servient estates prior to severance (in other words, the landlocked property and tract across which access is sought must have, at one time, been owned by the same person); (2) the claimed access is a necessity, not a mere convenience; and (3) the necessity existed at the time the two estates were severed.<sup>vi</sup> Unless all three of these elements can be shown by the landlocked owner, an easement by necessity will not be recognized. As one might imagine, these elements may be difficult to prove, especially if the severance of the two parcels took place some time ago. Finding witnesses who can testify about the existence of a necessity at the time of severance can prove difficult, and even impossible, in some circumstances.

Prior use easement. Another type of implied easement is one based upon prior use. This type of easement was recognized by courts after finding the necessity framework was ill-suited for other improvements, such as powerlines or utility



pipelines.<sup>vii</sup> In order to prove a prior use easement, the party seeking an easement must show each of the following elements: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended its use pass by grant; and (4) the use must be necessary to the use of the dominant estate.<sup>viii</sup> For example, in a case where a landowner sold 1 parcel while retaining ownership of another, yet failed to reserve any water lines to service his home, the court held that a prior use easement existed.<sup>ix</sup>

Prescriptive easement. Prescriptive easements are essentially like obtaining an easement through adverse possession, which is a concept discussed below. Unlike necessity or prior use easements where the landowner's consent was assumed, prescriptive easements can only exist when there is no such permission to use the easement. Because courts tend to disfavor this type of easement, each element will be strictly scrutinized.

In order to obtain a prescriptive easement, the person claiming the easement must prove that he or she has used the easement for at least 10 years and the use was: (1) open and notorious; (2) continuous; (3) exclusive; and (4) adverse. One example of these elements being satisfied was a case involving a rural road on a landowner's property where the neighbors used it without permission for over forty years, did not allow any other persons to use the road, maintained the road, and enclosed the road with a fence and gate at the end.<sup>x</sup> While possible to acquire a prescriptive easement, these elements are generally very difficult for the party seeking the easement to adequately prove.

Easement by estoppel. An easement by estoppel arises when one person acts in reliance on being told an easement exists. The elements required are: (1) a representation; (2) belief in the representation; and (3) reliance on the representation. Again, in order to enforce this type of easement, the landlocked owner would be forced to file a court action, to prove each element, and to get an order from a judge.

A recent Texas case illustrates a situation where this type of easement was granted. In *Cores v. Laborde*, the court held an easement by estoppel existed with regard to a road where prior landowners had utilized the road for years without objection, the purchasing landowner was told by the seller that he was able to use the road, and the seller rebuilt cattle pens next to the road.<sup>xi</sup> With these facts, the court found that the owner purchased the property in reliance on the ability to use the roadway.

## II. LANDLOCKED PROPERTY

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One common legal myth that circulates in coffee shops around Texas is that property cannot be landlocked because a neighboring landowner is required to allow entry. This is simply not true. Understanding this can be important for both landlocked owners and neighboring landowners as well so that each party understands his or her rights and obligations.

Under Texas law, absent an easement or other right of access legally obtained, property certainly can be landlocked.<sup>xiii</sup> This can cause problems for a landowner in regard to the marketability of the property. First, title companies are usually unwilling to insure title to a property that lacks access, so without access, the property will likely be difficult to sell to any party desiring title insurance. Second, without insurable title, a lender is very unlikely to loan money against the property. Given this, it is prudent for a landowner to seek some sort of legally enforceable access right to the land.

Although there is no automatic right to access landlocked property, there are a number of options a landowner may consider and seek to utilize in order to obtain legal access to property.

Obtain an express easement. Likely the easiest way to obtain access to landlocked property is to obtain an express easement from a neighboring landowner. As noted above, this easement should be in writing, signed by the grantor, specifically identify the property and details of the allowed easement use, and filed in the county deed records. Some neighboring landowners may grant this type of easement without requiring compensation, while others may seek some sort of payment for the right to cross their land. If a neighbor refuses to grant this type of express easement, a landlocked owner will likely be forced to look elsewhere for access.

Determine if there may be an easement by necessity. In the event an express easement cannot be obtained, an easement by necessity may be a method by which a landlocked owner can obtain access. As noted above, however, there are specific facts which must be proven in order to obtain an order granting this type of easement. The party seeking the easement must show each of the following elements: (1) unity of ownership of the alleged dominant and servient estates prior to severance (in other words, the landlocked property and tract across which access is sought must have, at one time, been owned by the same person); (2) the claimed access is a necessity, not a mere convenience; and (3) the necessity existed at the time the two estates were severed.<sup>xiii</sup>

As one can see, an easement by necessity is limited to fairly specific circumstances and will not serve as a method of access in every situation. There may be landlocked owners who cannot prove their land was previously owned jointly with land of a neighbor. Additionally, it can frequently be difficult to prove necessity existed at the time of severance, especially if severance occurred many decades before.

One important note here is the Texas Supreme Court has held that where the easement being sought involves accessing a landlocked, previously unified parcel, a prior use easement is unavailable, and the party may, instead, seek a necessity easement.<sup>xiv</sup>

Determine if there may be a prescriptive easement. Another option for a landlocked property owner may be to consider the elements of a prescriptive easement. Again, these would only apply in narrow circumstances. Importantly, if a landowner had permission to use the easement, there can be no finding of a prescriptive easement.

As noted above, a person claiming the prescriptive easement must prove he or she has used the easement for at least 10 years, and the use was (1) open and notorious; (2) continuous; (3) exclusive; and (4) adverse.

Several of these elements are often problematic. First, the exclusivity requirement means only the person seeking the easement made this use; if the road was used by the owner of the property which it crosses or by any other person, this element is not satisfied. Second, if permission to cross the land was granted to the current landowner or prior landowners upon whose use the party seeking the easement relies, then no easement by prescription will be recognized. If a landlocked owner can prove each of these elements in court, he or she may be able to obtain a legal prescriptive easement which can be filed in the deed records.

Determine if there may be an easement by estoppel. In the event the person seeking to obtain an easement can show a representation an easement existed and detrimental reliance on that representation, an easement by estoppel may be a possible solution. For example, if a person purchased landlocked property and began building a house based upon a promise from a neighbor that the purchaser could cross the neighbors land to access the property, but then the neighbor denied the promised access, that could potentially create an easement by estoppel.

Consider a provision allowing a statutory easement to be granted by a commissioners court. Finally, another option for landowners may be a statute in the Texas Transportation Code that allows a landlocked landowner to seek a public road from the commissioners court.<sup>xv</sup> Texas Transportation Code Section 251.053 provides that “a person who owns real property to which there is no public road or other public means of access may request an access road be established connecting the person’s real property to county public road system...”

In order for this action to be taken, the landlocked owner must file a sworn application with the county commissioners’ court, notice must be given to each property owner who would be affected, and a hearing on the application will be held. If the commissioners’ court determines the landowner has no access to their land, the court may issue an order creating a public road. Damages to affected property owners will be provided in the same manner as for other public roads, and the county pays all costs in connection with proceedings to open a road. The county is required to make the road initially suitable for use as a public access road but is not required to subsequently maintain the road. Note that in the statute, if the factors are met, the commissioners’ court *may* issue an order creating a public road—they are not required to do so. It is within the commissioners’ discretion as to whether to do so.

Additionally, there may be some reason for concern over whether a road created under this section could potentially be an unconstitutional taking of private property. The Texas Supreme Court held a prior version of this statute unconstitutional as it found a commissioners court could not take private property for a private use.<sup>xvi</sup> Although the current version of the statute was passed 30 years after that decision and has never been challenged, due to the similarity of the statutes and rationale of the court, this is at least a concern that landowners and county commissioners should consider.

### III. ADVERSE POSSESSION

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Adverse possession, sometimes referred to as “squatter’s rights,” operates to give title of real property owned by another to the adverse possessor if certain conditions are met and if the rightful owner does not file suit in a timely fashion. The rationale behind this legal doctrine is it encourages the efficient use of land by awarding ownership to those who value the property more, as evidenced by their possession and use of it, rather than those who do not appear to value the property due to non-use and failure to protect it from intruders.<sup>xvii</sup>

Not surprisingly, before property ownership is divested in one person and given to another, there are extremely strict elements which must be proven by the party seeking ownership by adverse possession. In order to acquire title to property by adverse possession, a party must prove six elements by preponderance of the evidence (1) visible appropriation and possession of the property; (2) that is open and notorious; (3) that is peaceable; (4) under a claim of right; (5) that is adverse and hostile to the claim of the owner; and (6) that is consistent and continuous for the duration of the statutory period.<sup>xviii</sup> Let’s consider each of these elements.

Visible appropriation. Courts interpret this element as being possession of “such character as to indicate *unmistakably* an assertion of a claim of *exclusive* ownership in the occupant.”<sup>xix</sup> This requires more than just presence on the property. For example, in cases where grazing livestock is used to allege adverse possession, courts have found merely grazing livestock, alone, is insufficient. Instead, parties must prove they took some action, such as erecting a new fence, that would clearly show their claim of exclusive ownership.<sup>xx</sup> Courts have consistently held casual uses such as clearing brush, grazing cattle, cutting weeds, and occasional hunting are insufficient.<sup>xxi</sup>

Open and Notorious. Texas case law interprets this requirement as being a use obvious to the landowner. In other words, if there is no verbal assertion made by the adverse possessor to the landowner, the possessor’s actions must be such that knowledge by the landowner will be presumed.<sup>xxii</sup> For example, in one case where the adverse possessor claimed cultivation of the land as the open and notorious use, the fact he let the land lie fallow and allowed weeds to become overgrown defeated the element of open and notorious use.<sup>xxiii</sup>

Peaceable. The “peaceable” element means the adverse possessor must prove the landowner did not take any action to remove the possessor from the land. If there was some action by the landowner to prevent the possession, the claim will likely fail.

Under a claim of right. This requires the possessor hold the land with intent to claim ownership, rather than merely using the land. As courts have explained, “No matter how exclusive and hostile to the true owner possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so. The naked possession unaccompanied with any claim of right will never constitute a bar.”<sup>xxiv</sup>

Adverse and hostile. This element requires the possessor act without permission or consent from the landowner. In the event the possessor had permission to use the land, a claim of adverse possession is defeated. Hostile use does not require animosity or intent to dispossess a landowner, which the possessor may not even know exists. It merely requires use without permission.<sup>xxv</sup>

Consistent and continuous for the statutory period. This element actually encompasses two different requirements. First, the use must be consistent and continuous. This means periodic uses such as hunting or growing crops only every-other-year are insufficient.

Second, this element requires uses to have lasted for a certain period of time. In other words, the landowner has a certain time frame in which to discover the adverse possessor and take action. Under Texas law, there are five different types of adverse possession, each having different requirements and a different statutory period under the Texas Civil Practice and Remedies Code:

3-year statute of limitations (Section 16.024). Actions brought to recover property held by another in peaceable and adverse possession under title or color of title must be brought no later than 3 years after the action accrues.

5-year statute of limitations (16.025). Actions to recover real property held in peaceable and adverse possession by another who cultivates, uses and enjoys the property, pays applicable taxes on the property, and claims the property under a duly registered deed must be filed within 5 years after the action accrues.

10-year statute of limitations (16.026). A person must bring suit within 10 years of accrual of the claim to recover property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. This is the time period applicable to most cases people think about as being true adverse possession cases. In other words, this statute applies when the adverse possession claim is based upon use of the land, rather than based upon some claim of ownership based on a deed.

25-year statute of limitations (16.027). A person, even under legal disability, must bring suit within 25 years of accrual of the claim to recover property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

25-year statute of limitations (16.028). A person, even under legal disability, must bring suit within 25 years of accrual of the claim to recover property held in peaceable and adverse possession by another who holds the property in good faith and under a deed or other instrument purporting to convey the property is recorded in the county.

In conclusion, while adverse possession is a legal doctrine recognized under the law, it is difficult to prove in practice. Nevertheless, all landowners should be aware of this law and take steps to inspect and protect their land from intruders or non-permitted users.

## IV. TRESPASSING

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Concerns over trespassers entering land are common for Texas landowners. It is important to understand one's rights with regard to unauthorized persons on property and to be aware of the potential legal avenues a landowner might pursue.

Trespass is a legal claim that can occur both civilly and criminally. A civil trespass claim would involve a landowner filing suit against the trespasser in civil court, usually to seek monetary damages. A criminal trespass suit would be prosecuted by the government on behalf of the state and seek to impose criminal penalties. Each require different elements of proof.

### CIVIL TRESPASS

In order to successfully prove a civil trespass claim, a landowner must prove "entry on the property of another without having consent of an owner."<sup>xxvi</sup> The burden of proving each of these elements rests with the plaintiff.

### CRIMINAL TRESPASS

A person commits criminal trespass if he or she enters on the property of another without effective consent, and the person had notice entry was forbidden.<sup>xxvii</sup> Thus, in order for a landowner to seek criminal prosecution against a trespasser, the landowner must first ensure the trespasser had notice he was not allowed to enter the property. Notice may be given in any one of the following ways: (1) oral or written communication by the owner or someone with authority to act for the owner; (2) fencing or other enclosure obviously designed to exclude intruders or contain livestock; (3) a sign posted on the property reasonably likely to come to the attention of the intruders' entry is forbidden; (4) the placement of purple paint marks on trees or posts, as discussed in more detail below; or (5) the visible presence of crops grown for human consumption under cultivation, in the process of being harvested, or marketable if harvested at the time of entry.<sup>xxviii</sup> A person violating this statute is guilty of a misdemeanor.<sup>xxix</sup>

With regard to the purple paint method of indicating entry is forbidden, the statute requires the markings be vertical lines of not less than 8 inches in length and not less than 1" in width, with the bottom of the mark being at least 3 feet from the ground but no more than 5 feet from the ground, and placed at locations readily visible to any person approaching the property and no more than 100 feet apart on forest land or 1,000 feet apart on land other than forest land.<sup>xxx</sup>

### TRESPASS BY DRONE

In the past couple of years, the issue of drones and privacy has arisen and has been a concern for some landowners. Is a drone trespassing if it flies over your personal property and captures photographs? Although laws regarding operations of drones are enacted at the federal level, there are not federal rules related to drones and privacy.

Texas, however, does have a statute expressly addressing this issue, the Texas Use of Unmanned Aircraft Statute.<sup>xxxii</sup> This statute, passed in 2013, has not been the subject of any reported decisions as of this time, meaning it will remain to be seen how courts might interpret these provisions. Importantly, the statute appears to apply only to drones “capturing images,” which is defined as “capturing of sound waves, thermal, infrared, ultraviolet, visible light, or other electromagnetic waves, odor, or other conditions existing on or about real property in this state or an individual on that real property.”<sup>xxxiii</sup> Thus, if a drone was merely flying without capturing images, it does not appear these provisions would apply.

The statute lists a number of lawful drone uses, for which the use of a drone to capture images is permitted in Texas. These include:

- (1) professional or scholarly research by higher education institutions;
- (2) in areas designated as test sites by the FAA;
- (3) as part of military operations;
- (4) images captured by satellites for mapping;
- (5) images captured by an electric or natural gas utility for operations, inspections, maintenance of facilities, for assessing vegetation growth on easements, and routing and siting for the purpose of providing service;
- (6) with consent of the person who owns or occupies the property;
- (7) pursuant to a valid search or arrest warrant;
- (8) if the image is captured by law enforcement or someone acting on behalf of law enforcement and (a) is in immediate pursuit of a suspect and the officers have reasonable suspicion to suspect he has committed a felony offense; (b) for the purpose of documenting a crime scene if a felony has been committed; (c) for the purpose of investigating the scene of a human fatality, accident causing death or serious bodily injury, or any accident on a state or federal highway; (d) in connection with the search for a missing person, (e) to conduct a high-risk tactical operation that poses a threat to human life, (f) on private property generally open to the public where the owner consents to law enforcement public safety responsibilities;
- (9) images captured by state or local law enforcement authorities or someone acting on their behalf for the purpose of (a) surveying the scene of a catastrophe or other damage to determine if a state of emergency should be declared, (b) preserving public safety, protecting property, or surveying damage or contamination during a state of emergency, or (c) conducting routine air quality sampling;
- (10) at the scene of a hazardous material spill;
- (11) fire suppression;
- (12) rescuing a person in imminent danger;

- (13) images captured by a licensed Texas real estate broker for marketing, sale, or financing of real property so long as no individual in the images is identifiable;
- (14) of real property or a person on real property within 25 miles of a border;
- (15) from a height no more than 8 feet above ground level in a public place, if the image was captured without using any means to amplify the image;
- (16) of public real property or persons thereon;
- (17) images captured by the owner of an oil, gas, water or other pipeline for the purpose of inspection, maintenance, or repair;
- (18) in connection with oil pipeline safety and rig protection;
- (19) in connection with port authority surveillance and security;
- (20) captured by a registered professional land surveyor in the practice of surveying so long as no individual is identifiable;
- (21) captured by a professional engineer in the practice of engineering so long as no individual is identifiable.<sup>xxxiii</sup>

Conversely, the statute also lists prohibited uses of drones to capture images. Drones may not be used to capture an image of an individual on private real property with the intent to conduct surveillance on the individual or property captured in the image.<sup>xxxiv</sup> In this provision, “intent” means it is a person’s “conscious objective or desire to engage in the conduct or cause the result.”<sup>xxxv</sup> Further, a person may not capture an image in violation of this provision and then possess, disclose, display, distribute, or otherwise use the image.<sup>xxxvi</sup>

Violations of these provisions result in convictions of a Class C misdemeanor.<sup>xxxvii</sup> In addition, the owner or tenant of real property may bring suit against the person who captured the image and may seek an injunction, recover a civil penalty of \$5,000 for all images captured in a single episode or \$10,000 for disclosure, display or other use of an illegally captured image, actual damages if the person discloses or displays the image with malice, and reasonable attorney’s fees.<sup>xxxviii</sup>

It is a defense to liability if the person destroys an image he or she captured or came into possession of as soon as the person knows the image was captured in violation of the law and without disclosing, displaying, or distributing the image to a third party.<sup>xxxix</sup>

Additionally, particular rules apply to “critical infrastructure facilities,” which include concentrated animal feeding operations, in addition to a number of other facilities.<sup>xl</sup> A person may not knowingly or intentionally fly over one of these facilities lower than 400 feet, may not make contact with a facility, or come within a distance close enough to interfere with operations or cause a disturbance to the facility. Violation of this section is a Class B misdemeanor, and repeat violations are a Class A misdemeanor.<sup>xli</sup>




## V. ADDITIONAL RESOURCES

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- Ag Law in the Field Podcast Episode #28 – James Decker (Easements & Landlocked Property), *available at* <http://aglaw.libsyn.com/episode-28-james-decker-easements-landlocked-property>.
- Ag Law in the Field Podcast Episode #38 – Amber Miller (Adverse Possession), *available at* <http://aglaw.libsyn.com/episode-38-amber-miller-adverse-possession>.
- Judon Fambrough, *Easements in Texas*, Texas A&M Real Estate Center (2013), *available at* <https://assets.recenter.tamu.edu/documents/articles/422.pdf>.

