# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-14-00416-CV**

**Bradley B. Ware, Appellant**

**v.**

**Texas Commission on Environmental Quality, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT**
**NO. D-1-GN-10-002342, HONORABLE JOHN K. DIETZ, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

Bradley B. Ware appeals a district court judgment affirming an order of the Texas Commission on Environmental Quality (TCEQ) denying an application by Ware to extend and expand water rights previously granted him under a ten-year "term permit." We will affirm the district court's judgment.

## BACKGROUND

### Regulatory context

This case arises under the regime of water-rights regulation prescribed by Chapter 11 of the Water Code, and an initial overview of some of that regime's basic features facilitates understanding of both the underlying dispute and its ultimate resolution. Under Chapter 11, the waters of Texas rivers, streams, and lakes (among other sources) are declared to be the property of

the State (i.e., "state water")[1] held in trust for the public,[2] but the right to use state water (as opposed to corporeal ownership)[3] may be acquired by appropriation in the manner and for the purposes the chapter prescribes.[4] No new appropriation can be made unless a permit is first obtained from TCEQ.[5] The agency may grant the permit only upon application complying with various procedural requirements set forth in the chapter and, among other things, "unappropriated water is available in the source of supply," and the proposed appropriation is intended for a "beneficial use," does not impair the previously vested water rights of others, and "is not detrimental to the public welfare."[6] The permit may authorize an appropriation of up to three years' duration (termed a "temporary" permit) or one of perpetual or permanent duration under either a "seasonal" permit permitting use during certain portions of the calendar year or a "regular" permit with no such limitation.[7] A permanent water right is an easement that passes with the title to the land and may be conveyed as with other rights in land.[8]

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[1] *See* Tex. Water Code § 11.021.

[2] *See id*. § 11.0235(a).

[3] A usufructuary right, in other words. *See, e.g.*, *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982) (noting that a "usufruct has been defined as the right to use, enjoy and receive the profits of property that belongs to another").

[4] *See* Tex. Water Code §§ 11.022, .0235.

[5] *See id*. §§ 11.121, .122. Although some of the underlying events predate the agency's current incarnation, for convenience we use "TCEQ" also to refer to its predecessors.

[6] *See id*. § 11.134.

[7] *See id*. §§ 11.135–.138.

[8] *See id*. § 11.040.

A permanent appropriative right conferred by a permit under Chapter 11 is, however, conditioned on ongoing "beneficial use" also prescribed in the permit. The right is "limited not only to the amount specifically appropriated" as stated in the permit, "but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriated."[9] Similarly, no appropriative right is "perfected" unless the water has been "beneficially used" for a purpose specified in the permit.[10] And because "[n]o person is granted the right to waste water by not using it,"[11] an appropriative right is subject to forfeiture or cancellation for nonuse,[12] and also to loss by prescription.[13] But such rights continue to exist in perpetuity to the extent beneficial use does.[14]

In its "*Stacy Dam*" decision,[15] the Texas Supreme Court held that "unappropriated water . . . available in the source of supply," as required for issuance of a permit authorizing new appropriation of water,[16] excludes amounts that had been previously granted by permit but left

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[9] *Id*. § 11.025.

[10] *Id*. § 11.026.

[11] *Lower Colo. River Auth. v. Texas Dep't of Water Res.*, 689 S.W.2d 873, 882 (Tex. 1984) ("*Stacy Dam*") (citations omitted).

[12] *See id*.; Tex. Water Code §§ 11.030, .146, .171–.177, .183–.186.

[13] *See* Tex. Water Code § 11.029.

[14] *See Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971) (describing such permits as "grants to the permittees of usufructuary rights to the State's water upon the implied condition subsequent that the waters would be beneficially used").

[15] 689 S.W.2d 873.