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- <sup>i</sup> *Greenwood v. Lee*, 420 S.W.3d 106 (Tex. Ct. App. – Amarillo 2012).
- <sup>ii</sup> *Greenwood v. Lee*, 420 S.W.3d 106 (Tex. Ct. App. – Amarillo 2012).
- <sup>iii</sup> *Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363 (Tex. Ct. App. – Houston [1st Dist.] 1994).
- <sup>iv</sup> *Kearney & Son v. Fancher*, 401 S.W.2d 897 (Tex. Ct. App. – Ft. Worth 1966).
- <sup>v</sup> *Boerschig v. Southwestern Holdings*, 322 S.W.3d 752 (Tex. Ct. App. – El Paso 2010).
- <sup>vi</sup> *Hamrick v. Ward*, 446 S.W.3d 377 (Tex. 2014).
- <sup>vii</sup> *Hamrick v. Ward*, 446 S.W.3d 377 (Tex. 2014).
- <sup>viii</sup> *Hamrick v. Ward*, 446 S.W.3d 377 (Tex. 2014).
- <sup>ix</sup> *Holstrom v. Lee*, 26 S.W.3d 526 (Tex. Ct. App. 2000).
- <sup>x</sup> *Boerschig v. Southwestern Holdings*, 322 S.W.3d 752 (Tex. Ct. App. – El Paso 2010).
- <sup>xi</sup> *Cores v. LaBorde*, No. 13-17-00011-CV, 2018 WL 3062478 (Tex. Ct. App.- Corpus Christi June 21, 2018).
- <sup>xii</sup> *See, e.g., McClung v. Ayers*, 352 S.W.3d 723 (Tex. Ct. App. – Texarkana 2011) (upholding jury verdict of no access to property).
- <sup>xiii</sup> *Hamrick v. Ward*, 446 S.W.3d 377 (Tex. 2014).
- <sup>xiv</sup> *Hamrick v. Ward*, 446 S.W.3d 377 (Tex. 2014).
- <sup>xv</sup> Tex. Transportation Code § 251.053.
- <sup>xvi</sup> *Maier v. Lasater*, 354 S.W.2d 923 (Tex. 1962).
- <sup>xvii</sup> *Brown v. State*, No. 02-12-00639-CR, 2013 WL 6805158 (Tex. Ct. App. – Ft. Worth, December 19, 2013).
- <sup>xviii</sup> Tex. Civ. Practice & Remedies Code § 16.026(a).
- <sup>xix</sup> *Rick v. Grubbs*, 214 S.W.2d 925 (Tex. 1948).
- <sup>xx</sup> *Rhodes v. Cahill*, 802 S.W.2d 643 (Tex. 1990).
- <sup>xxi</sup> *Parker v. Weber*, No. 10-16-00446-CV, 2018 WL 2248369 (Tex. Ct. App. – Waco May 16, 2018).
- <sup>xxii</sup> *Orsborn v. Deep Rock Oil Corp.*, 267 S.W.2d 781 (Tex. 1954).
- <sup>xxiii</sup> *Smith v. Matthews*, 662 S.W.2d 450 (Tex. Ct. App. – Ft. Worth 1983).
- <sup>xxiv</sup> *Houston Oil Co. of Texas v. Stepney*, 187 S.W. 1078 (Tex. Ct. App. – Beaumont 1916).
- <sup>xxv</sup> *Tran v. Macha*, 213 S.W.3d 913 (Tex. 2006).
- <sup>xxvi</sup> *Environmental Processing Systems, L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).
- <sup>xxvii</sup> Tex. Penal Code § 30.05.
- <sup>xxviii</sup> Tex. Penal Code § 30.05(b)(2).
- <sup>xxix</sup> Tex. Penal Code § 30.05(d).
- <sup>xxx</sup> Tex. Penal Code § 30.05(b)(2)(d).
- <sup>xxxi</sup> Tex. Government Code § 423.
- <sup>xxxii</sup> Tex. Government Code § 423.001.
- <sup>xxxiii</sup> Tex. Government Code § 423.002.
- <sup>xxxiv</sup> Tex. Government Code § 423.003.
- <sup>xxxv</sup> Tex. Government Code § 423.003; Tex. Penal Code § 6.03.
- <sup>xxxvi</sup> Tex. Government Code § 423.004.
- <sup>xxxvii</sup> Tex. Government Code § 423.003; § 423.004.
- <sup>xxxviii</sup> Tex. Government Code § 423.006.
- <sup>xxxix</sup> Tex. Government Code § 423.003; § 423.004.
- <sup>xl</sup> Tex. Government Code § 423.0045(a)(1).
- <sup>xli</sup> Tex. Government Code § 423.0045(b).



“Eminent domain  
is the single  
greatest power  
the government  
wields over  
law-abiding  
citizens.”

- Zach Brady

## CHAPTER 8

Photo by Dr. Rick Machen

# EMINENT DOMAIN

*Eminent domain* is the power of the government or a private entity acting upon power granted by the government to take private property for public use. The entity seeking to condemn is known as the “condemnor.” Common instances of eminent domain being used include roads, hospitals, schools, electric lines, and pipelines.

The power of eminent domain is recognized in both the United States and Texas Constitutions. The Fifth Amendment of the United States Constitution provides that private property may not be taken for public use without just compensation.<sup>i</sup> Article I, Section 17 of the Texas Constitution, likewise, prohibits the taking, damaging or destruction of property for public use without adequate compensation being made.<sup>ii</sup> These provisions are not a grant of power to the State, but are, instead, a limitation on the power by imposing certain requirements.<sup>iii</sup>

Any landowner facing potential condemnation, regardless of the condemnor or the type of project, should consider consulting with an attorney who frequently handles these types of cases. The potential impact of condemnation on property, which can last for generations to come, is certainly important enough to justify incurring legal fees upfront.

## I. THE ELEMENT OF EMINENT DOMAIN.

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Based on this, there are essentially three elements of eminent domain under Texas law: (1) The condemnor must be authorized to exercise eminent domain; (2) the property may only be taken for a public use; and (4) the landowner must receive adequate compensation.

### THE CONDEMNOR MUST BE AUTHORIZED TO EXERCISE EMINENT DOMAIN

Under Texas law, **only a governmental entity or a private entity granted the power of eminent domain under law is permitted to condemn property.**<sup>iv</sup>

Entities may only have the power of eminent domain when they are a governmental entity or a private entity that has been authorized to do so by the Texas Legislature.<sup>v</sup> Beginning in 2010, the Legislature may grant this power only upon a two-thirds vote of both houses.<sup>vi</sup> Examples of private entities authorized by law to condemn property include gas or electric corporations, groundwater conservation districts, and common carrier pipelines.

Although there is no statute or regulation that lists out each of the entities in Texas that have the right to eminent domain, the Texas Comptroller's Office maintains an online database of every entity with eminent domain authority in Texas.<sup>vii</sup> This database includes information including the entity name, address and public contact information, type of entity, and the provision of the law that grants the entity eminent domain power. The database is updated annually.

An example of a statute authorizing the right of eminent domain can be found in the Texas Natural Resources Code Section 111.019, which states:

- (a) *Common carriers have the right and power of eminent domain.*
- (b) *In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.*

Given the large number of pipeline projects currently being planned and constructed across the state, taking a moment to consider the definition of a “common carrier pipeline” seems prudent. Please note there are other types of pipelines, such as gas utilities, that may not meet this common carrier definition but would have eminent domain power under other statutory authority.

A common carrier is defined by statute as a pipeline which owns or operates a pipeline that transports crude oil, coal, carbon dioxide, or hydrogen for hire, or transports crude oil purchased from others.<sup>viii</sup> Natural gas pipelines, although not governed by the same statutes as crude oil pipelines, are also considered common carriers if they transport natural gas for hire. Pipelines transporting only their own product are not considered common carriers.

Common carrier status is designated by the pipeline company at the Texas Railroad Commission. The company is required to file a Form T-4, which requires the company to declare it is either a common carrier or a private line by checking a box and providing certain information, including an affidavit from a company official. The Railroad Commission is not authorized to investigate this status, meaning the representation of the company on the form is taken at face value. The Railroad Commission has no authority to determine if a company is, in fact, a common carrier.<sup>ix</sup> Landowners may challenge the pipeline company's designation of a common carrier during the condemnation proceeding. However, note the Texas Supreme Court has applied a fairly lenient standard in evaluating common carrier status. In *Denbury Green*, the court held a pipeline company need only prove "by a reasonable probability" it was a common carrier.<sup>x</sup>

## THE PROPERTY MAY ONLY BE TAKEN FOR A PUBLIC USE

In order for property to be condemned, it must be taken for "public use." The definition of "public use," is not as straightforward as one might expect. This term is defined in the Texas Constitution as the **ownership, use, and enjoyment of the property by the State, a political subdivision of the state, or the public at large, or an entity granted the power of eminent domain under law or the elimination of urban blight.**<sup>xi</sup> Courts generally decide whether a taking is for public use based upon the specific facts of a case.

Examples of public uses include: transportation projects like highways, bridges, railroads, airports, utility projects, oil and gas pipelines, water and sewer lines, electric lines; commercial structures such as stadiums, arenas, shopping centers; public projects such as schools, hospitals or public parks; or water-related projects like water supply projects, drainage projects, and water reservoirs. The amount or type of property condemned depends on the specific public use, but it can include a taking of an entire parcel of land, an easement, and improvements such as houses or barns, just to name a few.

Texas statutes do provide certain situations which do not qualify as public use. Public use does not occur if a private benefit is conferred to a particular private party through the use of the party.<sup>xii</sup> Nor does it include the taking of property for transfer to a private party for the primary purpose of economic development or enhancement of tax revenues.<sup>xiii</sup> If, however, economic development or increased tax revenues is a secondary purpose, as opposed to the primary purpose of the taking, it may be considered public use.<sup>xiv</sup>

## THE LANDOWNER MUST RECEIVE ADEQUATE COMPENSATION

Although a Texas landowner cannot prevent an entity with eminent domain power from taking his or her property, the landowner is entitled to adequate compensation. There are a number of considerations used to determine what satisfies the "adequate compensation" requirement.

### *Market Value of the Property*

Adequate compensation is calculated based upon the market value of the property, which is defined as “the price the property will bring when offered for sale by one who desires to sell, but is not obligated to sell, and is bought by one who desires to buy, but is under no necessity of buying.”<sup>xv</sup> This market value is determined at the time of the taking<sup>xvi</sup> (specifically, at the time of the special commissioners’ hearing as discussed below), which can be important, particularly if property values in an area have significantly changed over time.

### *Highest and Best Use*

In determining the market value of the property, a landowner is entitled to receive the value of the “highest and best use” of the property, rather than the value of the property for which the landowner actually used the land.<sup>xvii</sup> This is defined by the Appraisal Institute and adopted by Texas courts as “the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.”<sup>xviii</sup> There are four factors in determining the highest and base use: legal permissibility, physical possibility, financial feasibility, and maximal productivity.<sup>xix</sup> This requires consideration of all uses to which the property is “reasonably adaptable” and for which it is, or “in all reasonable probability will become within the foreseeable future.”<sup>xx</sup> Importantly, this consideration cannot be based on “purely speculative or unavailable” uses.<sup>xxi</sup>

For example, if a vacant lot was located in a commercially zoned area, the highest and best use of the property would likely be the value of a commercially developed property, rather than the value of a vacant lot. Similarly, in a situation where agricultural land may be surrounded by housing developments or commercial businesses, it may be that the highest and best use of the property would justify a value based upon those residential or commercial uses, rather than agricultural use.

### *Remainder Damages*

If a person’s entire tract is taken, the damage is the local market value of the property at the time of the special commissioners hearing.<sup>xxii</sup> If, however, a portion of a tract of land is taken, then adequate compensation should include not only the value of the portion taken, but should also include “remainder damages” if they exist.<sup>xxiii</sup> These “remainder damages” are based upon any decrease in value to the portion of the property not taken, the remainder, by virtue of the taking. Typical damages falling into this category include loss of access to a road or highway, loss of economic uses, cost of fencing, loss of street frontage, or loss of water sources. Injuries shared by the landowner and general public (such as increased traffic), however, may not be considered in calculating a damage award.<sup>xxiv</sup>

Additionally, if there are any benefits to the landowner due to the taking, which actually increase the value of his remaining property, the amount of those benefits is deducted from the remaining property damages recoverable.<sup>xxv</sup>

### *Moving/Relocation Expenses*

If a landowner is permanently displaced from his home or business and is not entitled to recover moving expenses under another law, he or she may recover reasonable moving expenses for a maximum distance of 50 miles.<sup>xxvi</sup>

Additionally, under certain situations, relocation assistance, including relocation payments or housing assistance, may be available for landowners, including those moving their farming or ranching operation as a result of condemnation.<sup>xxvii</sup>

### *Costs Not Included*

In reviewing this list of common damage considerations, one may note that attorney's fees or the cost of an appraiser utilized during the eminent domain process are not included. This has been a concern of various landowner and agricultural groups for years. In the past, several bills have been introduced in the Texas Legislature to modify the existing law to allow a landowner to recover costs incurred in defending a condemnation action, specifically attorney and appraiser fees, if the landowner is successful in recovering a certain percentage above the initial offer from the condemnor.<sup>xxviii</sup> As of the date of this publication, no such attempts have been successful.

## **II. STEPS OF A CONDEMNATION PROCEEDING IN TEXAS.**

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In Texas, condemnation proceedings have very different procedures than other civil cases. It is important for landowners to understand the condemnation process in case they ever find themselves faced with a condemnation suit. As noted above, given the complex nature of condemnation proceedings, the factual differences between every case, and the potential long-term impacts of condemnation, it is highly recommended landowners seek an attorney during this process.

Condemnation proceedings are governed by Texas Property Code Chapter 21, which sets forth the procedure for all condemnation actions, regardless of the type of project at issue. For example, these provisions would apply whether the project was for a common carrier pipeline or a new highway. Generally, the condemnation process may be divided into five phases.

### **PHASE 1: OFFER AND NEGOTIATIONS**

Before initiating condemnation proceedings, the company must make a "bona fide offer" to purchase the property it seeks.<sup>xxix</sup> In order to have complied with this bona fide offer requirement, the company seeking to use eminent domain must make an initial written offer to purchase the property, obtain an appraisal from a certified appraiser of the value of the property, and make a final written offer that is greater than the amount of the appraiser's report.<sup>xxx</sup> Importantly, landowners are protected by certain time requirements in the statute. There must be at least 30 days between the initial offer and the final offer, and the landowner must be given at least 14 days to respond to the final offer before a condemnation proceeding may

be filed.<sup>xxx1</sup> This means from the initial written offer, the landowner has at least 44 days before the company may file an action in court.

The company is also required to provide landowners with certain information at the time the offer of purchase is made, including a copy of any appraisals in the company's possession related to the land that are in the company's possession and prepared in the last 10 years.<sup>xxxii</sup> Additionally, the company must provide the owner with a copy of the Texas Landowner Bill of Rights.<sup>xxxiii</sup> The Landowner's Bill of Rights is a document prepared by the Texas Attorney General setting forth the law regarding eminent domain, the condemnation process, and explains the landowner rights. This is critical information and should be carefully reviewed by anyone facing potential eminent domain.

Between the initial offer and final offer, negotiations are generally ongoing between the company and the landowner. During this time, a landowner may have an appraisal conducted by an appraiser of his or her own choosing but is required to provide the results to the condemner.<sup>xxxiv</sup> It is worth noting here landowners should be sure to consider more than just the monetary payment during this negotiation period. There very well may be non-monetary terms actually more important to the landowner than an increased payment, and those terms can only be obtained by negotiating them with the condemner. Tips on key terms to consider will be covered in Chapter 9.

If an agreement is reached between the condemner and the landowner during this phase, there is no need for a condemnation action, and the sale of the easement goes forward between the two parties. The final easement agreement, including all terms agreed to, should be reduced to writing and filed in the deed records at the courthouse in the county where the property is located. If no agreement is reached, the company may then file a condemnation proceeding.

One important note here relates to the condemner's right to survey the property, as this is a cause of frequent confusion and frustration to landowners. Texas courts have held the right to condemn land includes the right to enter onto the property to conduct surveys to select lands to be acquired. Of course, this means surveys may be conducted prior to the property actually being condemned. "Ancillary to the power of eminent domain is the authority to enter upon the land to make a preliminary survey."<sup>xxxv</sup> Courts have limited this right to visual inspections and lineal surveys, refusing to allow more invasive procedures like core drilling or subsurface soil testing.<sup>xxxvi</sup> Landowners who seek to interfere with this right may be subject to a court injunction should the condemner seek one.

However, landowners can (and should) request a "Right of Entry Permit," which is essentially a contractual agreement with the company, limiting their rights and imposing other protections for the landowner while the company is on the property.

## **PHASE 2: CONDEMNATION PETITION FILING**

If no agreement is reached, the company will likely file suit against the landowner in either the district court or the county court of law in the county where at least part of the property is located.<sup>xxxvii</sup> This is the beginning of the formal



condemnation proceeding. The petition must contain a description of the property to be condemned, the public use for which the property is being taken, the name of the property owner, state the company and the landowner are unable to agree on the damages due, state the company provided the landowner with a copy of the Bill of Rights, and state the company made a bona fide offer as required.<sup>xxviii</sup>

Keep in mind, the filing of the condemnation action does not prevent the landowner from continuing negotiations with the condemnor.

### **PHASE 3: SPECIAL COMMISSIONER APPOINTMENT, HEARING, AND AWARD**

Upon the filing of a condemnation proceeding, the judge will quickly appoint three local landowners to sit as “special commissioners” to determine adequate compensation.<sup>xxxix</sup> Both the landowner and the company have the right to strike one of the three local landowners, and if exercised, the judge will appoint another special commissioner. Importantly, these three commissioners have no authority to consider whether condemnation is proper but instead are only able to determine the proper compensation owed to the landowner.<sup>xl</sup>

The special commissioners will schedule a hearing on the issue of adequate compensation. The hearing will be set at the earliest practical time but will not be sooner than twenty days after the commissioner appointment.<sup>xli</sup> The affected landowner will receive notice of the hearing and may present appraisal reports or other evidence at the hearing.<sup>xlii</sup> Specifically, the commissioners shall consider evidence of the value of the property being condemned, the injury to the property owner, the benefit to the owner’s remaining property, and the use of the property for the purpose of the condemnation.<sup>xliii</sup> Both the condemnor and the landowner have the right to present such evidence at this informal hearing and cross-examine all witnesses.

After the hearing, the special commissioners will issue an award stating the value of adequate compensation to be paid by the company to the landowner for the easement. This compensation award is then filed with the court.

Importantly, once the commissioners have made an award, the company may take possession of the property pending results of further litigation if the company pays the required amount to the landowner or to the court or posts a bond to secure the payment of damages.<sup>xliv</sup> This right to possession would allow a pipeline company, for example, to immediately begin construction of the line even though the case was still pending on appeal.

### **PHASE 4: AWARD FILING AND OBJECTIONS PERMITTED**

If either the landowner or company is dissatisfied with the special commissioners’ award, an objection may be filed with the court on or before the first Monday following the 20th day after the day the commissioners’ determination is filed with the court.<sup>xlv</sup> If an objection is filed, the condemnation case will be set for trial, before either a judge or jury, and a verdict rendered.

## PHASE 5: TRIAL BY JUDGE OR JURY AND APPEALS

If either party appeals the special commissioners' award, the case will proceed to a trial. This is the point in time in which a landowner may challenge issues other than compensation, such as whether the entity is entitled to use eminent domain or whether the land will be taken for a public use. Unlike the special commissioners, the court has the power to consider these issues.

After the trial occurs and a verdict is entered, either party has the right to appeal the decision and proceed through the appellate process like any other litigation.

## III. CONCLUSIONS

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Eminent domain is a topic difficult for many landowners to understand and accept. As Austin-based attorney Jim Bradbury advises clients, take a day or 2 to be mad, but then get over it and start getting smart. Understanding one's rights, the law, and what he or she is entitled to with regard to eminent domain is crucial to protecting one's self and one's property.

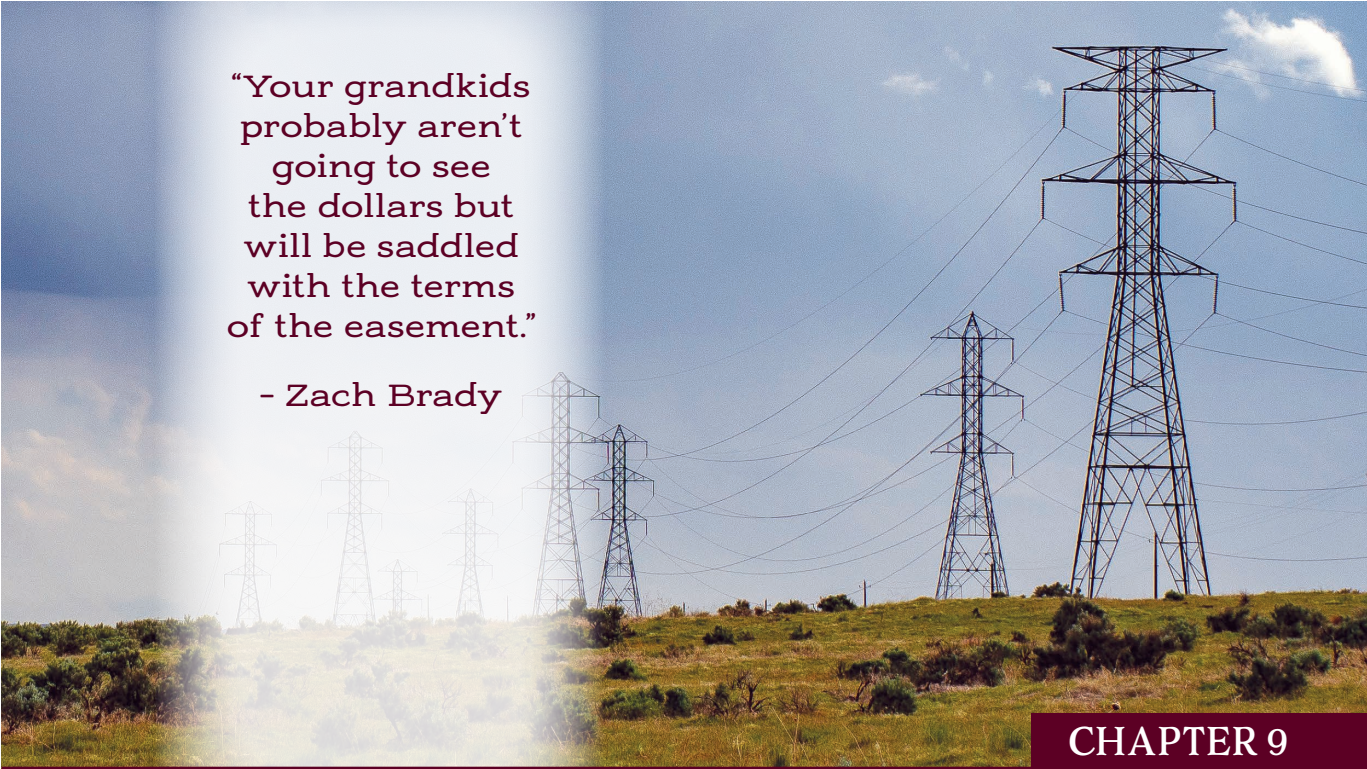
## IV. ADDITIONAL RESOURCES

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- Attorney General of the State of Texas, *Texas Landowner Bill of Rights*, available at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/LandownersBillofRights.pdf>.
- Texas A&M University School of Law, *A Survey of Eminent Domain Law in Texas and the Nation*, available at <https://law.tamu.edu/docs/default-source/faculty-documents/a-survey-of-eminent-domain-law-in-texas-and-the-nation.pdf?sfvrsn=2>.
- Ag Law in the Field Podcast Episode #52 – Zach Brady (Eminent Domain FAQs), available at <http://aglaw.libsyn.com/episode-52-zach-brady-eminent-domain-faqs>.
- Ag Law in the Field Podcast Episode #18 – Luke Ellis (Eminent Domain in Texas) available at <http://aglaw.libsyn.com/episode-18-luke-ellis-eminent-domain-in-texas>.

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- <sup>i</sup> U.S. Constitution, amend. X.
- <sup>ii</sup> Tex. Constitution, Article I, Section XVII.
- <sup>iii</sup> *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. Ct. App. – Austin 2005).
- <sup>iv</sup> Texas Property Code Section 21.012; *Crawford Family Farm Partnership v. TransCanada Keystone Pipeline, L.P.*, 409 S.W.3d 908 (Tex. Ct. App. – Texarkana 2013).
- <sup>v</sup> Office of the Attorney General of Texas, Texas Landowner Bill of Rights, available at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/LandownersBillofRights.pdf>.
- <sup>vi</sup> H.J.R. 14 (81st Legislature, 2009).
- <sup>vii</sup> Glen Hegar, Comptroller’s Online Eminent Domain Database (COEDD), Tex. Comptroller of Pub. Accts., <https://coedd.comptroller.texas.gov/>.
- <sup>viii</sup> Tex. Natural Resources Code § 111.002.
- <sup>ix</sup> Railroad Commission of Texas, Pipeline Eminent Domain and Condemnation, available at <https://www.rrc.state.tx.us/about-us/resource-center/faqs/pipeline-safety-faqs/faq-pipeline-eminent-domain-and-condemnation/>.
- <sup>x</sup> *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017).
- <sup>xi</sup> Tex. Constitution, Article I, Section XVII.
- <sup>xii</sup> Texas Government Code § 2206.001(b)(1).
- <sup>xiii</sup> Tex. Constitution, Article I, § XVII(b).
- <sup>xiv</sup> Texas Government Code § 2206.001(b)(3).
- <sup>xv</sup> *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177 (Tex. 2001).
- <sup>xvi</sup> Texas Property Code § 21.042.
- <sup>xvii</sup> *State v. Windham*, 837 S.W.2d 73 (Tex. 1992).
- <sup>xviii</sup> *City of Sugar Land v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503 (Tex. Ct. App. – Eastland 2007).
- <sup>xix</sup> *City of Sugar Land v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503 (Tex. Ct. App. – Eastland 2007).
- <sup>xx</sup> *State v. Windham*, 837 S.W.2d 73 (Tex. 1992).
- <sup>xxi</sup> *City of Sugar Land v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503 (Tex. Ct. App. – Eastland 2007).
- <sup>xxii</sup> Texas Property Code § 21.042.
- <sup>xxiii</sup> Texas Property Code § 21.042.
- <sup>xxiv</sup> *State v. Whataburger, Inc.*, 60 S.W.3d 256 (Tex. Ct. App. – Houston (14th Dist.) 2001).
- <sup>xxv</sup> Texas Property Code § 21.042(c).
- <sup>xxvi</sup> Texas Property Code § 21.043.
- <sup>xxvii</sup> Texas Property Code § 21.046.
- <sup>xxviii</sup> See, e.g., S.B. 474 (84th Legis. 2015).
- <sup>xxix</sup> Texas Property Code § 21.0113.
- <sup>xxx</sup> Texas Property Code § 21.0113.
- <sup>xxxi</sup> Texas Property Code § 21.0113.
- <sup>xxxii</sup> Texas Property Code § 21.0111.
- <sup>xxxiii</sup> Texas Property Code § 21.0112.
- <sup>xxxiv</sup> Texas Property Code § 21.0111.
- <sup>xxxv</sup> *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544 (Tex. Ct. App. – Houston (1st Dist.) 1982).
- <sup>xxxvi</sup> *Coastal Marine Serv. v. City of Port Neches*, 11 S.W.3d 509 (Tex. Ct. App. – Beaumont 2000).
- <sup>xxxvii</sup> Texas Property Code § 21.001; Texas Property Code Section 21.013.
- <sup>xxxviii</sup> Texas Property Code § 21.001.
- <sup>xxxix</sup> Texas Property Code § 21.014.
- <sup>xl</sup> Texas Property Code § 21.014.
- <sup>xli</sup> Texas Property Code § 21.015.
- <sup>xlii</sup> Texas Property Code § 21.015-.016.
- <sup>xliii</sup> Texas Property Code § 21.041.
- <sup>xliv</sup> Texas Property Code § 21.021.
- <sup>xlv</sup> Texas Property Code § 21.018.





“Your grandkids probably aren’t going to see the dollars but will be saddled with the terms of the easement.”

- Zach Brady

## CHAPTER 9

Photo by Brett Sayles (Pexels)

# PIPELINE AND TRANSMISSION LINE EASEMENTS

Many Texas landowners have property across which a pipeline or transmission line is located. Most of these pipelines or powerlines are there by virtue of an easement allowing for them to cross private property. Easements may be condemned by eminent domain, as was discussed in Chapter 8, or may be a result of a voluntary agreement between two consenting parties. This chapter will focus on key considerations and terms for pipeline and power line easement agreements.

## I. THE ROUTING APPROVAL PROCESS

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One important distinction to draw between a transmission line project and an oil or gas pipeline is the routing approval process. For oil and gas pipelines, no agency oversees the need for or routing of a pipeline, meaning the company itself essentially determines whether to build and sets the desired route.<sup>i</sup> A company seeking to build a pipeline need only file a Form T-4 with the Texas Railroad Commission.

Conversely, for transmission lines, the Public Utility Commission (PUC) is tasked with determining whether to issue a Certificate of Convenience and Necessity (CCN) after determining a transmission line is needed and selecting a final route for any transmission line project.<sup>ii</sup> A company seeking to build a transmission line must apply for a CCN, explain the need for an additional line, and provide several

proposed routes for the PUC to consider. All landowners along any proposed route will receive notice from the PUC about the application. Landowners may then elect to participate, if they wish, as either a protestor or an intervener.

Protesters participate informally by filing either written or verbal comments in support of the CCN application. Protesters are not considered parties to the case and do not have the rights an intervenor would. This means, more importantly, the protesters may not submit evidence, and because the PUC is required to base all decisions on evidence, the protester role is quite limited.

Intervenors enjoy actual party status to the case by filing a statement with the PUC seeking to intervene and explaining how the project would impact the landowner's property. While any landowner may seek to intervene, the right is generally granted only to those directly affected landowners, meaning those across whose land one or more proposed routes for the transmission line may cross or a proposed center line for the project is within a certain distance to the landowner's home. Of course, with party status comes a host of responsibilities such as responding to requests for information, being available for cross-examination, and sending documents to everyone involved in the case. Eventually, through a hearing process determined by the PUC and which may involve hearings conducted by an Administrative Law Judge, the PUC will issue a final order on the CCN application, which will include the official route for the transmission line project.

## II. EMINENT DOMAIN POWER DETERMINATION

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Determining whether or not the person seeking an easement has the power of eminent domain is an important first step for any landowner who receives a request for an easement across private property. There is a variety of information a landowner could request. For a transmission line, the landowner could seek a copy of the company's CCN or application to obtain or amend a CCN. For a pipeline company, the landowner could request documentation supporting the pipeline's common carrier status provided to the Texas Railroad Commission. Other options include seeking a copy of the statutory authority granting eminent domain or utilizing the Texas Comptroller's database<sup>iii</sup> to see if the company is listed as having eminent domain power.

This should be the initial analysis considered, as it will affect the bargaining position of the landowner during negotiations. For example, if a landowner is approached by a private pipeline company not possessing eminent domain authority, he or she is in a much different and stronger position to insist on certain terms than a landowner who is approached by a common carrier pipeline having eminent domain authority.

## III. KEY TERMS TO CONSIDER

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Whether a landowner is facing an easement for a pipeline or a transmission line, there are a number of key considerations to be undertaken related to drafting easement terms. This list is not exhaustive but seeks to address some of the key

terms to consider in negotiating an easement agreement for a pipeline or powerline across a landowner's property.

Determining compensation details. There are a number of considerations to keep in mind when working to determine an agreeable compensation amount and structure. If the company does not have eminent domain power, the landowner is in the drivers' seat in regard to what he or she believes the property is worth. If the company does have the power to condemn, as discussed in Chapter 8, there are a number of factors involved in calculating what constitutes "adequate compensation" under Texas law. Ensuring proper consideration of concepts like highest and best use and remainder damages can be extremely important.

Generally, payment for pipeline easements will be made either on a per foot, per acre, or per rod (16.5 feet) basis. Landowners may benefit from seeking payment based on the square foot, which takes into account both the length and width of the easement in terms of compensation. Keep in mind the concept of remainder damages if a pipeline or transmission line company's easement will diminish the value of the remainder of the property owned by the landowner.

Landowners should also consider seeking additional compensation for any temporary work easement sought by the company. For example, if a company seeks a 50-foot pipeline easement but also seeks a 150-foot temporary work easement or 3 months, the landowner should be paid for the use of his or her additional property during that 4-month time period.

Finally, discuss with an accountant how the payment will be described or structured. The payment description as an easement purchase versus a payment combined with remainder damages may have tax consequences. Discussing these issues with a tax attorney or accountant before a final agreement is signed and payment is made is important to minimize potential tax liability.

Set a specific, not a blanket easement. Easement agreements, historically, were extremely broadly drafted and are sometimes referred to as "blanket easements." For example, an easement might simply provide the company has the right to lay pipelines over and through the landowner's property. This type of blanket easement lacks the specificity desired in a strong easement agreement. An easement expressly stating details such as the location of the easement, setback distances from structures, and the other terms included in this chapter are much preferred. Landowners should request a survey of the property and an as-built drawing of where the easement will be located as part of the final easement agreement. In considering easement location, be sure to check any restrictive covenants in the deed records which might specify the required location of pipelines or powerlines.

Identification of the parties. Require the condemnor to designate as specific contact person in case issues arise and to provide written notice to the landowner with a set time period (i.e., 30 days).

Exclusivity of easement. Landowners may want to seek a non-exclusive easement, thereby allowing the landowner to grant additional easements to other parties within the easement area. For example, if another pipeline company wants to place

a line through the property, the landowner may want the right to have the second line placed within the same easement designated to the first company, rather than having two separate easements across the property.

Limit the easement agreement to a single line. Many proposed easement agreements seek to allow the company to “lay lines” or “construct pipelines” across the property. Limit the easement agreement to allow only one pipeline or one powerline to be permitted under this agreement. This term allows a landowner to retain the right to negotiate and receive additional payment for any additional line the company may seek to add on the property, rather than receiving a one-time easement that could allow additional lines in the future.

Limit the types of products running through the line. In addition to restricting the easement to a single line, seek to limit the line to carry a single product. For example, a landowner might grant the right to lay a natural gas pipeline, but if the company later wants to flow carbon dioxide through the line, a second easement would be necessary. At minimum, a landowner should know what products are running through the line.

Determine the permissible pipeline diameter and pressure. Generally, a landowner wants a smaller, lower-pressure line, and a company wants the right to place the largest, highest-pressure line it may ever need. During negotiations, seek an agreement stating the line will not exceed a certain diameter and specific pressure to help alleviate safety concerns.

Determine the width of the easement. Widths are often described in two measurements, a temporary construction easement (generally 50 feet or wider) and a permanent pipeline easement (typically ranging from 20 to 50 feet). Limit both of these measurements to the narrowest width possible to control the amount of land used or damaged by the easement. Also, determine a date by which the temporary pipeline easement will terminate and provide for damages if the company extends this deadline.

Require a specific pipeline depth. In the past, many easements stated the pipeline would be “plow depth.” Avoid this type of nonspecific, subjective term. Easements usually stipulate the line will be buried 36 inches below the ground, the depth requirement of Texas law. If a pipeline is buried at 36 inches, erosion will eventually make the line too shallow to comply with state law. In light of this, have the line buried to at least 48 inches deep or stipulate for the company to maintain the 36-inch depth.

Specify the type and size of transmission line. Spell out details including the type and size of poles, foundations, concrete pads, footings, and guy wires.

Specify what surface facilities, if any, are permitted. Even underground pipelines require some surface facilities such as cleaning stations, compressor units, and pump stations at points along the line. Transmission lines will likely require electric transmission towers and lines, substations, and other structures. Require a pipeline company or transmission line company to either waive all surface facilities on the property or specify exactly how many surface facilities will be



allowed, their size, type, and location. If surface facilities will be placed on the property, negotiate additional compensation.

Reserve landowner surface use. Retain the right to use as much of the easement area as necessary. For example, once an underground pipeline is in place, the landowner may want to graze his cows on the property, including the surface above the pipeline. Similar consideration applies to the landowner's ability to place roadways, ponds or tanks, and water lines across the easement.

Provide property access for the landowner. It is not uncommon to install a pipeline beneath an entry road or driveway to the landowner's property. State in the agreement that the company will provide access to the landowner's property during the pipeline installation, as well as after the construction is completed.

Limit company access to the easement. Although a company has the right to enter the easement, a landowner can limit the company's access to the easement in a number of ways:

- Require notice be given before entry.
- Set certain times or days when entry is not permitted.
- Determine where company employees may enter and exit the property.
- Designate what roads may be used while on the property.
- Prohibit any fishing or hunting on the easement or any of the landowner's property by the company or any of its employees, agents, or contractors without landowner permission.

Require the use of the double ditch method. The double ditch method requires the company to dig the pipeline trench so the topsoil remains separate from the subsurface soil and is placed back on top of the subsoil when the construction is completed and the line buried.

Include the right to approve schedule and damages for construction, maintenance, repair, replacement, and removal. Require the company to be responsible for damages caused not only during construction but also during future maintenance, repair, and replacement activities. Also, include any limitations or notice requirements desired for the company's maintenance schedule. For example, a farmer growing crops near the pipeline may want written notice before any pesticide or herbicide is sprayed on the easement area. Another common example is a landowner who leases hunting rights may want to ensure routine maintenance like mowing is not scheduled during deer season.

Set specific restoration standards. To ensure the easement area is properly restored, state the company's responsibilities regarding repairs. How will the disturbed area over the pipeline or around the transmission line be treated after the line has been installed? Will the operator remedy any changes to the slope of the land or replace the topsoil? Will the reseeded be done with native grass, or is a special type of seed required? Address these issues in detail. Consider setting a measurable standard to ensure repairs are adequate or appoint a neutral third party to inspect the land after the damages have been repaired to determine if the repairs are sufficient.

Request payment for damages. Because these easements generally last a long time, request an up-front payment for damages or require the company to post a bond, so money is available for future damages. This provides some protection to the landowner in the event the company disappears before making damage repairs. Additionally, require repairs to the surface of the easement be done when the construction is completed as well as when the easement terminates.

Specify fencing and gate requirements. Require the pipeline or transmission line company to fence the easement area according to specifications such as the type of fence to be built, the width and details of gates to be placed, the number and type of H-braces to be installed, and the tinsel strength of the wire.

Include repairs or improvements to existing roadways. Constructing a pipeline or transmission line requires significant equipment and vehicle traffic. If the company will use any roads owned by the landowner or will construct roads across the landowner's property, seek compensation, and require the company restore or improve the roads when the construction is finished.

Define when the easement will terminate. From a landowner's perspective, this is perhaps one of the most important provisions of an easement agreement. There are several circumstances under which an easement might terminate under Texas law, but abandonment is the most common concern for landowners with pipeline easements. Under Texas law, an easement is considered abandoned if there is non-use by the company (an objective test) and the company indicates an intent not to use the line in the future (a subjective test). Under this rule, it is difficult for a landowner to prove the subjective test in order to have the easement terminate due to abandonment. Instead of relying on the general rule, set a specific, objective standard for when the easement will end. This could be a specific time in the future (for example, the easement will last for 10 years) or may be a statement if the pipeline company does not flow product through the line for a certain period (for example, 1 year), it is considered abandoned, and the easement terminates. Whatever the standard, including it in the agreement prevents easements from lasting into eternity. Further, require the company provide a release of the easement, so it can be recorded in the public record when the easement ends.

State the requirements for removing facilities. Require the company to remove all lines and structures after termination of the easement or forfeit them to the landowner. Also, state any damages caused by this removal will be the responsibility of the company.

Determine remedies for violating the easement agreement. If a company violates the easement agreement, the landowner can file a lawsuit to terminate the agreement, but the court will require the violation is "material" before granting termination of the agreement. Whether or not a violation is material is determined on a case-by-case basis on the specific facts at issue. This causes two potential problems: (1) the landowner must go to court, which is expensive and time-consuming, and (2) the violation must be material for termination to be permitted.

To avoid these issues, consider two options: First, the landowner may be able to define what violations are deemed material and state that in the agreement. For

example, the agreement could “Employees shall be permitted on the easement only, and if they leave the easement and enter the landowner’s property, this shall constitute a material breach.” This material breach would likely permit the landowner to terminate the agreement without court action. Second, require conditions in the agreement by stating, “or the agreement shall terminate without further action by the landowner.” For example, the agreement could say, “Employees shall be permitted on the easement only. If they leave the easement and enter the landowner’s property, this shall constitute trespass, and the agreement shall terminate.” Under either of these scenarios, the landowner knows precisely when he or she may terminate the agreement, rather than having to wait for a judicial determination of material.

Include liability and indemnification provisions. Incorporate liability and indemnification responsibility in the easement agreement. Provide the landowner is not liable for any acts, omissions, or damages caused by the company, its agents, contractors, or employees. Further, stipulate if any claim is made against the landowner by any party related to the pipeline, transmission line, other surface facilities, any of the company’s activities, or any environmental laws, the company will hold the landowner harmless and state this includes paying any judgment against the landowner and providing a defense to the landowner without charge.

List the landowner as “additional insured” on the company insurance policy. Require the company to carry liability insurance and provide a copy of the policy to the landowner. Also, request the company list the landowner as an “additional insured” on its insurance policy. This is not usually a major cost to the company, and it may allow the landowner the protections of the company’s insurance policy if he or she is sued based on something related to the pipeline.

Delete warranty of title. Frequently, easement agreements require the landowner to warrant title (the landowner promises there are no other unknown owners or encumbrances on the property). Because the company is in a better position to conduct a title search and make sure they are negotiating with all the right parties, the landowner should not take the risk of warranting title. If the company goes through the condemnation process, Texas law does not allow it to obtain a warranty of title, so there should be no reason to require this term in a negotiated agreement.

Limit the terms of transferability. Specify whether the company can assign its rights under the agreement to a third party. Request no assignment be made without prior written consent of the landowner, state any assignee will be held to the terms of the original agreement between the landowner and the company, and state the company will remain liable in the event of a breach of the agreement by the assignee. At a minimum, require notification before an assignment occurs.