[16] *See* Tex. Water Code § 11.134(b)(2).

unused—notwithstanding the proviso that "all water not so used is considered not appropriated"[17]—unless and to the extent such water is "freed" through cancellations of permits to which it is subject.[18] In the aftermath of *Stacy Dam*, the Legislature added a new permitting mechanism to Chapter 11 that gave TCEQ discretion to temporarily reallocate unperfected appropriated water rights to others who will use them, thereby providing the agency a means, short of cancellation, of ensuring utilization of the appropriative right.[19] A new Section 11.1381 provided that "[u]ntil a water right is perfected to the full extent provided by Section 11.026" (the above-referenced proviso that no appropriative right is "perfected" unless the water has been "beneficially used" for a purpose specified in the permit), TCEQ "may issue permits for a term of years for use of state water to which a senior water right has not been perfected."[20] These "term permits," Section 11.1381 further specified, are "subordinate to any senior appropriative water rights"[21] and shall not be granted "if the holder of the senior appropriative water right" demonstrates that issuance would prohibit it "from beneficially using the senior rights during the term of the term permit."[22] An additional conforming change required that the form TCEQ provides applicants for term permits

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[17] *Id.* § 11.025.

[18] *See Stacy Dam*, 689 S.W.2d at 874–82.

[19] Act of May 21, 1987, 70th Leg., R.S., ch. 405, §§ 1–5, 1987 Tex. Gen. Laws 1932, 1932 (codified in material part in Tex. Water Code §§ 11.1381 and 11.124(e)).

[20] Tex. Water Code § 11.1381(a).

[21] *Id*. § 11.1381(d).

[22] *Id*. § 11.1381(c).

"must . . . state that on expiration of a term permit the applicant does not have an automatic right to renew the permit."[23]

Of final note, the Legislature in Chapter 11 has codified the historical rule in prior-appropriation regimes that, "[a]s between appropriators, the first in time is the first in right."[24] It has further specified that "[w]hen the commission issues a permit, the priority of the appropriation of water and the claimant's right to use the water date from the date of filing of the application."[25] The TCEQ by rule has construed the "date of filing" for purposes of this requirement to mean the date the application that precedes the permitted appropriation is declared administratively complete.[26]

**Events below**

Since 1996, Ware has owned 261 acres of land situated along the Lampasas River—part of the Brazos River basin—in Bell County, about fifteen miles southwest of Killeen and upstream from the Stillhouse Hollow Lake.[27] Upon obtaining ownership, Ware desired to produce

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[23] *See id*. § 11.124(e).

[24] *Id.* § 11.027.

[25] *Id*. § 11.141.

[26] *See* 30 Tex. Admin. Code § 297.44(c) (Tex. Comm'n on Envtl. Quality, Subject to Prior and Superior Water Rights). In the absence of any material substantive change in a rule, we cite to the current version of the Texas Administrative Code.

[27] The Lampasas River originates in Hamilton County and passes through Lampasas and Burnet counties before flowing into Bell County, where it is impounded in the Stillhouse Hollow Lake southwest of Belton. Below the dam, the Lampasas continues roughly another nine miles to join the Leon River and form the Little River near the Bell County town of the same name. The Little River then flows roughly seventy-five miles to join the Brazos—which by now has drained a watershed extending into New Mexico—near the historic Port Sullivan town site in Milam County.

crops from the land with aid of irrigation water diverted from the Lampasas. He sought to acquire the necessary water rights by filing an application under Chapter 11 for a regular permit authorizing him to divert and use 130 acre-feet annually for irrigation purposes.

At relevant times, TCEQ has ascertained the availability of water for purposes of both perpetual and term permits by using some version of a computer-based simulation known as a "water availability model" (WAM), whose general utility Ware does not dispute on appeal. The WAM, simply described, projects the availability of water at an applicant's diversion point in light of estimated streamflow at the location as compared to preexisting water rights in the same source, taking account of the full authorized amount of preexisting appropriative rights when determining availability of unappropriated water for perpetual permits, and taking account of estimated actual utilization of those preexisting rights in determining the amount of unperfected appropriated water that is available for term permits.