Request a most-favored-nations clause. Although companies dislike these requests and are unlikely to agree to this term, ask for a most-favored-nations clause. This provides if any other landowner in the area negotiates a more favorable deal within a certain timeframe, the landowner is given the benefit of the more favorable deal.

Seek payment for negotiation costs. Because the landowner may incur significant costs during the negotiation process, including appraiser costs, fees for forestry or

agricultural experts, surveyor expenses, and attorney's fees, require the company to pay all or a portion of these costs.

Use a choice-of-law provision. A choice-of-law provision allows the parties to determine which state's law will govern the agreement in the event of a dispute. For example, a pipeline company headquartered in another state may try to require the laws in its home state apply to any dispute involving the easement agreement. Generally, courts enforce these clauses as long as they are not against public policy and are reasonably related to the contract. Because many laws vary by state and a choice-of-law provision could significantly impact rights under the agreement, consult with an attorney to determine which options are the most advantageous to the landowner.

Include a forum clause. A forum clause provides a dispute over the agreement will be heard in a particular location or court. Include a requirement stating any lawsuit will be filed in the county where the land is located or where the landowner lives. This can significantly lower litigation and travel costs and ensures if a jury trial occurs, the jury will be made up of local citizens.

Understand dispute resolution clauses. These types of clauses limit the time and expense of a court action in the event of a dispute. There are two primary types of dispute resolution: arbitration and mediation. In arbitration, a third-party arbitrator (usually an attorney) hears evidence and delivers a decision. If the arbitration is "binding," this judgment is final, absent evidence of fraud by the arbitrator. Mediation involves a neutral third party who works with the landowner and the company to reach a mutually acceptable resolution. If both parties refuse to agree to settle, the case goes to court. Understanding the difference between these options is important; consult with an attorney to determine which option is best. A dispute resolution clause should identify how the arbitrator or mediator is selected.

Review by a licensed attorney. A licensed attorney familiar with easement negotiation issues should review all pipeline easement agreements. Although hiring an attorney who specializes in representing landowners in these types of transactions may be an additional cost, it could save money in the long run by preventing a dispute from arising because of an unclear or inadequate easement agreement.

## IV. CONCLUSIONS

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As this chapter illustrates, there are a number of considerations and concerns landowners should be aware of when negotiating an easement for a pipeline or powerline across their property. Although not an exhaustive list, hopefully, these provisions will assist in determining important terms to protect a landowner's property.

## V. ADDITIONAL RESOURCES

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- Tiffany Dowell, Texas Pipeline Easement Negotiation Checklist, *available at* <https://agriflifecdn.tamu.edu/texasaglaw/files/2016/08/Texas-Pipeline-Easement-Negotiation-Checklist.pdf>.
- Indiana Ag Law Foundation, *Utility Line Easements – Landowner Rights*, *available at* <http://www.inaglaw.org/files/Utility-Line-Easements-Landowners-RightsChecklist.pdf>.
- Ag Law in the Field Podcast Episode #52 – Zach Brady (Eminent Domain FAQs), *available at* <http://aglaw.libsyn.com/episode-52-zach-brady-eminent-domain-faqs>.
- Ag Law in the Field Podcast Episode #18 – Luke Ellis (Eminent Domain in Texas) *available at* <http://aglaw.libsyn.com/episode-18-luke-ellis-eminent-domain-in-texas>.


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<sup>i</sup> Railroad Commission of Texas, *Pipeline Eminent Domain and Condemnation*, *available at* <https://www.rrc.state.tx.us/about-us/resource-center/faqs/pipeline-safety-faqs/faq-pipeline-eminent-domain-and-condemnation/>.

<sup>ii</sup> Public Utility Commission of Texas, *Landowners and Transmission Line Cases at the PUC*, *available at* <http://www.puc.texas.gov/industry/electric/forms/ccn/brochure8x11.pdf>.

<sup>iii</sup> <https://coedd.comptroller.texas.gov/>.





“Everything  
is better with  
some cows  
around...”

- Corb Lund

## CHAPTER 10

Photo by milesz (Pixabay)

# TEXAS RIGHT TO FARM STATUTE

One real concern for farmers across the country, especially those whose operations are located in areas where houses are moving out into traditionally more rural areas is the threat of nuisance lawsuits. In order to succeed on a nuisance claim, a plaintiff must show the defendant substantially interfered with the plaintiff’s use and enjoyment of his or her own property.<sup>i</sup> Frequently, nuisance claims against agricultural operations involve complaints about dust, odors, flies, or noise. These types of lawsuits have been filed across the country, including here in Texas. Given the threat of litigation, attorney’s fees, and the potential of facing an injunction shutting down an agricultural operation if successful, this is a serious issue for all agricultural producers.

Recognizing these types of lawsuits had the potential to harm American agriculture, legislatures in all 50 states passed Right to Farm statutes, which provide an affirmative defense to an agricultural operation facing a nuisance lawsuit. This means if an agricultural operation is sued for nuisance, it may raise the Right to Farm defense, and so long as the operation is able to meet the requirements of the state’s Right to Farm Act, the lawsuit will be dismissed.

The Texas Right to Farm Act was passed in 1981 with the express purpose to “conserve, protect, and encourage the development and improvement of Texas’ agricultural land for the production of food and agricultural products.”<sup>ii</sup> Cases

where this defense has been utilized in Texas have involved claims related to manure runoff from a dairy; odor, flies, noise, and lights at a sheep feedlot; and odors from manure application.

## I. REQUIRED ELEMENTS

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In order to successfully prove the Right to Farm defense applies, a plaintiff must show the following elements (1) there is an agricultural operation; (2) it has been in existence for a year or more prior to the date of the lawsuit, and (3) the conditions complained of have not been changed since the established date of operation.

### AGRICULTURAL OPERATION

The Texas Right to Farm Act applies to all “agricultural operations” which is defined to include cultivating the soil; producing crops for human food, animal feed, planting seed, or fiber; floriculture; viticulture; horticulture; silviculture; wildlife management; raising or keeping livestock or poultry; and planting cover crops or leaving land idle for participation in government programs or as part of crop or livestock rotation.<sup>iii</sup> Texas courts have also found grain handling facilities to be considered an agricultural operation under this Act.<sup>iv</sup>

### TIMING REQUIREMENT

The Right to Farm Act may only be used as a defense if the operation has been in existence a year or more. Practically speaking, this means if a new operation were to begin today, neighbors would essentially have 1 year to file any type of nuisance claim against the operation. Once that year has passed, the Right to Farm statute’s protections are available to the operation.

Importantly, the Right to Farm Act only applies if the conditions have remained unchanged since the established date of operation. Under the statute, the established date of operation is the date on which the agricultural operation commenced. If there are changes or expansions thereafter, the established date of operation for the original farm will not change, but a new established date of operation for the new activity would be the time when the change was made. At that point, the 1-year clock would start over for that specific activity.

Let’s consider an example. Assume a farmer began growing corn on his farm in 2000, but later, he expanded to build a cattle feedlot on part of his property in 2005. The established date of operation for the corn farm would be 2000, but the established date of operation for the cattle feedlot would be 2005. Thus, if someone wanted to file a lawsuit in 2005 against the corn operation, the Right to Farm Act would apply as a defense because the 1-year time period already passed for that activity. If, however, the lawsuit filed in 2005 was related to the cattle feedlot, now the Right to Farm Act would be inapplicable, as the 1-year time requirement would not be met by that specific activity.

Additionally, the Act expressly states agricultural improvements built on agricultural land are not a nuisance so long as they were not expressly prohibited



by law in effect at the time the improvement was constructed.<sup>v</sup> “Agricultural land” is defined as any land the use of which qualifies for appraisal based on agricultural use under the Texas Tax Code. An “agricultural improvement” includes pens, barns, fences, and other improvements designed to shelter, restrict, or allow feeding of animals or aquatic life, for storage of or the production of feed, or for storage or maintenance of implements.<sup>vi</sup> The courts make clear this section does not apply to an improvement that obstructs the flow of water, light, or air to other land.<sup>vii</sup>

## II. TYPES OF CLAIMS AFFECTED

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The statutory language states the Right to Farm Act applies as an affirmative defense to a claim of nuisance. When some creative plaintiffs’ lawyers filed suit against a dairy in far West Texas related to manure runoff, they sought to circumvent this Right to Farm defense by alleging claims of both nuisance and trespass.<sup>viii</sup> When the dairy raised the Right to Farm defense, the plaintiffs argued the defense did not apply to trespass claims. The El Paso Court of Appeals rejected this position, holding instead the Right to Farm statute can serve as a defense to either claims of nuisance or trespass.

## III. EXCEPTIONS/LIMITATIONS TO APPLICABILITY

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The Texas Act is not unlimited. The statute expressly states it does not serve to protect an agricultural operation which is conducted in violation of federal, state, or local law.<sup>ix</sup> Further, the statute does not prevent the state from acting to protect public health, safety, and welfare.<sup>x</sup>

## IV. ATTORNEY FEE PROVISION

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Generally, in the American justice system, each party pays for his or her own attorney regardless of the outcome of the case. This can be modified, however, by contract or if a statute allows for the recovery of attorney’s fees. Under the Texas Right to Farm Act, an agricultural operation is entitled to recover reasonable attorney fees and costs related to defending the action from the plaintiff.<sup>xi</sup>

## V. EFFECT OF GOVERNMENTAL REQUIREMENTS

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An additional portion of the Right to Farm Act, although not necessarily related to nuisance lawsuits, could prove important to agricultural landowners. The Act provides a governmental requirement of a political subdivision other than a city applies to an agricultural operation with an established date of operation subsequent to the requirement but does not apply to an agricultural operation with an established date of operation prior to the requirement.<sup>xii</sup> The “effective date of operation” of a governmental requirement is the date on which the requirement requires compliance to the agricultural operation.<sup>xiii</sup> Further, with regard to the requirements of a city, those requirements do not apply to an agricultural operation situated outside the city as of 1981. If the operation is subsequently

annexed into the city limits, the requirements of the city do not apply unless they are necessary to protect persons in the immediate vicinity from the danger of explosion, flooding, vermin, insects, physical injury, contagious disease, removal of lateral or subjacent support, contamination of water supplies, radiation, storage of toxic materials, traffic hazards, or the discharge of firearms or other weapons.<sup>xiv</sup>

## VI. CONCLUSIONS

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All Texas landowners should be aware of the Texas Right to Farm Act. Its protections have implications on the rights of Texas landowners, whether or not they are involved in an agricultural operation.

## VII. ADDITIONAL RESOURCES

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- National Agricultural Law Center, *States' Right-To-Farm Statutes*, available at <http://nationalaglawcenter.org/state-compilations/right-to-farm/>.
- Ag Law in the Field Podcast Episode #43 – Ashley Ellixson (Right to Farm laws), available at <http://aglaw.libsyn.com/episode-43-ashley-ellixson-right-to-farm-laws>.

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<sup>i</sup> *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016).

<sup>ii</sup> Tex. Agric. Code §2 51.001.

<sup>iii</sup> Tex. Agric. Code § 251.002.

<sup>iv</sup> *Cal-Co Grain Co. v. Whatley*, 2006 WL 2439973 (Tex. Ct. App. – Corpus Christi Aug. 24, 2006) (not reported).

<sup>v</sup> Tex. Agric. Code § 251.006(a).

<sup>vi</sup> Tex. Agric. Code § 251.006(c).

<sup>vii</sup> Tex. Agric. Code § 251.006(b).

<sup>viii</sup> *Ehler v. LVDVD, L.C.*, 319 S.W.3d 817 (Tex. Ct. App. – El Paso 2010).

<sup>ix</sup> Tex. Agric. Code § 251.004(c).


<sup>x</sup> Tex. Agric. Code § 251.004(a).

<sup>xi</sup> Tex. Agric. Code § 251.004(b).

<sup>xii</sup> Tex. Agric. Code § 251.005.

<sup>xiii</sup> Tex. Agric. Code § 251.005.

<sup>xiv</sup> Tex. Agric. Code §251.005.



“Some of us  
grew up playing  
with tractors.  
The lucky  
ones still do.”

- Unknown

CHAPTER 11

Photo by Cooper Terrill

# AGRICULTURAL LEASES

Agricultural leasing is the topic for which I get the most requests for educational information and programs. Leasing agreements can be beneficial to both landowners and tenants alike. For a landowner, a lease agreement may allow continued revenue without his or her physical labor needed to farm the land. A hunting lease may provide for an additional source of revenue, while also diversifying income streams. For a tenant, a lease agreement may be an excellent way of getting started in agriculture, as it allows the tenant to begin farming or ranching while avoiding the high cost of purchasing land of their own.

This chapter will highlight some of the key considerations when negotiating and drafting lease agreements. For a more detailed discussion, obtain a copy of our Ranchers Agricultural Leasing Handbook. Additionally, we offer Ranchers Leasing Workshops around the state each year. These half-day programs focus on developing the concepts contained in this chapter in much greater detail.

## I. THE IMPORTANCE OF WRITTEN LEASES

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If there is one piece of advice to take away from this chapter, it should be to get every lease agreement in writing. Historically, many lease agreements involving agricultural land have been done on a handshake between landowner and tenant. This leaves both sides facing significant risk in the event something goes wrong. There are a number of issues to consider regarding written leases.

First, although generally oral agreements are legally enforceable, this is not the case for lease agreements lasting over a year or more. The Statute of Frauds requires lease agreements for real estate lasting over one year to be in writing.<sup>1</sup> This is particularly important as many agricultural lease agreements last for more than one year.

Second, a written lease agreement may be necessary to provide to other agencies. For example, if the property qualifies for any sort of Farm Bill programs, the Farm Services Agency (“FSA”) will need a copy of a written lease agreement. Similarly, a County Appraisal District may request a copy of a lease agreement if the activities of the tenant are the agricultural use upon which open space valuation is received.

Third, written lease agreements protect both parties and their relationship. By considering and agreeing to terms that both the landowner and tenant consider, understand, and agree to, the odds of an issue arising to cause a dispute during the lease agreement greatly decreases.

## II. SETTING A LEASE RATE

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Determining the right amount to charge or pay for an agricultural lease may be more of an art than a science. A number of considerations go into reaching a mutually acceptable lease rate for both the landowner and the tenant. To read more detail on methods to calculate different pricing approaches, see the Ranchers’ Agricultural Leasing Handbook.

### COMMON TYPES OF LEASE ARRANGEMENTS

For agricultural lease agreements, there are normally three types of arrangements utilized: cash leases, crop share leases, and flex/hybrid leases. There is no right or wrong option to select here so long as the parties can agree on the structure and the details that go along with the selection.

#### *Cash leases*

The most common and most straightforward lease structure is a cash arrangement. A tenant and a landowner agree on a set price for the lease. Cash lease rates are generally listed as per acre or per head, although a flat fee could be utilized as well. For example, a landowner leasing 100 acre pasture to graze cattle could structure payment as \$10 per acre, as \$5 per head, or \$1,000 per year. Nearly all hunting leases are cash agreements and are often structured as per acre, per gun, or with a flat fee.

The benefit of a cash lease to a landowner is certainty of payment, and the downside is inability to share in good years where yield, price, or both are higher than normal. The benefit of a cash lease to a tenant, too, is certainty of cost, while the downside is the cost must be paid, regardless of how the crop or the markets fare.

### *Crop share leases*

Another common fee arrangement in agricultural leases is a crop share lease. This type of agreement is seen more commonly in row crop-type farm leases but could be utilized in grazing leases as well. As the name suggests, in this situation a landowner and a tenant share in certain costs and share in the revenue made from selling the crop in an agreed upon percentage. The common percentages vary based on both the geographic location and on the type of crop being grown. For example, in the Northern Texas Panhandle, it is common to see a cotton lease done on the thirds—meaning a landowner receives 1/3 of the income, and the tenant receives 2/3. Compare that to a lease in the Midwest where corn is grown, where share lease rates would be much closer to 50/50.

One key consideration in structuring a crop share lease is to be clear about which specific costs the landowner will share in. For example, typically, in the Northern Texas Panhandle, landowners share in fertilizer, chemicals, and irrigation. Again, this varies by geographic area and crop, and ultimately landowners and tenants can include whatever costs they can agree on in the list of those to be shared. The key is both parties understand what costs will be split and any requirements regarding providing receipts or documentation for such costs to be paid.

The benefit of a crop share lease for a landowner is the opportunity to share in the upside risk if it is a good year, and, of course, the downside is the risk of receiving far less payment in a bad year than a cash lease might have generated. For the tenant, a crop share lease allows payment to be based upon the revenue generated and offers some assistance in paying for certain inputs which are positive but also may require additional recordkeeping, billing, and in a good year, could result in greater lease payment than would have been owed under a cash agreement.

### *Flex/hybrid leases*

Finally, a flex or hybrid lease is a newer leasing structure which essentially combines attributes of both the cash and crop share lease. Although these could be drafted any number of ways, generally a flex/hybrid lease will set a base price the tenant will pay and then flex up or down from that base price based upon an external factor, usually either yield or price.

For example, a flex lease could provide a tenant will pay \$25 per acre to grow dryland corn, but if the price of corn rises above or falls below \$4.00 per bushel, the lease rate will flex \$.25 for every \$.10 over or under \$4.00.

With this type of lease, the devil is certainly in the details. Ensuring specifics are included in the lease, such as the specific market that will be used to determine prices and at what time of year the determination is made, for example, are critical to ensure both parties are on the same page about how the final price will be calculated.

Landowners may benefit from a flex/hybrid lease from the standpoint it allows them the assurance of at least the set amount but also allows them to share in the potential upside of a good price or yield. The downside for a landowner is, of course,

the potential downside risk that could lower the total lease payment received. For the tenant, the flip side is true. The flex/hybrid lease is attractive as it does provide some certainty with regard to the amount he or she will owe but does allow a potential decrease in a year with low market prices or yields, depending on how the lease is structured. Of course, the opposite is also true, and the downside of a flex lease for a tenant is the potential increased rental payment owed if the flex is triggered.

## PUBLISHED CASH LEASING INFORMATION

There are a number of resources available to help a landowner or tenant determine the average cash lease rate in a particular location for a particular type of land or crop. Of course, oftentimes word of mouth from other landowners or tenants, or information from the local County Extension Agent may be more beneficial than a publication. As with any average, keep in mind there are a number of factors that could greatly affect the acceptable lease rate for a given property, including availability of water, quality of fencing, location, and existence of trees or brush.

There are three helpful publications for Texans which publish average cash lease rates: the USDA NASS Report; The Texas Rural Land Value Trends Report; and the Texas A&M AgriLife Extension Budgets.

*USDA-NASS Cash Rents Report.* Each year, The USDA National Ag Statistics Service (“NASS”) surveys landowners and producers about current lease rates and, in August, publishes a report of the average lease rates for irrigated cropland, nonirrigated cropland, and pastureland for the United States and for each state. For example, in 2018 for Texas, the average lease rates were \$91 for irrigated cropland, \$30 for nonirrigated cropland, and \$6.70 for pastureland.<sup>ii</sup>

For certain years, NASS breaks down this data further by reporting data by district within a state and by county. Texas is divided into 15 districts, and average cash rent values are reported for each one. For example, for the Northern High Plains in 2017, cash lease rates were reported as \$139 for irrigated cropland, \$31.5 for nonirrigated cropland, and \$7.20 for pastureland.<sup>iii</sup>

The same database also further breaks down the data by county. For example, average reported lease rates in Dallam County for 2016 were \$97.50 for irrigated cropland, \$55.50 for nonirrigated cropland, and \$6.10 for pastureland.<sup>iv</sup> This information can be found in the database for any county in the United States.

*Texas Rural Land Value Trends.* Each April, the Texas Chapter of the American Society of Farm Managers and Rural Appraisers publishes a report, the Texas Rural Land Value Trends, which includes an analysis of land prices throughout the state and reports on the average range for land lease rates.<sup>v</sup> The report breaks Texas into seven regions and each region into subregions and reports a host of information for each, including average land prices and rental rates.

For example, for Region 1, which includes much of the Panhandle and South Plains, the 2017 report shows land value ranges and rental ranges for several classes of property: irrigated cropland (good water), irrigated cropland (fair water), dry cropland (east), dry cropland (west), rangeland, and Conservation Reserve

Program. For rangeland in the North Panhandle area, the report shows a rental range that has been stable with activity at \$7 to \$12 per acre. For the same area, irrigated cropland with good water shows stable rental rates from \$150 to \$250 per acre. The same type of data is available for all seven regions.