After analyzing Ware's application with aid of the WAM, TCEQ staff determined that the amount of unappropriated water available at his location was insufficient to allow for a regular permit. However, agency staff determined that unperfected appropriated water would be available in sufficient amounts to support granting Ware a ten-year term permit. On November 7, 1997, TCEQ granted Ware Permit No. 5594 authorizing him to divert and use, for ten years hence, up to 130 acre-feet of Lampasas River water annually to irrigate 100 acres of his property. This right was

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*See Handbook of Texas Online*, Diana J. Kleiner, "Lampasas River," accessed February 6, 2017, http://www.tshaonline.org/handbook/online/articles/rnl01; *Handbook of Texas Online*, "Little River," accessed February 6, 2017, https://www.tshaonline.org/handbook/online/articles/rnl09; *Handbook of Texas Online*, Kenneth E. Hendrickson, Jr., "Brazos River," accessed February 6, 2017, https://www.tshaonline.org/handbook/online/articles/rnb07.

conditioned on availability of a specified minimum flow in the river that varied according to the time of year. The permit further specified that the right granted was "subject to all superior and senior water rights in the Brazos River Basin" and was to "expire and become null and void on November 7, 2007" (ten years thereafter) unless Ware made application before that date for an extension and the application was subsequently granted "for an additional term or in perpetuity." The permit also included a statement that "[t]he priority date of this permit and all extensions hereof shall be July 1, 1997."

In late 2005, Ware filed an application to renew Permit No. 5594, or alternatively convert it to a perpetual authorization, and also to increase his authorized usage by 20 acre-feet annually and his irrigation to cover 31 more acres. TCEQ staff analyzed the availability of water with aid of the current version of the WAM, but this time determined there was insufficient water available at Ware's location even to support renewing his term permit, let alone to increase his authorized usage or to make his right perpetual. The TCEQ Executive Director (ED) accordingly recommended that Ware's application be denied.

Ware requested a contested-case hearing on his application, and the matter was referred for that purpose to the State Office of Administrative Hearings (SOAH).[28] Ware bore the burden of proof,[29] and a key focus of his case emphasized TCEQ actions in response to a water-rights application that had been filed by the Brazos River Authority (BRA). The BRA is the special district

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[28] *See* Tex. Water Code § 11.133; 30 Tex. Admin. Code § 55.250 (Tex. Comm'n on Envtl. Quality, Applicability); *id.* §55.251 (Tex. Comm'n on Envtl. Quality, Requests for Contested Case Hearing, Public Comment); *id.* § 295.171 (Tex. Comm'n on Envtl. Quality, Request for Contested Case Hearing); *id.* § 295.172 (Tex. Comm'n on Envtl. Quality, Contested Case Hearing).

[29] *See* 30 Tex. Admin. Code § 80.17(a) (Tex. Comm'n on Envtl. Quality, Burden of Proof).

charged with developing and managing water resources throughout the almost 45,000 square-mile Brazos River Basin, and to that end it holds permitted perpetual rights to large quantities of state water stored in a system of reservoirs located throughout the basin.[30] In the permit application in question, termed its "System Operations Permit," BRA had requested numerous authorizations that included a new appropriation of over 400,000 acre-feet of state water.

In response to the BRA's application, agency staff had prepared a water-availability analysis, and two components of this document were the focus of Ware's complaints. First, staff had "modeled" or calculated the WAM projections assuming a "priority date" of October 14, 2004, the date the BRA's application had been deemed administratively complete. This date preceded the "priority date" staff had assumed when evaluating Ware's 2005 application—January 5, 2006, which, as with the BRA application, was the date Ware's current application had been declared administratively complete. Ware insisted, however, that TCEQ was required instead to credit him with a priority date of July 1, 1997, pointing to the statement in his 1997 term permit that "[t]he priority date of this permit and all extensions hereof shall be July 1, 1997." From this premise, Ware further reasoned that his rights (albeit under a term permit) were "first in time" and "first in right" over any water rights that had vested or been claimed subsequent to July 1, 1997—including any new appropriations granted or made under regular permits.

Second, Ware emphasized that the BRA water-availability analysis reflected what was termed an "update" of inputs into the WAM to take account of a basin-wide total of approximately

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[30] BRA owns and operates three lakes in which it stores water—Possum Kingdom Lake, Lake Granbury, and Lake Limestone—and also leases water storage space in eight lakes owned and operated by the U.S. Army Corps of Engineers. Among the latter group is Stillhouse Hollow Lake.