*Texas A&M AgriLife Extension Service Agricultural Economics Budgets.* Each year, the AgriLife Extension district economists prepare budgets for various districts across Texas, based on a variety of crops. The Texas Crop and Livestock Budgets for each district are available on the AgriLife Extension website.<sup>vi</sup>

For example, for District 1, which includes the Panhandle, there are budgets for forage crops such as hay and silage; field crops such as corn, cotton, and wheat (both irrigated and dryland); and for livestock, including cow-calf and stockers. Within the cow-calf budget spreadsheet is a line item for “Pasture Cost,” which is the lease cost. For a cow-calf operator in District 1, the 2019 budget includes a projected cost of \$7 per acre per year.

### III. KEY TERMS TO CONSIDER

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There is no one-size-fits-all agricultural lease agreement, as every situation is different. There are, however, a number of key terms landowners and tenants should consider when drafting a lease agreement. For a more thorough checklist and more detailed information, consult the *Ranchers Agricultural Leasing Handbook* publication.

#### GRAZING LEASES

There are a number of terms to carefully consider when drafting a grazing lease agreement.

*Duration of the lease and termination provisions.* The length of the lease should be specified with particularity and may range from a matter of weeks to several years. A tenancy for term of years simply refers to any set lease term (whether months or years) that terminates upon the conclusion of the term. Conversely, under a periodic tenancy, the lease will automatically renew at the end of the initial term unless a specific notice of the intent not to renew is given by either party. In this instance, it is important to determine the amount of notice that will be required. It is likely in the best interest of both the landowner and tenant to require a lengthy notice period, so in the event the lease will not be renewed, the landowner has time to secure a new tenant, and the lessee has time to find alternative arrangements for his or her livestock. It is advisable to require notice be given in writing.

*Stocking rates.* A grazing lease should set forth stocking limitations to address the number and size of animals permitted on the property. This is a particularly important term for a tenant in order to ensure the property is not overgrazed during the lease term.

One key term to keep in mind is any stocking rate included in a lease agreement should comply with any intensity of use requirements for continued open space

tax valuation, as discussed in Chapter 13. For example, if a lease limited a tenant to running one cow for every ten acres, but the County Appraisal District required one cow for every 5 acres to keep open space valuation, this could pose a significant problem for the landowner.

Stocking rates should take into account the size of animals. For example, the stocking rate may differ if the lessee intends to run 1,000-pound Angus cows on the land versus if he or she intends to run 1,600-pound Charolais cattle on the land. One way to take size into consideration is to set a stocking rate based on an animal unit basis. For cattle, 1 animal unit is 1,000 pounds. This means that a 1,000-pound cow is 1 animal unit, while a 1,600-pound cow is 1.6 animal units.

*Repair and maintenance of fixed assets.* The lease should discuss the right of the tenant to use any facilities on the property, including fences, corrals, buildings, barns, and houses. If any maintenance or repairs are necessary, the lease should describe who will be responsible for undertaking repairs and paying for both parts and labor. These costs can be all borne by one party to the lease or could be divided between parties.

*Right to erect improvements.* The lease should address whether the tenant has the right to erect any improvements on the property during the lease. Generally, permanent improvements will stay on the land after the termination of the lease. Consequently, the landowner may want to have an input on the location and building specifications for any such improvements. From the tenant's perspective, since any structures will generally remain once the lease terminates, he or she may seek an agreement from the landowner to assist in costs for materials or labor related to building such improvements.

Some leases require the lessee to obtain written permission from the landowner before taking any such action. In order to avoid confusion or conflict, the lease should specify whether the lessee has the right to remove any improvements at the end of the lease and set a deadline for such removal.

*Landowner's right to access the property.* Unless reserved, the landowner grants exclusive possession of the property to the tenant, meaning the landowner may not enter the property. The landowner may want to reserve the right to enter the property for various reasons during the lease, including to care for crops and to inspect the premises. Further, if the landowner wants to retain rights as to the property, including the right to hunt, this should be expressly set forth in the lease agreement.

*Breachy livestock.* Many grazing leases involving cattle include a provision whereby any animal known to be "breachy" (i.e., frequently escaping the pasture by jumping or breaking through fences) must be removed from the premises.

*Disaster contingencies.* The parties should consider how disasters such as drought or fire may impact the landlord/lessee relationship. In the event all or some of the grazing land is destroyed, how will a determination regarding the lease be made? Who will determine if it is necessary to lower the number of livestock permitted to be on the property or whether it is necessary to terminate the lease all



together? Parties may want to consider agreeing on a neutral third party, such as a county extension agent or another livestock operator in the area, to help with this determination. In the event the lease is limited or canceled, the lease agreement should address whether a refund of any prepaid rent will be made.

*Tenant insurance requirement.* A landowner may require the tenant to acquire liability insurance to be maintained throughout the lease term. If so, the landowner should also consider requiring the tenant include the landowner as an “additional insured.” This should offer insurance coverage to the landowner pursuant to the lessee’s policy in the event of a claim made by a third party against the lessee and landowner. The landowner may also want to require a specific minimum level of coverage. Even if this type of term is required, it is still advisable for a landowner to maintain his or her own liability insurance on the property.

## FARM LEASES

*Requirement or prohibition of certain farming practices.* A landowner may want to ensure certain farming practices are used, or not used, on the property. For example, a lease agreement might include a prohibition or limitation on plowing or could require application of certain fertilizer or chemical desired by the landowner.

*Provision of data to landowner.* The concept of “big data” is still relatively new in agriculture. Given the ability of equipment to collect data about a property, including yield information and soil health data, there can be real monetary value to this type of information. A landowner and tenant should agree upon whom will have access to the data during the term of the lease and after the lease terminates.

*Soil fertility measuring and maintenance.* The landowner may want to require periodic soil fertility measurements and require certain fertilizers or other inputs to maintain soil health and pH.

*Treatment of noxious weeds.* Parties may want to set forth requirements with regard to noxious weeds. Some parties may wish to require diligence in preventing weeds from going to seed on the farm and require certain treatments be made. Any particular types of required treatments and who will shoulder such costs should be addressed. On the other hand, some parties may wish to limit the amount of chemicals utilized on the property for various reasons, and, if so, that should be spelled out.

*Provisions for unharvested crop at termination of lease.* There are times even with the best of intentions, a tenant is unable to get a crop out of the field before the termination of a lease. It is prudent for a lease agreement to spell out the rights of a tenant to enter and harvest a crop after the completion of the term of the lease.

*Agreement on division of farm program payments.* For farmland qualifying for government program payments, such as farms with base acres qualifying for Title I payments under ARC or PLC, the landowner and tenant may want to consider the value of payments that have been received in the past and consider whether the parties wish to agree on a certain method of dividing the payments. Although the government has set rules on which party will receive payments based on the

structure of the lease, the parties can agree amongst themselves to modify the distribution of payment proceeds.

## HUNTING LEASES

*Description and map of the land.* The land needs to be described so that both parties (and a judge or jury if there ever were to be a dispute over the lease) can understand exactly where the tenant had permission to hunt. This can be done by legal metes-and-bounds descriptions or by words if a specific description can be conveyed, but oftentimes including an aerial photograph or diagram and marking the location where the tenant is allowed to be can be easier to understand and more useful. Further, having a map allows the landowner an opportunity to warn the tenant of any dangerous conditions on the property, as discussed in Chapter 5.

*Security deposit.* A landowner may want to consider requiring a security deposit to cover any damage caused to the property, improvements, fences, crops, or livestock while the lessee is on the property. This is likely more common when the lease is with a tenant the landowner does not know well or has never engaged in business with before.

*Use of ATVs.* The lease should state whether the lessee is permitted to use vehicles or ATVs on the property and, if so, whether there are any limitations such as a limit on the number of vehicles allowed or areas where such vehicles are prohibited. The lease may also want to address the use of ATVs by minors, and potentially either prohibit use or require adult supervision.

*Requirement gates to be left as they were found.* One common “country rule” is to leave a gate as it was found. For tenants who may not have been raised in an agricultural area, including this term in a lease agreement can be important.

*Requirements regarding guests other than lessee.* Given the potential liability concerns and written documentation a landowner may wish to require from everyone on the property, as discussed in Chapter 5, a landowner may want to limit the number of guests who may be present on the lease and may want to require written notice and permission before guests are allowed on the property.

*Rules regarding conditions like open flames or alcohol.* Landowners should consider potentially problematic activities that could occur on the properties. Common terms falling within this category include a prohibition on open flames on the lease or a requirement alcohol not be consumed while hunting on the land.

## IV. ADDITIONAL RESOURCES

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- Tiffany Dowell Lashmet, *et al.*, *Ranchers Agricultural Leasing Handbook*, available at <https://agrifilecdn.tamu.edu/texasaglaw/files/2016/08/Ranchers-Agricultural-Leasing-Handbook.pdf>.
- Ag Lease 101 Website, available at <https://aglease101.org/>.

- Tiffany Dowell Lashmet, Negotiating a Fair Cash Lease Rate in Texas, *available at* <https://agrifecdn.tamu.edu/texasaglaw/files/2018/03/Negotiating-a-Fair-Cash-Lease-Rate-in-Texas.pdf>.
- Robert Tinger, *et al.*, Farmland Leasing Checklist, *available at* <https://extension.unl.edu/statewide/platte/farmland%20lease%20checklist.pdf>.
- Ag Law in the Field Podcast, Episode #42 – Erin Herbold-Swalwell (Farm Leases), *available at* <http://aglaw.libsyn.com/episode-42-erin-herbold-swalwell>.
- Ag Law in the Field Podcast, Episode #39 – Cari Rincker (Grazing Leases), *available at* <http://aglaw.libsyn.com/episode-39-cari-rincker-grazing-leases>.
- Ag Law in the Field Podcast, Episode #20 – Trace Blair (Hunting Leases), *available at* <http://aglaw.libsyn.com/episode-20-trace-blair-hunting-leases>.
- USDA National Ag Statistics Service, *Quick Stats – State Cash Rent Database*, *available at* <http://bit.ly/2tlaSjS>.
- USDA National Ag Statistics Service, *Quick Stats – Count Cash Rent Database*, *available at* <https://quickstats.nass.usda.gov/results/E0F5EB36-3313-3D7B-9E7F-E56A3365CF2B#9A9F55D7-E267-38C6-ACB9-DF106291B5A7>.
- American Society of Farm Managers & Rural Appraisers, *Rural Land Trends*, *available at* <http://bit.ly/2I6T1jV>
- TAMU Extension Agricultural Economics, *Texas Crop and Livestock Budgets*, *available at* <https://agecoext.tamu.edu/resources/crop-livestock-budgets/budgets-by-extension-district/>.

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<sup>i</sup> Texas Business & Commerce Code § 26.01(b)(5).

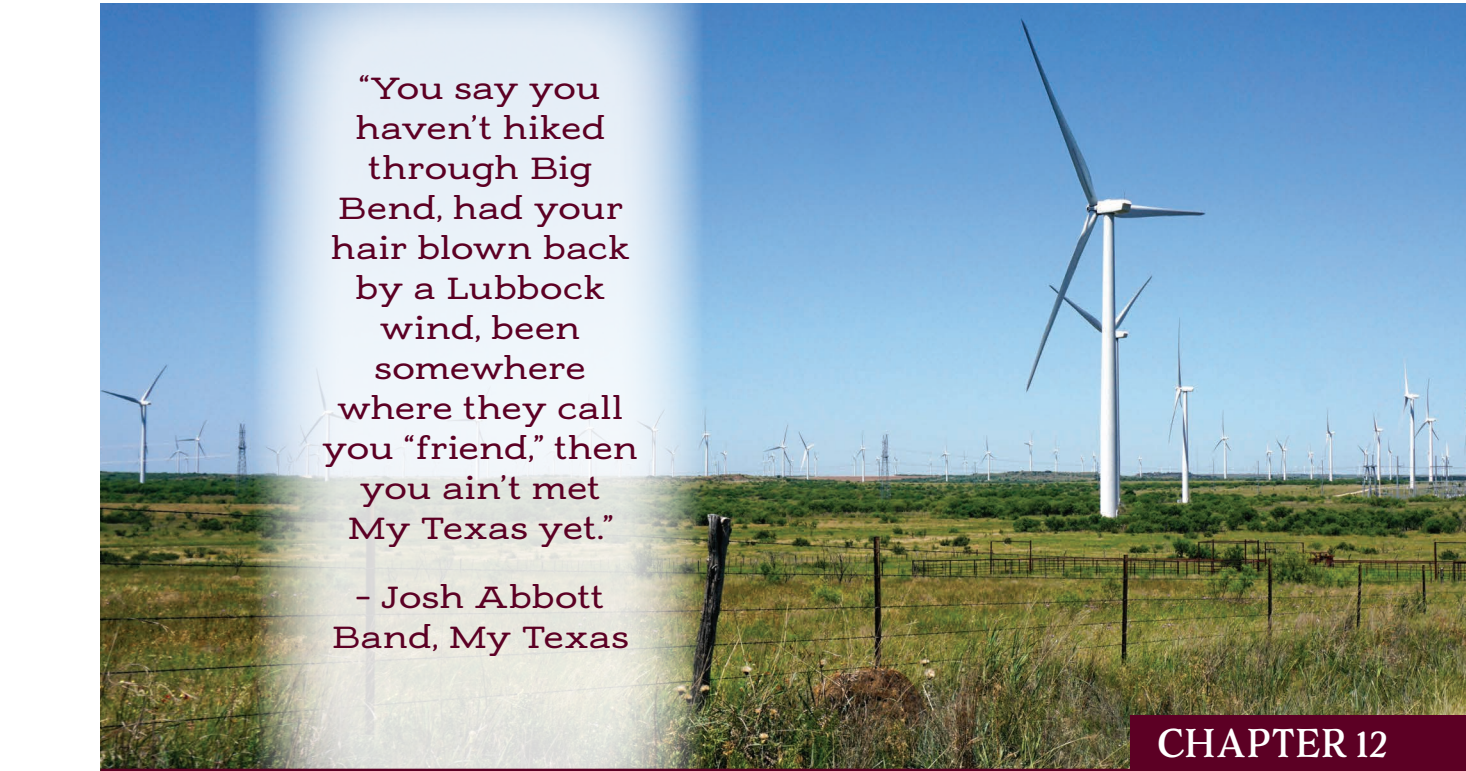
<sup>ii</sup> USDA National Ag Statistics Service, Quick Stats, available at <http://bit.ly/2tlaSjS>.

<sup>iii</sup> USDA National Ag Statistics Service, Quick Stats, available at <https://quickstats.nass.usda.gov/results/E0F5EB36-3313-3D7B-9E7F-E56A3365CF2B#9A9F55D7-E267-38C6-ACB9-DF106291B5A7>.

<sup>iv</sup> USDA National Ag Statistics Service, Quick Stats, available at <https://quickstats.nass.usda.gov/results/E0F5EB36-3313-3D7B-9E7F-E56A3365CF2B#9A9F55D7-E267-38C6-ACB9-DF106291B5A7>.

<sup>v</sup> American Society of Farm Managers & Rural Appraisers, Rural Land Trends, available at <http://bit.ly/216T1jV>.

<sup>vi</sup> Extension Agricultural Economics, District 1 Texas Crop and Livestock Budgets, available at <https://agecoext.tamu.edu/resources/crop-livestock-budgets/budgets-by-extension-district/district-1-panhandle/2019-district-1-texas-crop-and-livestock-budgets/>.



“You say you  
haven’t hiked  
through Big  
Bend, had your  
hair blown back  
by a Lubbock  
wind, been  
somewhere  
where they call  
you “friend,” then  
you ain’t met  
My Texas yet.”

- Josh Abbott  
Band, My Texas

## CHAPTER 12

Photo by RJA1988 (Pixabay)

# RENEWABLE ENERGY LEASES

If anyone has driven across rural Texas, especially the Panhandle or West Texas, that person has likely seen white wind turbines dotting the horizon. Texas is the largest wind energy producer in the nation, with wind generating capacity of 22,000 megawatts as of December 2017.<sup>i</sup> Recently, Texas landowners have also been the recipients of interest from potential solar projects seeking to lease land in the Lone Star State. Although Texas currently is only the sixth-largest solar energy-producing state, in the next 5 years, Texas is expected to triple the current solar capacity by installing an additional 4,266 megawatts of solar capacity.<sup>ii</sup>

For Texas landowners, the growth of renewable energy in the state offers the potential for increased and diversified revenue streams for landowners interested in entering into a wind or solar agreements. For landowners not interested in these agreements, the growth of the industry has caused strife and frustration among neighbors. For example, recently in Van Zandt County, neighboring landowners have found themselves at odds over a proposed solar energy farm, with landowners willing to lease to the company excited about the opportunity and neighboring owners concerned about the potential impact on their own properties.<sup>iii</sup>

This chapter will focus on some of the legal issues related to renewable energy leases and highlight some of the key terms for landowners considering entering into wind or solar leases to consider. As with oil and gas lease agreements, landowners should consider retaining an attorney who is experienced in negotiating these types of agreements to best protect the landowner’s interest.

## I. WHO OWNS THE WIND AND SUN?

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As was discussed in Chapters 2 and 3, when estates are severed, it is important to consider which estate owns commonly leased or produced substances. Although the Texas Supreme Court has never expressly addressed this issue, most legal scholars believe both wind and solar are part of the surface estate, and the industry has undertaken leasing of land based upon this understanding as well.<sup>iv</sup>

Of course, like mineral or groundwater rights, wind or solar rights could theoretically be severed from the surface estate and owned by a separate owner. In the past decade, many Texas landowners have severed wind rights by selling their surface estate but reserving wind rights.<sup>v</sup> In some other states, like Oklahoma, laws have been passed to prohibit severing wind from the surface estate.<sup>vi</sup> Although given the impact of solar production on the surface of the land, as discussed below, it seems less likely to see solar severances in practice.

## II. LACK OF IMPLIED RIGHTS

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Unlike oil and gas law, which has decades of legal decisions upon which to rest, there is relatively little law related to wind and solar law. In addition to the fact that oil and gas law has been around longer, there is also the issue of certain rights having been implied into all oil and gas leases as a matter of law. For example, as discussed in Chapter 3, under Texas law, mineral owners have the implied right to use as much of the surface as reasonably necessary to produce the mineral.<sup>vii</sup> Because the mineral estate is deemed to be dominant when severed, this type of implied rights exists. The same is now true for groundwater, as was discussed in Chapter 4.<sup>viii</sup> At least as of now, there has been no such decision holding a severed wind or solar estate is dominant over the surface estate.

As neither the wind nor solar estate has been deemed dominant when severed by Texas courts, this body of implied law has not been applied to wind or solar leases. This means rather than relying upon implied rights of surface use, wind and solar companies must include such rights of use in their lease agreements. This is why wind and solar leases are often far longer and more complex than oil and gas leases because there is simply not the same implied body of law at work. Oftentimes an oil and gas lease form provided by the company might be only 2 or 3 pages, whereas many wind and solar leases are 40 pages or more.

## III. WIND ENERGY AGREEMENTS

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Wind energy agreements, which are entered between the surface owner of the property and the wind company can be extremely complex. There are a number of legal and economic issues to be considered by a landowner before entering into this type of agreement. As noted previously, it is recommended landowners consult with an attorney experienced in this area to assist in negotiating a wind energy agreement.

This section will highlight some of the key terms to consider when reviewing or negotiating a wind lease. Importantly, this is not a comprehensive list, and landowners are encouraged to review the resources included in the “Additional Information” section below for a more detailed, in-depth discussion.

## IDENTIFICATION OF PROJECT PHASES

Oftentimes, wind leases will be divided into three separate phases: Development, Construction, and Operations.

*Development Phase.* Most wind leases will begin with a development phase, which may also be referred to as an “option”, during which the wind company collects data and analyzes whether or not the property at issue is desirable for wind farm construction. This option agreement may be either included in the wind lease agreement itself or could be negotiated as a separate document.

During this time, the developer has the right to conduct research, including erecting a meteorological (“MET”) tower to measure wind data. Generally, companies want to collect at least 1 year of MET data. Transmission studies are also often conducted to ensure the ability to transport electricity from the location to the grid. If these studies garner positive results, the company will likely move on to conduct certain environmental, biological, and soil studies. A landowner may also wish to negotiate a term requiring the company to provide them a copy of any such data collected, as this could be desirable for a subsequent potential lessee.

The length of the development phase differs from project to project but is typically in the 5- to 7-year range.<sup>ix</sup> Landowners should take care to expressly define the scope of the development phase and when development turns into construction.