75,000 acre-feet annually in "return flows" (chiefly discharges of previously diverted water from approximately 135 water-treatment or power plants[31]) that staff was treating as water available for appropriation by BRA. Ware perceived that this "update" was tantamount to an admission by TCEQ that newly discovered additional unappropriated water existed that staff had not considered, and was required to consider, when determining whether water was available to him. And relying on the above premise that his rights dated back to 1997, Ware deduced that TCEQ was required to allocate the "new water" to him prior to BRA and grant his application. By failing to do so, Ware insisted, the ED was improperly attempting to "reserve" the return flows for BRA by "manipulating" priority dates.

In response, the ED urged that Ware was mistaken about the role of priority dates and, more fundamentally, about the respective legal positions of term permits vis-à-vis perpetual water rights. The ED further urged that Ware's factual premises were similarly erroneous, and he presented staff testimony[32] to the effect that the return flows were "interruptible" (i.e., subject to being curtailed during shortages), but could appropriately be considered as a source of water as to BRA due to unique features of its system and the circumstances of its uses. Among these features were that BRA had the capacity to draw water it owns from one of several reservoirs if ever necessary to make up any shortages resulting from its using the amount of return flows, thereby

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[31] *See* Tex. Water Code §11.046(c) ("Once water has been diverted under a permit, certified filing, or certificate of adjudication and then returned to a watercourse or stream, . . . it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.").

[32] Chiefly, Kathy Alexander, a work leader on the TCEQ staff that prepares water-availability analyses.

ensuring that such use did not impinge upon any senior water rights if return flows proved to be less than the appropriated amount. In contrast, the ED emphasized, Ware had no capacity or right to store water from which he could make up any shortages. A further distinction was that the full amount of return flows was available to BRA only at the Gulf of Mexico, whereas Ware's diversion point was hundreds of miles upstream and situated on one of the Brazos's subtributaries.

The Administrative Law Judge (ALJ) issued a proposal for decision (PFD) that Ware's permit application be denied in full. The TCEQ commissioners adopted the PFD with some modifications that did not change the result and issued a final order denying Ware's application. The order rested upon ultimate findings or conclusions that Ware had "failed to carry his burden of proving that sufficient water exists in the Brazos River basin or that all applicable statutory and regulatory requirements have been met to warrant issuing to him the proposed Water Use Permit" and that "[p]ursuant to the authority of, and in accordance with, applicable laws and regulations, the requested Permit should not be granted." The underlying findings and conclusions were consistent with the ED's view of the law and the evidence.

After exhausting his remaining administrative remedies, Ware sued for judicial review of the TCEQ's final order in the district court. That court affirmed the order in full, and Ware perfected this appeal.

## STANDARD OF REVIEW

Our review of the TCEQ's order on appeal is governed by the same analysis as in the district court—the familiar "substantial-evidence" rule that is codified in Section 2001.174 of the

Administrative Procedure Act.[33] Under this standard, we must reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are":

> (A) in violation of a constitutional or statutory provision;
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> (B) in excess of the agency's statutory authority;
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> (C) made through unlawful procedure;
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> (D) affected by other error of law;
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> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
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> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[34]

Essentially, this is a rational-basis test to determine, as a matter of law, whether an agency's order finds reasonable support in the record.[35] "The test is not whether the agency made the correct conclusion in our view, but whether some reasonable basis exists in the record for the agency's

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[33] *See* Tex. Gov't Code § 2001.174.

[34] *Id.* § 2001.174(2).

[35] *See Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452–53 (Tex. 1984).

action."[36] We apply this analysis without deference to the district court's judgment.[37] We presume that the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on the contestant to demonstrate otherwise.[38] Ultimately, we are concerned not with the correctness of TCEQ's decision, but its reasonableness.[39]

Substantial-evidence analysis entails two component inquiries: (1) whether the agency made findings of underlying facts that logically support the ultimate facts and legal conclusions establishing the legal authority for the agency's decision or action and, in turn, (2) whether the findings of underlying fact are reasonably supported by evidence.[40] The second inquiry, which has been termed the "crux" of substantial-evidence review,[41] is highly deferential to the agency's determination: "substantial evidence" in this sense "does not mean a large or considerable amount of evidence"—in fact, the evidence may even preponderate against the agency's finding—but requires only "such relevant evidence as a reasonable mind might accept as adequate to support a

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[36] *Slay v. Texas Comm'n on Envtl. Quality*, 351 S.W.3d 532, 549 (Tex. App.—Austin 2011, pet. denied) (citing *Railroad Comm'n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 41 (Tex.1991)).