Of course, landowners are to be compensated for this development phase, although payment in this phase will likely be less than payments offered in the construction or operations phase. Generally, compensation during the option is paid as a lump sum or based on a per-acre calculation. Further, payments can either be made up-front or on an annual basis. This should be detailed in the agreement. Landowners may also want to consider escalation clauses, whereby if yearly payments are made, the amount owned increases as time goes on.

Finally, agreements should address what requirements are in place should a company decide to terminate the lease during the option phase, including the type of notice to be given to a landowner.

*Construction Phase.* The construction phase is, as the name would suggest, the period after the option is executed, during which the project facilities are constructed prior to actual power generation. Landowners should carefully review the compensation offered during the construction term.

Generally, the construction phase is not included in the term of the length, but this is an issue that should be confirmed in each lease agreement. Legal scholars note, depending on the size of the project, construction terms typically last from 9 to 18 months.<sup>x</sup>

*Operations Phase.* The operations phase occurs when the project begins generating and selling power. The exact commencement of the operations phase should be expressly stated in the lease.

## LENGTH OF THE LEASE

Another important consideration for landowners is the term of the lease agreement. Several years ago, it was not uncommon to see wind lease agreements proposing a term of 100 years. Now, 30-year to 50-year terms are far more common. Even still, making a land use decision today which will impact the land and heirs 30 to 50 years from now is not something to be taken lightly.

Landowners should ensure the lease clearly sets forth what event triggers the start of the term. Does the completion of the development trigger the term? Is construction included in the term of the lease, or is that considered a separate phase? Is it written notice from the developer that triggers the term? Is it the first sale of electricity in commercial quantities which trigger the lease term to begin? This type of detail is important for landowners to understand and to be included in the lease.

Additionally, landowners should carefully review leases for any extensions that could greatly increase the length of the lease. Many leases may include automatic extensions at the sole option of the developer. For example, a wind lease may be for 30 years with 2 automatic 10-year extensions should the developer chose to exercise the option. Landowners may wish to seek to have an automatic escalation of the compensation provision if these options are exercised or to have the ability to renegotiate compensation terms if an option is exercised.

## LANDOWNER COMPENSATION

Compensation for wind leases often includes compensation for easements, for use of the land, as well as some form of payment for power generated.

For easements, such as roads or underground transmission lines, leases generally specify how payments will be calculated either as one-time payment or periodic payment based on some measurement, such as rods, feet, or acres.

Lease payments are frequently structured as a royalty, although there could be leases offering payments per turbine or per megawatt generated.

For leases with royalty provisions, this is a percentage share for the landowner in the proceeds generated from the project. Frequently, wind royalties are calculated based upon a percentage of the gross revenue generated from the sale of power generated on the property.<sup>xi</sup> In Texas, wind lease royalties are frequently around 4 percent but could be seen in the 5 percent to 6 percent range. As with any contractual agreement, the devil is in the details, and landowners should take care to understand what is included and deducted from the definition of “gross revenues” upon which the royalty will be calculated.



Landowners should be careful to ensure the lease expressly states and explains the formula by which royalty payments will be calculated. It is also important for landowners to secure in the lease agreement a method of auditing production and revenues to confirm payment is accurate.

Some wind agreements contain a minimum royalty clause, providing some set payment amount to be paid, even if the royalties generated by the project are less than minimum amount. For example, a lease could provide a clause offering a set price per turbine as a minimum royalty. Thus, if royalties owed based on power generated were less than the price per turbine minimum royalty payment, the landowner would receive the minimum royalty payment.

One additional consideration for landowners is seeking assistance with legal expenses for the lease negotiation process. Some companies will agree to pay at least some portion of a landowner's attorney's fees up to a certain amount.

## **IMPACT ON CURRENT SURFACE USES**

While wind energy leases may lease a large number of acres for a project, the actual, physical footprint of the land used is far smaller. Research conducted by Oklahoma State University indicates for every megawatt of capacity, a wind project occupies less than 1-acre of land.<sup>xiii</sup> Nevertheless, wind leases come with a number of easements allowing the company to construct roads, erect turbines, build surface facilities, and a number of other uses which could impact the surface owner's use of the land.

Landowners should ensure the lease agreement expressly allows them to make desired use of the property, such as grazing livestock or raising crops. Additionally, landowners may want to seek some say in the location of turbines, where roads will be built, what type of erosion prevention practices may be needed, etc.

Wind leases may also require a landowner to avoid obstruction with wind flow. Depending on how this requirement is written, it may impede the landowner's ability to construct new improvements on the property.

## **PROJECT CONCLUSION REQUIREMENTS**

Many landowners negotiate lease agreements regarding decommissioning the project upon completion. This may include requirements the developer remove all equipment and restore the land to its original condition (for example, restoring grade, restoring soil quality, restoring grass or other vegetation, decompaction). To ensure this is done, landowners may seek a bond be posted by the developer to ensure funds are available for these activities.

Another consideration at the conclusion of the project is to require the developer to ensure the release of any easements or liens on the property caused by the project. This is important as these encumbrances are likely filed in the deed records for the land.

## IV. SOLAR LEASE AGREEMENTS

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While solar lease agreements are similar to wind leases in many ways, there are important differences to consider as well, especially with regard to how payments are structured and the potential for other surface uses to be made during the term of the lease.

### OWNERSHIP OF SEVERED ESTATES

One threshold issue landowners should be aware of is many solar companies may be concerned if the surface owner does not own at least the executive rights for, or some portion of, a severed mineral or groundwater estate. Some companies go a step further and refuse to consider solar lease agreements where the landowner does not own or control the mineral and groundwater estates unless a surface use waiver can be obtained from the parties who do own those severed estates.

This is due to the implied right for the mineral and severed groundwater owner to use as much of the surface estate as is reasonably necessary to produce the mineral or groundwater, which could have a substantial impact on a solar farm with panels covering acres of land.

This is an issue landowners should at least be aware of if they are interested in a solar lease agreement for their property. Additionally, for partial mineral owners who hold full executive rights, there may be an issue with the duty of utmost good faith and fair dealing owed to non-participating mineral owners that could be an issue in entering into a solar lease. The duty owed is discussed further in Chapter 3.

### LENGTH OF THE LEASE

Because solar lease agreements often last 20 to 30 years, tying up property for a significant time, it is important to carefully evaluate the lease terms. This is especially true for solar lease agreements given the limitations these projects often make on surface uses, as discussed below.

Solar leases, like wind leases, generally include different phases. Frequently for solar leases, there are two phases: development/construction and operations. A construction phase, however, may also be included. The development phase involves testing to see if the project is feasible in the area, conducting environmental studies, analyzing transmission capabilities, and other information-gathering. This generally lasts from 5 to 7 years.<sup>xiii</sup>

The operations phase occurs when the project begins producing and selling energy. When reviewing draft leases, pay attention to how these phases are defined and what must happen to move from the development to the operations phase.

### LANDOWNER COMPENSATION

Compensation structure is another area where solar leases generally differ from most wind and mineral leases. The vast majority of solar lease agreements provide for compensation not based on royalties but on a price-per-acre basis, paid

annually. Oftentimes, the price offered is lower in the development period but is increased once the operations period is commenced.

The price per acre a Texas landowner can expect is dependent on a number of factors. Chief among these considerations for a solar company is the topography of the land and desirability of the potential for energy generation, the proximity of the land to transmission lines to transport the energy, and the market value of the property in the area. For example, theoretically, if two properties offered the same topography and solar generating prospects, one located closer to the Dallas/Ft. Worth metroplex sitting next to a transmission line will be worth more per acre than the same property located outside of Alpine, several miles from a transmission line. The rates offered to Texas landowners span a large range, with one attorney reporting seeing offers from \$150 per acre per year to \$850 per acre per year.

Landowners may seek a royalty clause for solar leases. In a recent presentation, one attorney in Texas stated royalty rates of 3.5 to 4.5 percent of gross revenue are common in leases providing for royalty payments.<sup>xiv</sup> As discussed above, carefully defining the term “gross revenue” is critical for landowners entering into these types of agreements. When royalty clauses are included in solar leases, landowners will likely also want to ensure a minimum royalty payment as well, perhaps on a per-acre basis.

## **IMPACT ON CURRENT SURFACE USES**

As compared to wind projects, most solar projects lease fewer acres, but the percentage of the leased acres actually utilized is much higher. Solar projects will likely occupy 40 to 50 percent of the amount of acreage leased.<sup>xv</sup>

Not surprisingly, the increased use of land by the solar project also decreases the ability of the surface owner to use the property. While farmers and ranchers quite frequently grow crops and graze livestock around wind turbines, many solar agreements will prohibit any use of the leased acreage, or at a minimum any use of the “occupied area” where the solar panels are actually located. Frequently, companies will fence off the occupied area and will not allow any use of that portion of the land.

From an economic perspective, landowners should certainly consider the impact a prohibition on any other uses of the land may have as compared to the income generated by a solar lease agreement.

## **PROJECT CONCLUSION REQUIREMENTS**

As with wind projects, it is common for landowners to request a removal bond be posted to ensure that equipment will be removed and land restored at the completion of a project.

## **ENSURE COMPENSATION FOR TAX IMPLICATIONS**

In Texas, many rural landowners take advantage of the special tax valuation available for agriculture or open space land, as will be discussed further in Chapter

13. If a landowner meets the criteria, property tax calculations are based on a percentage of the agricultural productive capacity versus the fair market value of the land, which is usually much greater and gives the landowner a substantially lower tax bill.

A solar project could impact whether a property qualifies for this special-use valuation and create issues such as the need for a rollback period where the landowner might owe the difference between the normal tax value and the modified value paid. Even after the solar project has left the land, it could be years before the property can qualify for agricultural or open-space valuation again.

Landowners considering a solar lease should discuss this issue with their local appraisal district to determine how solar projects affect special-use valuation in their county. Further, landowners should include a term in the solar lease agreement requiring the solar company to cover any additional real property taxes owed as a result of the solar project, including any rollback penalties and increased taxes owed after the project is completed before land may qualify for special use valuation, and also to pay for any personal property taxes on the solar equipment.

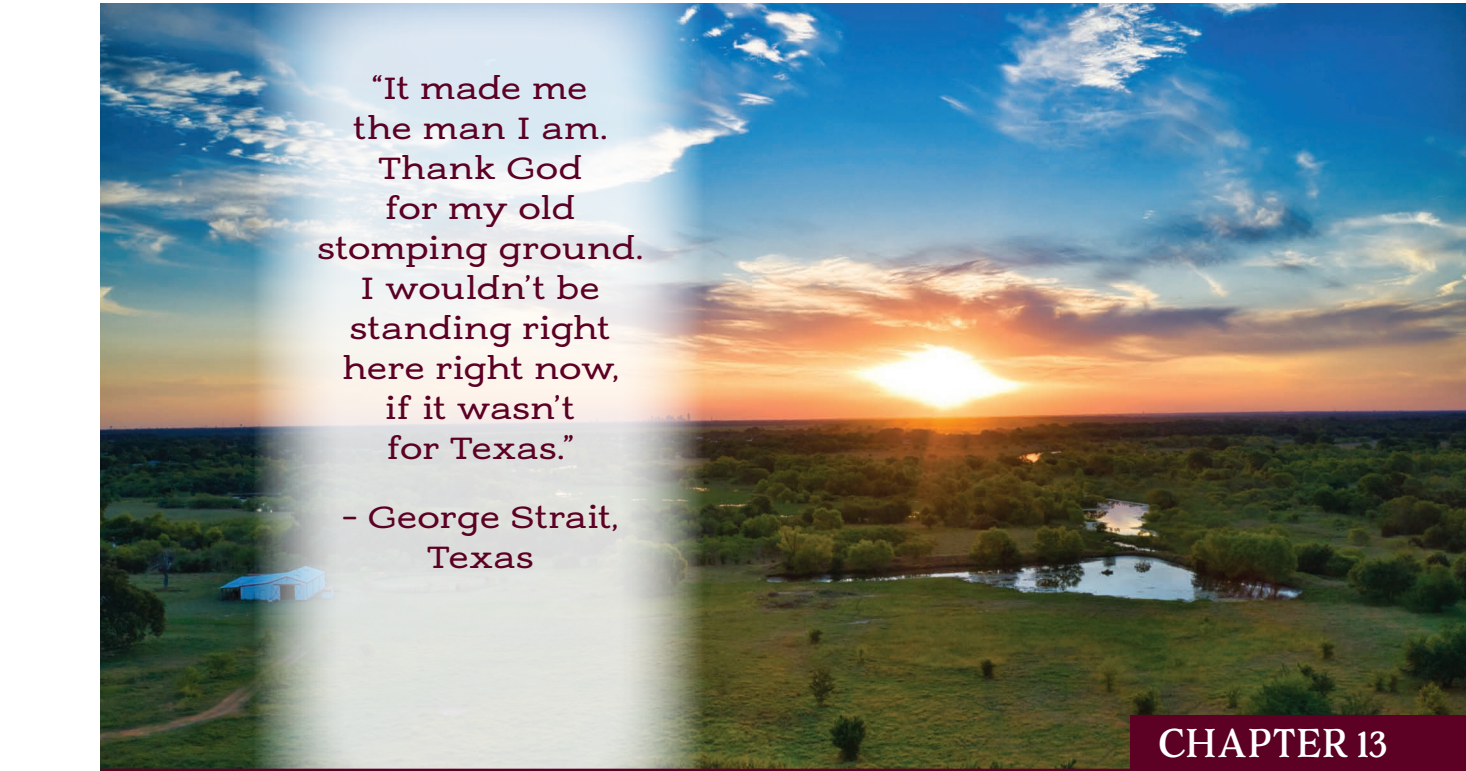
## V. ADDITIONAL RESOURCES

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- Oklahoma Cooperative Extension Service, *Wind Energy Leasing Handbook*, available at <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Rendition-15569/unknown>.
- Shannon L. Ferrell, Wind Energy Leasing Issues video (2012), available at <https://www.youtube.com/watch?v=WrwIMR8MyDg&feature=youtu.be>.
- Oklahoma State University Wind Energy Links, available at <http://www.agecon.okstate.edu/wind/links.asp>.
- University of Maryland Ag Law Education Initiative, *Solar Energy Leasing Webinar*, available at <https://vimeo.com/172991201>.
- Tiffany Dowell Lashmet, *Solar Lease Considerations for Landowners*, available at <https://agrifecdn.tamu.edu/texasaglaw/files/2016/08/Solar-Lease-Considerations-for-Landowners.pdf>.

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- <sup>i</sup> Rye Druzin, Texas wind generation keeps growing, state remains at No. 1, *Houston Chronicle* (August 23, 2018).
- <sup>ii</sup> L.M. Sixel, Solar energy generation is growing in Texas, *Houston Chronicle* (December 13, 2018).
- <sup>iii</sup> L.M. Sixel, Solar farm divides a ranching community, *Houston Chronicle* (March 8, 2019).
- <sup>iv</sup> See, e.g., Lisa Chavarria, *Wind Power*, 88 *Texas Bar Journal* 832 (2015).
- <sup>v</sup> Earnest Smith, et. al., *Texas Wind Law* at 4-10 (2013).
- <sup>vi</sup> Oklahoma Statutes Section 60-820.1.
- <sup>vii</sup> *Merriman v. XTO Energy*, 407 S.W. 3d 244 (Tex. 2013).
- <sup>viii</sup> *City of Lubbock v. Coyote Lake Ranch*, 498 S.W.3d 53 (Tex. 2016).
- <sup>ix</sup> Roderick E. Wetsel, et. al., *A Place in the Sun: Solar Leases in Texas*, State Bar of Texas Agricultural Law Course (2018).
- <sup>x</sup> Earnest Smith, et. al., *Texas Wind Law* at 2-7 (2013).
- <sup>xi</sup> Shannon Ferrell, *Landowner Rights: Wind and Solar Leasing* video, available at <https://www.youtube.com/watch?v=8jmQYT2ICOA>.
- <sup>xii</sup> Shannon Ferrell, *Landowner Rights: Wind and Solar Leasing* video, available at <https://www.youtube.com/watch?v=8jmQYT2ICOA>.
- <sup>xiii</sup> Roderick E. Wetsel, et. al., *A Place in the Sun: Solar Leases in Texas*, State Bar of Texas Agricultural Law Course (2018).
- <sup>xiv</sup> Roderick E. Wetsel, et. al., *A Place in the Sun: Solar Leases in Texas*, State Bar of Texas Agricultural Law Course (2018).
- <sup>xv</sup> Shannon Ferrell, *Landowner Rights: Wind and Solar Leasing* video, available at <https://www.youtube.com/watch?v=8jmQYT2ICOA>.





“It made me  
the man I am.  
Thank God  
for my old  
stomping ground.  
I wouldn’t be  
standing right  
here right now,  
if it wasn’t  
for Texas.”

- George Strait,  
Texas

## CHAPTER 13

*Photo by TimUrban89 (Pixabay)*

# SPECIAL TAX USE VALUATION

Most Texas landowners are aware of the special use valuation methods available to agricultural landowners allowing property taxes to be calculated based on productive agricultural value, as opposed to market value of the land. Note, there is a separate special use valuation method for timberland using similar concepts, but different requirements. These types of special use valuation can be extremely important to landowners as it can greatly reduce the property tax owed on agricultural land each year.

Importantly, this is not a “tax exemption” for agricultural landowners but instead is an alternative way to calculate property taxes owed. Landowners still pay property taxes calculated based on ag production value rather than market value, as is the case with many taxes. When people refer to an agriculture tax exemption, they are likely either incorrectly categorizing the special use valuation or may be referring to the exemption on sales tax for certain products. To qualify for this sales tax exemption, one must obtain an Agriculture and Timber Registration number from the State Comptroller.<sup>1</sup>

Additionally, it is important to understand the special use valuation is provided only for the land itself, but not for structures on the property, even if those structures are for agricultural use. For example, if a hay barn was built on land designated to receive special use valuation by the appraisal district, the land itself on which the barn sat would receive the special use valuation, but the barn would be valued at fair market value and taxed accordingly.

## I. BACKGROUND

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In the 1960s, urban sprawl began to threaten agricultural land across the United States. This created a problem for agricultural landowners. Not only were developers offering attractive prices to purchase farmland to build homes and businesses, but agricultural landowners were also faced with skyrocketing property tax rates. Generally, property taxes are calculated based upon the market value of the property. Thus, where developers drove up the market value for land near agricultural areas, property taxes for farms and ranches correspondingly rose – in some instances, to amounts higher than the farmers’ and ranchers’ annual agricultural incomes. Recognizing this issue of escalating land values and property tax bills threatened agriculture, state governments got involved. Specifically, legislation was drafted to allow agricultural land meeting certain specific requirements to be taxed based upon the land’s actual capacity for producing agricultural products instead of based on the traditional approach of the market value of the land. The first agricultural tax assessment statute was passed in Maryland in 1960. Since then, numerous states, including Texas, have passed similar laws.

The purpose of Texas’ agricultural land special use valuation system is to protect the family farm.<sup>ii</sup> Rooted in the State Constitution, Texas recognizes two distinct types of agricultural-related property use valuation. The original method is known as “agricultural use valuation” or “1-D appraisal” after the Constitutional section from which it originates.<sup>iii</sup> The second, intended to promote the preservation of open spaces, is known as the “open space valuation” or “1-D-1 appraisal.”<sup>iv</sup> A sub-part of the open space valuation is the wildlife management use category.<sup>v</sup> Although each valuation method serves a similar purpose, distinct rules exist. Even further complicating the matter, certain rules vary by County Appraisal District, as will be discussed in this chapter.

Agricultural use valuation is critically important to Texas agricultural producers. Without being able to avail themselves of these special valuation methods, many farmers and ranchers would owe more in taxes than they generate by agricultural production. For example, let’s consider an actual 1,200-acre family ranch in Jack County. This ranch, whose income consists of raising cattle and selling hunting leases, has been in the same family for over 135 years. In 2015, the gross ranch revenue was \$30,000. If the ranch’s taxes were based upon fair market value, using an average assessment rate in Jack County for 2015, their tax bill would have been \$45,880. Under alternative valuation afforded by the Open Space Valuation law, the actual tax bill was \$1,687. This is a classic situation where the rancher could be driven out of business without the special use valuation.

## II. AGRICULTURAL USE VALUATION

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Agricultural Use Valuation (“AUV”) was the initial alternative use valuation method for agricultural land. Passed in 1966, this method is governed by Article VIII, Section (d)(1) of the Texas Constitution and Sections 23.41-23.47 of the Texas



Tax Code. Given the more stringent requirements for AUV than for Open Space Valuation, most Texas land now qualifies under the Open Space rules, rather than the AUV method.

## REQUIREMENTS

In order to qualify for AUV, each of the following criteria must be satisfied:

- (A) *The landowner is using and must intend to use the land for “agricultural use” as an occupation or business venture for profit during the current year.*<sup>vi</sup>

Agricultural use is broadly defined by the Constitution and corresponding statutes. The Constitutional definition includes the raising of livestock or growing of crops, fruit, flowers, and other products of the soil.<sup>vii</sup> Further, the statute provides this does not include the processing of plant or animal products after harvesting or the production of timber products.<sup>viii</sup> Finally, although agricultural use does not have to be the sole use of the land, it is required to be the primary use.<sup>ix</sup>

- (B) *The property must be owned by a natural person.*<sup>x</sup>

This requirement prohibits farms owned by LLCs, trusts, corporations, or other entities from qualifying for AUV.

- (C) *Agriculture is the owner’s primary occupation and primary source of income.*<sup>xi</sup>

This requires a greater portion of the landowner’s time and a greater portion of the landowner’s gross income is from agriculture than any other occupation.<sup>xii</sup> This provision may disqualify many landowners who have off-farm jobs.

- (D) *For at least 3 successive years prior to the application, the land must be devoted exclusively to agricultural use or continually developed for agricultural use.*<sup>xiii</sup>

## APPLICATION REQUIREMENT

An annual application must be filed with the County Appraisal District before May 1.<sup>xiv</sup> A copy of the blank application should be sent every February to each landowner who qualified the prior year by the Chief Appraiser, or copies are available on the State Comptroller’s website.<sup>xv</sup> The Chief Appraiser may, for good cause, extend this deadline by up to 60 days,<sup>xvi</sup> but obviously, the more prudent route is to be sure to file applications by the deadline. For applications filed after May 1, but before the appraisal review board meets to approve the appraisal records for the year, special appraisal may be approved, but subject to a penalty in the amount of 10 percent of the difference in the taxes imposed at AUV and the taxes that would have been imposed at fair market value.<sup>xvii</sup>

If a landowner fails to timely file the required application during a given year, the landowner may not qualify for AUV that year.<sup>xviii</sup>

## LAND VALUE CALCULATION

For landowners who meet the AUV requirements, the Texas Tax Code provides, for tax purposes, the land value should be based upon the average net income the land would have yielded under prudent management from the production of agricultural products during the past 5 years.<sup>xix</sup> This value is frequently significantly less than the value of the land would be if the general valuation approach—utilizing the market value of the land—was used.

## III. OPEN SPACE VALUATION

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In 1978, the Texas Constitution was amended to provide for Open Space Valuation (OSV), commonly referred to as “1-D-1 Valuation.”<sup>xx</sup> OSV is governed by Article VIII, Section 1(d)(1) of the Texas Constitution and Sections 23.51-23.59 of the Texas Tax Code.

Enacted more than a decade after Agricultural Use Valuation, this special use valuation method offers another way to qualify for alternative use valuation that is different—in some ways less stringent, in some ways more—as compared to AUV. According to the Comptroller, most of the eligible land in Texas now qualifies under OSV.<sup>xxi</sup>

### REQUIREMENTS

In order to qualify, a landowner must prove each of the following:

(A) *The land must be currently devoted principally to agricultural use;*<sup>xxii</sup>

#### Agricultural Use

The definition of agricultural use under the OSV rules is quite broad, including cultivating the soil; producing crops for human consumption, animal seed, planting seed, or fibers; floriculture; viticulture; horticulture; raising or keeping livestock; raising or keeping exotic animals; planting cover crops; participating in government programs requiring land to be left idle; and planting crops or leaving land idle in conjunction with crop or livestock rotation.<sup>xxiii</sup> Additionally, the definition under OSV includes the use of land to harvest logs or posts used for fences, pens, barns, or other agricultural improvements on agricultural lands.<sup>xxiv</sup>

With regard to animals, as noted above, the definition of “agricultural use” includes raising or keeping livestock and exotic animals. The Texas Comptroller states that the term “livestock” includes beef or dairy cattle, horses, goats, swine, poultry, and sheep.<sup>xxv</sup> Exotic animals, the raising or keeping of which is included in the definition of “agricultural use” if they are used for the production of tangible products having commercial value, are defined as “a cloven-hoofed ruminant mammal or exotic fowl that is not native to Texas and is not livestock.”<sup>xxvi</sup> Recently, the keeping of bees has been added to the list of acceptable production practices provided the

land involved is between 5 to 20 acres.<sup>xxvii</sup> Wild animals are not considered “livestock,” and having wild animals on one’s property does not fall within the definition of an “agricultural use.”<sup>xxviii</sup>

Finally, “agricultural use” also includes wildlife management purposes, which requires additional elements be shown and will be discussed in the next section.

### Principally Devoted

Additionally, keep in mind agriculture must be the “principal” use. Other uses will not disqualify land so long as agriculture is the primary use. For example, a ranch may raise cattle and allow recreational hunting. So long as the raising of cattle was the primary use of the land, the fact hunting income was generated would not impact the OSV.

When considering whether land is “principally devoted” to agriculture, Texas courts have drawn a distinction between qualifying “agricultural uses” and non-qualifying “recreational uses.” The Texas Supreme Court considered this in *Tarrant County Appraisal District v. Moore*,<sup>xxix</sup> a case involving horses. There, the Court drew a distinction between land primarily used for agricultural uses (such as breeding, raising, or grazing horses) and land primarily used for recreational uses (showing, training, stabling horses). “If the use of the land is principally recreational, or as a hobby, then the activity, although agricultural in nature, is not one that promotes a farm or ranch purpose but instead promotes a recreational purpose.”<sup>xxx</sup> Each of these decisions will have to be made on a fact-specific, case-by-case basis by the County Appraisal District.

#### *(B) Of the degree of intensity generally accepted in the area;*<sup>xxxi</sup>

This requirement is likely the most complicated issue involved with special use valuation for agriculture. Importantly, this analysis is made based only upon the year for which the property owner applies for OSV, not for the years preceding the application.<sup>xxxii</sup>

Determining what is required to meet the “degree of intensity generally accepted in the area” is extremely fact specific and considers a number of factors, including the type of crop or animal being raised and the location of the land. Each appraisal district in Texas has its own rules to determine what is required to meet this standard.

For example, at the time of this publication, Harris County requires on large tracts of native pastureland, there must be 7 acres per animal unit. In nearby Washington County, the rules require 3 acres per animal unit for native pastureland. The same differences exist across the state for farmland. In Ellis County, corn must yield 70 bushels per acre, while the number is 87 bushels per acre in Harris County and 61 bushels per acre in Travis County. Due to these significant differences and discrepancies, landowners should carefully review their own County Appraisal Districts rules to determine the applicable requirements.

Landowners should also be aware of a statutory provision addressing how this requirement will be evaluated during a drought. The Texas Property Code Section 23.522 provides during a drought, the eligibility for this valuation does not end because the land is not used to the generally accepted degree of intensity if (1) a drought declared by the governor creates an agricultural necessity to extend the normal time land is excused from production; and (2) the owner of the land intends to use the land in the manner and degree of intensity when the drought declaration has been lifted.<sup>xxxiii</sup> As one might imagine, the Texas Governor declared droughts for numerous counties between 2011 and 2014, implicating this provision.

- (C) *For at least 5 of the last 7 years, the land must be devoted principally to agricultural use, timber, or forest products.*<sup>xxxiv</sup>

Again, keep in mind the focus here is on the principal use of the property, and the degree of intensity requirement does not apply to the prior years, only to the year when the application is made.

### Application Requirement

A one-time application must be filed with the County Appraisal District before May 1.<sup>xxxv</sup> There may also be situations where the appraisal district requests a landowner refile an application. This may occur because the appraisal district believes a change may have occurred.

The Chief Appraiser may, for good cause, extend this deadline by up to 60 days,<sup>xxxvi</sup> but obviously, the more prudent route is to be sure to file applications by the deadline. For applications filed after May 1, but before the appraisal review board meets to approve the appraisal records for the year, special appraisal may be approved but subject to a penalty in the amount of 10 percent of the difference in the taxes imposed at OSV and the taxes that would have been imposed at fair market value.<sup>xxxvii</sup>

Importantly, this application is required any time the land changes ownership, regardless of whether the land had previously qualified for OSV. For example, if a ranch had been receiving OSV for the last 20 years but it sold in July 2018 to a new owner, the new owner would be required to file a new one-time application with the County Appraisal District before April 30, 2019.

### Land Value Calculation

When the above requirements are met, the County Appraisal District will divide all qualifying OSV land into categories.<sup>xxxviii</sup> Each county may create its own list of categories, but the most common include irrigated cropland, dryland cropland, and native and improved pastures. These categories are important because the taxable value calculations are made based on each category. For each category of land, the Appraiser then determines the “net to land” value.<sup>xxxix</sup> The net to land value for each category could potentially differ even within a county if there were a significant difference in soil types

in different parts of a county, for example. This is done by calculating the average net income that would have been earned during the past 5 years by an owner using ordinary, prudent management practices in addition to any income from hunting or recreational leases. The capitalization rate (10 percent, or the interest rate specified by the Farm Credit Bank of Texas plus 2.5 percent, whichever is higher) is then applied to the “net to land” value. Thus, the formula to calculate the land value is 5-year net average/capitalization rate.

For example, the Hunt County Appraisal District offered the following calculations in their 2015 Ag Appraisal Manual.<sup>xi</sup> (Please keep in mind, the land values will vary for every type of land and by location. This is to offer an example only.) For native pasture in Hunt County, the County Appraisal District calculated the average net to land to be \$5.75 per acre. That was divided by the 10 percent capitalization rate to get \$57/per acre value of the native pasture land.

## IV. WILDLIFE MANAGEMENT USE VALUATION

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In 1995, Texas voters amended the Constitution again and created a new special use valuation allowing a new pathway for landowners to qualify for an alternative valuation method.<sup>xii</sup> Wildlife Management Use Valuation (“WMUV”) is actually a subset of OSV, provided for by Article III, Section 1-D-1 of the Texas Constitution. However, WMUV has a distinct set of rules apart from other open space land. These rules are found in the Texas Tax Code Sections 23.51 and 23.521 and the Title 34 of the Texas Administrative Code Chapter 9.2001 – 9.2005.

### REQUIREMENTS

In order to qualify for WMUV, a landowner must meet the following requirements:

- (1) *Land must have qualified for open space valuation for the year prior to the application;*<sup>xlii</sup>

The threshold requirement for a landowner seeking WMVU is the land must have been qualified as open-space (1-d-1) for the year prior to the application. As discussed in the Open Space Valuation section above, there are numerous requirements, including use for 5 of the last 7 years, to satisfy the requirements of open space valuation. Importantly, land qualified as timber use under Section 23(E) or land qualified as agricultural use under Section 1-d the year prior to the WMVU application does not qualify for WMVU.<sup>xliii</sup>

- (2) *Land used primarily for wildlife management;*<sup>xliiv</sup>

As was discussed with OSV above, the issue of whether a land’s primary use is wildlife management will necessarily be very fact-specific.

To determine if land is primarily used for wildlife management, Appraisal Districts look at a number of factors, including whether the land is being

managed under a wildlife management plan, whether the landowner gives wildlife management practices priority over other activities on the land, whether the secondary uses of the property significantly and demonstrably interfere with the wildlife management practices, and whether the activities conducted on the land are detrimental to the indigenous wildlife targets for management.<sup>xlv</sup> Also considered is whether there are any improvements, such as fencing, to control or sustain the wildlife population.<sup>xlvi</sup>

Additionally, certain wildlife use requirements, which impose minimum size requirements, have been adopted by Texas Parks and Wildlife and adopted into the Texas Administrative Code.<sup>xlvii</sup> These limited size rules apply only if the number of acres in the tract of land at issue is less than the number of acres in the tract of land on January 1 of the preceding tax year.<sup>xlviii</sup> Put another way, if the size of land has stayed the same or increased, the wildlife use size requirements need not be a consideration for the landowner.<sup>xliv</sup> In order to determine the wildlife use requirements, Texas Parks and Wildlife divided the state into 12 regions and set different requirements for each region.<sup>1</sup>

- (3) *Land is actively being managed to sustain a breeding, migrating, or wintering population of indigenous wildlife through implementation of a wildlife management plan.*<sup>li</sup>

An “indigenous” animal is a native animal that originated or naturally migrates through an area and is living naturally in that area.<sup>lii</sup> Animals need not permanently be on the land, provided they regularly migrate or seasonally live there.<sup>liii</sup>

Requirements for a wildlife management plan are set forth in Title 34 of the Texas Administrative Code Section 9.2003, and an example may be found on the Texas Parks and Wildlife website.<sup>liv</sup>

- (4) *Indigenous wildlife populations must be produced for human use.*<sup>lv</sup>

The law requires the wildlife be for human use, which includes food, medicine, or recreation.<sup>lvi</sup> Of these, recreation is the broadest, allowing activities like hunting, bird watching, photography, and even the owner’s own enjoyment of the land and wildlife to qualify.<sup>lvii</sup>

- (5) *Landowners must utilize at least three of the seven listed practices.*<sup>lviii</sup>

A landowner must use at least three of the following seven practices each year: habitat control; erosion control; predator control; providing supplemental supplies of water; providing supplemental supplies of food; providing shelters; or making census counts to determine populations.<sup>lix</sup> These practices are discussed in detail in the Texas Comptroller publication and in the Redmon/Cathy publication included in the “Additional Resources” section.

## APPLICATION REQUIREMENT

In addition to the requirements set out above, in order to use the WMVU, a one-time application must be filed with the County Appraisal District before May 1.<sup>lx</sup>

The Chief Appraiser may, for good cause, extend this deadline by up to 60 days,<sup>lxi</sup> but, obviously, the more prudent route is to be sure to file applications by the deadline. For applications filed after May 1, but before the appraisal review board meets to approve the appraisal records for the year, special appraisal may be approved but is subject to a penalty in the amount of 10 percent of the difference in the taxes imposed at WMVU and the taxes that would have been imposed at fair market value.<sup>lxii</sup>

Although an annual application is not required to continue receiving WMUV, the County Appraisal District may require an annual report describing how the wildlife management plan was implemented in the past year.<sup>lxiii</sup> Texas Parks and Wildlife Department has a form for making this type of report.

Importantly, this application is required any time the land changes ownership, regardless of whether the land had previously qualified for WMVU. For example, if a ranch had been receiving WMVU for the last 20 years but it sold in July 2018 to a new owner, that new owner would be required to file a new one-time application with the County Appraisal District before April 30, 2019.

## LAND VALUE CALCULATION

Land in WMUV is valued based upon its appraised value prior to conversion to Wildlife Management Use. In other words in order to determine the special use valuation, the appraiser will consider the net value of land as discussed above in the OSV calculation. For example, if prior to conversion, land was valued under Open Space Valuation as native pasture, it would remain to be valued based upon native pasture calculations. In other words, there is no method for calculating the value of land with regard to the wildlife use; instead, it is valued in the same way it was prior to the change from OSV to WMVU.

## V. ROLLBACK PENALTY

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For each of the special use valuation methods described here, it is important to note there are serious penalties for ceasing to comply with the requirements to maintain special use valuation. Known as the “rollback penalty,” the law requires a landowner to pay back the difference between the taxes which would have been owed using traditional market value tax valuation and those taxes actually paid using the special use valuation.<sup>lxiv</sup>

For land in Agricultural Use valuation, the rollback period where repayment is owed is 3 years.<sup>lxv</sup> This rollback penalty is triggered for AUV land when the land is taken out of agricultural use or when the land is sold.<sup>lxvi</sup> The interest charged for rollback penalty owed on AUV land is 1 percent per month for the last 3 years.<sup>lxvii</sup>

For Open Space Valuation, a 5-year rollback period applies. The rollback penalty is triggered when land is taken out of agricultural use.<sup>lxviii</sup> Note, unlike AUV, a sale does not trigger a rollback for OSV land. The interest rate charged for rollback penalty owed on OSV land is 7 percent per year for the last 5 years.<sup>lxix</sup>

For example, a landowner in Collin County had qualified for and received open space valuation for the last 5 years on 137.33 acres. The land’s appraised market value and agricultural values are:

Year	Market Value	Agricultural Value
2018	\$755,315	\$22,247
2017	\$755,315	\$22,385
2016	\$755,315	\$23,209
2015	\$549,320	\$23,895
2014	\$549,320	\$24,582

Assume the landowner ceases agricultural production on the land and decides to build houses instead. The tax district will calculate a rollback penalty for changing the use. First, the difference in taxes that would have been paid had the land been valued at market versus the taxes actually paid will be determined and are as follows:

Year	Estimated Property Taxes (Market Value)	Estimated Property Taxes (Agricultural Value)	Difference
2018	\$204.97	\$13,848.68	\$13,643.70
2017	\$207.38	\$13,924.58	\$13,717.20
2016	\$217.06	\$14,057.22	\$13,840.16
2015	\$225.56	\$10,318.70	\$10,093.15
2014	\$236.49	\$10,516.51	\$10,280.02

Taking the difference in property taxes paid and estimated property taxes that would have been paid for the land for the last 5 years, plus 7 percent interest per year would yield the following:

Year	Difference in Property Taxes	Interest at 7% per year	Total
2018	\$13,643.70	\$955.06	\$14,598.76
2017	\$13,717.20	\$1,920.41	\$15,637.61
2016	\$13,840.16	\$2,906.43	\$16,746.60
2015	\$10,093.15	\$2,826.08	\$12,919.23
2014	\$10,280.02	\$3,598.01	\$13,878.03
Total Estimated Rollback			\$73,780.23

Thus, changing the use of the 137.33 acres in Collin County from agriculture would result in a rollback penalty of \$73,780.23.



## VI. PROPERTY TAX PROTEST

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Texas landowners have the ability to protest their property tax bill if they believe the County Appraisal District has made errors. The law allows a landowner to protest a number of issues including the market or appraised value of property, whether any exemptions should apply, qualification for alternative use valuation (such as ag, open space, wildlife, or timber), which local governments should be taxing the property, or changes in land use.

The notice of appraised value will usually arrive in the Spring, although payment is not due until the Fall. However, it is important a landowner carefully review the notice when it is received and determine if there is any information he or she wishes to dispute as the deadline for filing a protest of the information contained in the notice is April 30 for residential homesteads, May 31 for all other property, or 30 days after receipt of the notice, whichever is latest. If a landowner does not act upon receipt of the notice and waits instead for the Fall when payment is due to review, he or she will likely have waived the right to protest.

The Texas Comptroller has forms available for filing a protest and a website with helpful information for landowners considering protesting.

## V. CONCLUSIONS

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For rural landowners in Texas, having special use property tax valuation is important and is an issue that should not be overlooked or taken lightly. All landowners should determine whether they currently have special use valuation and investigate what may need to be done to keep this type of valuation or what may be needed to qualify.

## VI. ADDITIONAL RESOURCES

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- Glen Hegar, Texas Comptroller of Public Accounts, *Manual for the Appraisal of Agricultural Land* (January 2017), available at <file:///C:/Users/tiffany.dowell/Downloads/96-300.pdf>.
- Texas Comptroller, *Guidelines for Qualification of Agricultural Land in Wildlife Management Use* (January 2018), available at <https://comptroller.texas.gov/taxes/property-tax/>.
- Larry Redmon & James Cathey, *Wildlife Management and Property Tax Valuation in Texas*, available at [http://www.hillcountryalliance.org/wp-content/uploads/2014/06/wildlife\\_tax\\_valuation\\_from\\_extension.pdf](http://www.hillcountryalliance.org/wp-content/uploads/2014/06/wildlife_tax_valuation_from_extension.pdf).

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- <sup>i</sup> Texas Comptroller, Agricultural and Timber Exemptions and Texas Taxes, available at <https://comptroller.texas.gov/taxes/ag-timber/>.
- <sup>ii</sup> See *McCormick v. Attorney General of Texas*, 822 S.W.2d 814 (Tex. App. -- Ft. Worth 1992, no pet.).
- <sup>iii</sup> Texas Constitution Article III, Section 1-d.
- <sup>iv</sup> Texas Constitution Article III, Section 1-d-1.
- <sup>v</sup> Texas Constitution Article III, Section 1-d-1; Texas Tax Code Chapter 23(D).
- <sup>vi</sup> Texas Constitution Article III, Section 1-d(a).
- <sup>vii</sup> Texas Constitution Article III, Section 1-d(a).
- <sup>viii</sup> Texas Tax Code § 23.41(a); Texas Tax Code Section 23.42(d)(1).
- <sup>ix</sup> Texas Tax Code § 23.42(c).
- <sup>x</sup> Texas Constitution Article III, Section 1-d(a).
- <sup>xi</sup> Texas Constitution Article III, Section 1-d; Texas Tax Code Section 23.42(a)(3).
- <sup>xii</sup> Texas Tax Code § 23.42(c).
- <sup>xiii</sup> Texas Constitution Article III, Section 1-d(e); Texas Tax Code Section 23.42(a)(1).
- <sup>xiv</sup> Texas Constitution Article III, Section 1-d(b); Texas Tax Code Section 23.43(a).
- <sup>xv</sup> Texas Tax Code § 23.43(e).
- <sup>xvi</sup> Texas Tax Code § 23.43(b).
- <sup>xvii</sup> Texas Tax Code § 23.541(b).
- <sup>xviii</sup> Texas Tax Code § 23.43(c).
- <sup>xix</sup> Texas Tax Code § 23.42(a)(1).
- <sup>xx</sup> Texas H.J.R. 1, 65th 2nd Called Sess. (1978).
- <sup>xxi</sup> Glen Hegar, Texas Comptroller of Public Accounts, Manual for the Appraisal of Agricultural Land (January 2017), available at file:///C:/Users/tiffany.dowell/Downloads/96-300.pdf.
- <sup>xxii</sup> Texas Tax Code § 23.51(1).
- <sup>xxiii</sup> Texas Tax Code § 23.51(2).
- <sup>xxiv</sup> Texas Tax Code § 23.51(1).
- <sup>xxv</sup> Glen Hegar, Texas Comptroller of Public Accounts, Manual for the Appraisal of Agricultural Land at 6 (January 2017), available at file:///C:/Users/tiffany.dowell/Downloads/96-300.pdf.
- <sup>xxvi</sup> Texas Tax Code § 23.51(6).
- <sup>xxvii</sup> Texas Tax Code § 23.51(2).
- <sup>xxviii</sup> Glen Hegar, Texas Comptroller of Public Accounts, Manual for the Appraisal of Agricultural Land at 6 (January 2017), available at file:///C:/Users/tiffany.dowell/Downloads/96-300.pdf.
- <sup>xxvix</sup> 845 S.W.2d 820 (Tex. 1993).
- <sup>xxx</sup> 845 S.W.2d 820 (Tex. 1993).
- <sup>xxxi</sup> Texas Tax Code § 23.51(1).
- <sup>xxxii</sup> *Riess v. Appraisal District of Williamson County*, 735 S.W.2d 633, 637- 638 (Tex. App.—Austin, 1987).
- <sup>xxxiii</sup> Texas Tax Code § 23.522.
- <sup>xxxiv</sup> Texas Tax Code § 23.51(1).
- <sup>xxxv</sup> Texas Tax Code § 23.54(d).
- <sup>xxxvi</sup> Texas Tax Code § 23.54(d).
- <sup>xxxvii</sup> Texas Tax Code § 23.541(b).
- <sup>xxxviii</sup> Texas Tax Code § 23.51(3).
- <sup>xxxix</sup> Texas Tax Code § 23.51(4).
- <sup>xl</sup> Hunt County Appraisal District, 2015 Agriculture Use (Open-Space) Valuation, available at <http://www.hunt-cad.org/wp-content/uploads/2015/03/HCAD-2015-Ag-Appraisal-Manual.pdf>.
- <sup>xli</sup> Tex. H.J.R. 72, 74th Reg. Sess. (1995).
- <sup>xlii</sup> Texas Administrative Code § 9.2004(b)(1).
- <sup>xliii</sup> Glen Hegar, Texas Comptroller of Public Accounts, Guidelines for Qualification of Agricultural Land in Wildlife Management Use (January 2018), available at <https://comptroller.texas.gov/taxes/property-tax/>.
- <sup>xliv</sup> Texas Administrative Code § 9.2004(b)(2).
- <sup>xliv</sup> Texas Administrative Code § 9.2004(d).
- <sup>xlvi</sup> Glen Hegar, Texas Comptroller of Public Accounts, Guidelines for Qualification of Agricultural Land in Wildlife Management Use at 5 (January 2018), available at <https://comptroller.texas.gov/taxes/property-tax/>.
- <sup>xlvii</sup> Texas Administrative Code § 9.2005.
- <sup>xlviii</sup> Texas Administrative Code § 9.2005(c).
- <sup>xlix</sup> Texas Administrative Code § 9.2005(b).
- <sup>l</sup> Texas Administrative Code § 9.2005(c).
- <sup>li</sup> Texas Administrative Code § 9.2004(b)(3).
- <sup>lii</sup> Texas Administrative Code § 9.2001(b)(8).
- <sup>liii</sup> Texas Administrative Code § 9.2001(9) – (11).

- <sup>liv</sup> Texas Parks and Wildlife, Agricultural Tax Appraisal Based on Wildlife Management, available at [https://tpwd.texas.gov/landwater/land/private/agricultural\\_land](https://tpwd.texas.gov/landwater/land/private/agricultural_land).
- <sup>lv</sup> Texas Administrative Code § 9.2004(b)(5).
- <sup>lvi</sup> Texas Administrative Code § 9.2001(12).
- <sup>lvii</sup> Glen Hegar, Texas Comptroller of Public Accounts, Guidelines for Qualification of Agricultural Land in Wildlife Management Use at 4 (January 2018), available at <https://comptroller.texas.gov/taxes/property-tax/>.
- <sup>lviii</sup> Texas Tax Code § 23.51(7)(a).
- <sup>lix</sup> Texas Tax Code § 23.51(7)(a).
- <sup>lx</sup> Texas Tax Code § 23.54(d).
- <sup>lxi</sup> Texas Tax Code § 23.54(d).
- <sup>lxii</sup> Texas Tax Code 23.541(b).
- <sup>lxiii</sup> Texas Administrative Code § 9.2003.
- <sup>lxiv</sup> Texas Tax Code § 23.46(c).
- <sup>lxv</sup> Texas Constitution Article III, Section 1-d(f); Texas Tax Code Section 23.46(c).
- <sup>lxvi</sup> Texas Tax Code § 23.46(c).
- <sup>lxvii</sup> Texas Tax Code § 23.46(c).
- <sup>lxviii</sup> Texas Tax Code § 23.55(a).
- <sup>lxix</sup> Texas Tax Code § 23.55(a).





“Please, folks,  
die with a will.  
It’s just easier  
on everyone  
that way!”

- James Decker,  
Esq., Mayor,  
Stamford, TX

CHAPTER 14

Photo by adou87 (Pixabay)

## KEY ESTATE PLANNING DOCUMENTS

Please understand farm and ranch estate and transition planning are far more complex than these few documents, but they are at least a bare minimum start. Other important considerations like when best to transition management and ownership, whether business entities would be useful, whether buy/sell restrictions should be considered, and how to ensure the farm remains viable for years to come, are all extremely important and beyond the scope of our discussion here. Additional documents that may be advisable for certain people in certain situations, such as out-of-hospital do not resuscitate orders or irrevocable living trusts, are also not discussed in this section. Lastly, understanding the Texas probate process is also extremely important, but not covered here for length’s sake. I highly suggest landowners take time to read or to listen to the list of Additional Information included at the end of this chapter, which addresses each of these issues in more detail.

At a minimum, all citizens should consider executing the following four legal documents: a will, an advanced healthcare directive, a medical power of attorney, and a durable power of attorney.

## I. WILL

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Most Texans are familiar with the purpose and general structure of a will. A will is a legal document stating how the person executing the document (the “testator”) wishes for his or her assets to be distributed at death.

### EXECUTION REQUIREMENTS

Texas imposes only a few limitations with regard to who may execute a will. First, the person must be “of sound mind and power to make a will.”<sup>i</sup> Under Texas law, being “of sound mind to make a will” refers to the testator’s “testamentary capacity” or ability to understand and appreciate the consequences of executing the will.<sup>ii</sup> Testamentary capacity requires a person (1) understand he or she is making a will; (2) understand the effect of making a will; (3) understand the general nature and extent of his or her property; and (4) know the natural objects of his or her bounty and the claims upon them.<sup>iii</sup> Capacity is determined as of the day and time the will was executed.

Second, the person must be either 18 years of age, or currently or previously married, or a member of the armed forces of the United States, an auxiliary of the United States armed forces, or the United States Maritime Service.<sup>iv</sup>

Assuming those requirements are met, to comport with Texas law, a will must be either handwritten completely in the testator’s handwriting or typewritten. Note here verbal promises or instructions about what should happen when someone dies are unenforceable under Texas law.

For typewritten wills, the testator must sign the document. This must be done in the presence of two witnesses who must also sign the will in the presence of the testator and each other.<sup>v</sup> These witnesses are only witnessing the act of the Testator signing the will, not the contents thereof. Witnesses should be disinterested, meaning it is not advisable to have family members or anyone who will or may inherit from the testator under the will to serve as a witness. To help reduce the cost of the estate during the probate process, it is also recommended to have the typewritten will self-proved (a more detailed discussion of this requirement is included below).

For handwritten wills, also referred to as “holographic wills,” there is no witness requirement.<sup>vi</sup> However, courts are cautious when enforcing such wills and strictly construe requirements, including the entire will be written in the testator’s handwriting, meaning there may be nothing typed and no other person’s writing on the document.<sup>vii</sup>

It is recommended rather than being holographic, wills should be typewritten and drafted or at least reviewed by an attorney licensed to practice in Texas to better ensure enforceability.

## IMPORTANT CONSIDERATIONS

Here are a few key considerations to keep in mind when drafting a will in Texas.

### *Laws differ by state*

Every state has different rules regarding proper execution and contents of wills. From certain language that may need to be included to how documents must be properly executed, there is simply no “one-size-fits-all” will available. Texas landowners should strongly consider hiring an attorney to help draft a will. While there are other estate planning documents for which statutory, fill-in-the-blank forms exist that is not the case with wills. Additionally, be cautious when using online or pre-printed wills sold various places. There are many horror stories from right here in the Lone Star State where something in one of these wills did not comport with or apply as written under Texas law which caused a good deal of litigation and heartache.

### *Wills only transfer probate assets*

Keep in mind a will only passes what are referred to as “probate assets” and does not pass any assets for which a contractual designation exists regarding disbursement on death. For example, a life insurance policy requires the purchaser to designate a beneficiary of the policy benefits. It is this contractual designation—not anything written in the person’s will—which will govern to whom payment will be made. In light of this, it is important to review your assets, retirement plans, life insurance policies, pensions, investment accounts, and bank accounts to ensure beneficiary designations are up to date and accurate.

### *Appointment of an Executor*

Wills generally designate someone to serve as the executor of the estate. This person will be charged with carrying out the instructions from the will, reporting to the court, and taking the steps necessary to administer the estate, meaning gathering assets of the estate and distributing those assets to the beneficiaries according to the terms of the will. A testator should be careful whom he or she names as an executor because the named person must be able to qualify to serve as the executor. In order to qualify the person must show that he or she is not a minor (or has never been deemed incapacitated by a court of law), has never been convicted of a crime of moral turpitude, is not a convicted felon, or for any other reason is not suitable to serve as an executor (examples of this would be the person has a claim against the estate, he or she brings discord or other conflicts of interest to the estate, or he or she is generally unable to handle the affairs of the estate due to lack of experience, knowledge, etc.). Further, the executor should be someone willing to serve in this role who is trustworthy enough to shoulder this type of responsibility.

Another decision important for a testator is whether the executor will be compensated with a fee. If so, this should be spelled out in detail in the will. Further, in the event the person designated executor is unable to serve, an alternate selection should be made and included in the will. Another important decision

a testator should consider is whether the executor may act independently of the court during the probate process, which is discussed in greater detail below.

Considerations for testators with minor children. For anyone with minor children, there are a host of additional considerations including the appointment of a guardian to care for the children, a conservator to manage property for the children, what type of trust should be set up to care for the children in the event both parents were killed and much more. Oftentimes, testamentary trusts are created for the benefit of minor children. These types of decisions may be included within a will or could be done in a separate document.

### *Consider a self-proving affidavit*

As noted above, a will does not have to be notarized to be properly executed. Only two witnesses are required for execution to be proper. That said, however, it may be beneficial to include a “Self-Proving Affidavit” along with an executed will, and the affidavit must be notarized.<sup>viii</sup> This type of affidavit simply allows the testator to make a signed, sworn statement he or she is the person signing and executing the will. Witnesses will sign the affidavit as well. An example of a Self-Proving affidavit may be found in the Texas Estates Code, Section 215.1045. This affidavit may be introduced into evidence as proof of proper execution of the will.<sup>ix</sup> Having this affidavit may help reduce costs associated with the probate process because if the will is not self-proved, at least one of the witnesses to the will would be required to appear before the court to testify and offer evidence regarding execution of the will.

### *Consider an independent administration clause*

Texas courts allow for independent administrations of estates.<sup>x</sup> Essentially, this allows a duly appointed and approved executor of an estate to act with very little court supervision once the executor has been appointed. This may be designated within a clause included in the will. If the will does not state the executor can serve independently, there are alternative ways to accomplish an independent administration, but that can be costly to the estate, and if all beneficiaries are not in agreement, the court will only allow a dependent administration. In a dependent administration, the executor will more or less have to have court approval to take any action associated with the estate.

## II. ADVANCED HEALTHCARE DIRECTIVE

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This document is sometimes referred to as a “living will,” which seems to cause a good deal of confusion as it is not, in fact, a will at all. An advanced healthcare directive provides instructions to a physician regarding the patient’s desire for artificial, life-sustaining measures to be taken in the event the patient is diagnosed with an irreversible or terminal condition.

Importantly, this document only becomes effective upon a diagnosis the patient is terminal or has an irreversible condition, which differs greatly from the medical



power of attorney discussed below, which is effective upon incapacity. Under Texas law, “terminal” is defined as “an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within 6 months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.”<sup>xi</sup> An “irreversible condition” is a condition, injury, or illness that “may be treated, but never cured or eliminated; that leaves a person unable to care for or make decisions for the person’s own self; and that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.”<sup>xii</sup>

## EXECUTION

In Texas, the legislature has drafted a statutory form advanced directive available online.<sup>xiii</sup> To be valid, Texas law requires two witnesses, one of whom may not be a person designated to make healthcare decisions for the patient, not related to the patient by blood or marriage, not entitled to receive any part of the patient’s estate or have any claims against the patient, and not the patient’s treating physician.<sup>xiv</sup>

## IMPORTANT CONSIDERATIONS

The main consideration for a person executing an advanced directive is whether he or she wishes for treatments other than those needed to make the patient comfortable to be discontinued or withheld or whether the patient wants to be kept alive using available life-sustaining treatment.

Additionally, the patient may include any additional requests in space provided and, in the event the patient has not executed a medical power of attorney, he or she may designate someone on the Advanced Healthcare Directive Form, although it would be best for the person to also execute a separate medical power of attorney, as discussed below.

## III. MEDICAL POWER OF ATTORNEY

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A medical power of attorney allows the person executing the medical power of attorney (the “principal”) to appoint an agent to act on his or her behalf to make medical decisions in the event the principal is incapacitated. For example, if a person is knocked unconscious and is unable to make decisions regarding treatment or testing, the medical power of attorney would allow the appointed agent to make such decisions.

## EXECUTION

In Texas, the legislature has drafted a statutory form Medical Power of Attorney that is available online.<sup>xv</sup> To be valid, Texas law allows a Medical Power of Attorney to either be signed before a Notary Public or to be signed in the presence of two adult witnesses.<sup>xvi</sup> As with the Advanced Directive, if the signor elects to utilize witnesses, the first witness may not be a person related to the signor, someone designated to make healthcare decisions, etc. as explained above.

## IMPORTANT CONSIDERATIONS

First, it is important to carefully consider who a person chooses to designate as his or her agent to make medical decisions. Serving in this role could lead to an agent having to make very difficult, painful decisions, and ensuring someone is selected who is capable of making the decisions the principal would want is critical.

Second, the statutory form allows for the principal to include any limitations on the decision-making authority of an agent in space provided.

## IV. DURABLE POWER OF ATTORNEY

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As the name suggests, a durable power of attorney functions much like the medical power of attorney, except it allows decisions to be made and actions to be taken with regard to financial assets and business matters, rather than medical decisions. Again, the person executing the document is called the principal, and he or she appoints an agent to carry out financial decisions and business matters on behalf of the principal. Generally, this includes power to do things like executing contracts, paying debts, and purchasing or selling property, although a principal certainly may place limits or restrictions on these powers.

### EXECUTION

In Texas, the legislature has drafted a statutory form Power of Attorney that is available online.<sup>xvii</sup> Texans may simply fill in the blanks and check the appropriate boxes on the form to draft a valid Power of Attorney.

Once the Power of Attorney has been completed, it must be signed before a Notary Public. Note, unlike the other documents we discussed, it is not sufficient to have witnesses sign your Power of Attorney.

### IMPORTANT CONSIDERATIONS

Keep in mind a principal may limit the powers granted to the agent. On the Texas statutory form, there are a number of common powers listed, and the principal has the opportunity to either allow the appointed agent to have all of the powers or to designate only certain powers granted to the agent.

Next, there is an opportunity to determine whether the agent is to be compensated for his or her service and to determine whether co-agents, if so appointed, may act independently of each other.

One decision which must be made when executing a Power of Attorney is when the document should go into effect. On the Texas statutory form, the document is presumed to go into effect immediately upon signing; however, the principal may elect to change that and have the power of attorney become effective only upon the principal's disability or incapacity. There should be specific language in the power of attorney that expressly says the power of attorney will not be terminated if the principal becomes incapacitated at a later date.

Lastly, it is key to understand the validity of a Power of Attorney ends at the death of the principal or the court's appointment of a guardian over the principal. This can surprise people, but once the principal has died, the Power of Attorney is void, and it will be the responsibility of the Executor of the estate, rather than the agent named in the Power of Attorney, to act.

## V. ADDITIONAL RESOURCES

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- Shannon L. Ferrell, *Oklahoma State University Farm Transitions*, available at <http://agecon.okstate.edu/farmtransitions/>.
- David Marrison, *Getting Your Farm and Family Affairs in Order*, available at <https://agnr.osu.edu/sites/agnr/files/imce/pdfs/publications/OSUExtension-GettingYourAffairsinOrder-writeable.pdf>.
- Shannon Ferrell, Transition Planning, Ag Law in the Field Podcast Episode #40, available at <http://aglaw.libsyn.com/>.
- Andrew Crocker, End of Life Planning, Ag Law in the Field Podcast Episode #40, available at <http://aglaw.libsyn.com/>.
- Stephanie Bradley Fryer, Texas Probate Process, Ag Law in the Field Podcast Episode #40, available at <http://aglaw.libsyn.com/>.
- Farm Journal Legacy Project, available at <http://www.farmjournallegacyproject.com/>.

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<sup>i</sup> Texas Estates Code § 251.001.

<sup>ii</sup> *Anderson v. Clingsmith*, 369 S.W.2d 634 (Tex. Ct. App. – Ft. Worth 1963).

<sup>iii</sup> *Long v. Long*, 196 S.W.3d 460, 464 (Tex. App.—Dallas 2006).

<sup>iv</sup> Texas Estates Code § 251.001.

<sup>v</sup> Texas Estates Code § 251.051.

<sup>vi</sup> Texas Estates Code § 251.052.

<sup>vii</sup> *Cason v. Taylor*, 51 S.W.3d 937 (Tex. Ct. App. – Waco 2001).

<sup>viii</sup> Texas Estates Code §§ 251.101; 251.1045.

<sup>ix</sup> Texas Estates Code § 251.102.

<sup>x</sup> Texas Estates Code § 402.001.

<sup>xi</sup> Texas Health and Safety Code § 166.033.

<sup>xii</sup> Texas Health and Safety Code § 166.033.

<sup>xiii</sup> Texas Health and Safety Code § 166.033.

<sup>xiv</sup> Texas Health and Safety Code § 166.003.

<sup>xv</sup> Texas Health and Safety Code § 166.164.

<sup>xvi</sup> Texas Health and Safety Code § 166.164.

<sup>xvii</sup> Texas Estates Code § 752.004.





“Texas is the  
finest portion  
of the globe  
that has ever  
blessed my  
vision.”

- Sam Houston

## CHAPTER 15

*Photo by Cooper Terrill*

# CONCLUSION

As this handbook makes clear, there are a number of potential legal issues facing a Texas landowner. It is both a great privilege and great responsibility to own your part of Texas! It is my hope this book will help provide a basic understanding of these issues, serve as a guide to additional resources, and offer comfort to landowners to show none of these issues are impossible to navigate.







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