[37] *See Texas Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006) (per curiam).

[38] *See Slay*, 351 S.W.3d at 549.

[39] *See Sanchez v. Texas State Bd. of Med. Exam'rs*, 229 S.W.3d 498, 510–11 (Tex. App.—Austin 2007, no pet.).

[40] *See Vista Med. Ctr. Hosp. v. Texas Mut. Ins. Co.*, 416 S.W.3d 11, 26–27 (Tex. App.—Austin 2013, no pet.) (citing *Charter Med.-Dallas*, 665 S.W.2d at 453).

[41] *See Granek v. Texas State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 778 (Tex. App.—Austin 2005, no pet.) (quoting John E. Powers, *Agency Adjudications* 163 (1990)).

[finding] of fact."[42] Likewise, we "may not substitute [our] judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion."[43] In contrast, the first inquiry, concerning the extent to which the underlying facts found by the agency logically support its ultimate decision or action, may entail questions of law that we review de novo.[44]

## ANALYSIS

In what he styles as six issues, Ware advances two basic sets of contentions that derive from his positions before the agency. First, he insists that TCEQ's order is not supported by substantial evidence in a factual or evidentiary sense, or is based on some sort of procedural impropriety, because it "disregard[s] the existing evidence of record concerning water availability in favor of outdated evidence known to be inaccurate," a reference to the return flows considered by agency staff when evaluating the availability of water as to the BRA.[45] The gravamen of Ware's argument is that the BRA water-availability analysis conclusively established that the same return flows would (at least in a physical or hydrological sense) be available to him. We have already

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[42] *Slay*, 351 S.W.3d at 549 (citations omitted).

[43] Tex. Gov't Code § 2001.174.

[44] *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011); *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 565 (Tex. 2000) (citing *Charter Med.-Dallas*, 665 S.W.2d at 453); *City of El Paso v. Public Util. Comm'n*, 344 S.W.3d 609, 618–19 (Tex. App.—Austin 2011, no pet.).

[45] These arguments are advanced chiefly in Ware's first and fifth issues.

summarized the contrary evidence presented by the ED, and we need not belabor that it provided abundant reasonable bases for TCEQ to reject Ware's view of the underlying facts.

Ware's remaining arguments advance various legal theories to the effect that TCEQ had a mandatory duty to allocate water to him from the return flows. To the extent these arguments are predicated on the return flows being available to him as an evidentiary matter, our disposition of his preceding challenge would render any error harmless.[46] But Ware's legal theories also fail on their own terms. Essentially, Ware maintains that the 1997 "priority date" referenced in his term permit means that his rights thereunder are superior to any water rights TCEQ has granted after that date—including perpetual water rights—and continue so long as he makes beneficial use of the water.[47] Ware overlooks fundamental distinctions between term and perpetual permits, including that term permits, by definition, confer a temporary right to use waters already appropriated to another that would otherwise be unused and are, similarly, "subordinate to any senior appropriative water rights."[48] Ware's contrary view would convert term permits to de facto perpetual rights (if not also "double permitting" the same water), in derogation of Chapter 11's regulatory scheme.

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[46] *See* Tex. Gov't Code § 2001.174(2) (requiring reversal or remand of a case for further proceedings only "if substantial rights of the appellant have been prejudiced"); *see also AEP Tex. Commercial & Indus. Retail Ltd. P'ship v. Public Util. Comm'n*, 436 S.W.3d 890, 904, 914 (Tex. App.—Austin 2014, no pet.) (noting that court may reverse agency's final order only if party's "substantial rights" were "prejudiced" by error).

[47] Ware presents the substance of these arguments within his second, third, and fourth issues.

[48] *See* Tex. Water Code § 11.1381(d).

Any remaining complaints by Ware do not present a basis for reversal.[49] He invokes equitable considerations, portraying himself as a small family farmer struggling to save a generations-deep legacy enterprise from ruin. While TCEQ suggests that Ware's situation is hardly so precarious,[50] it does not appear to dispute that Ware's 261-acre plot has been in his family since the 1870s and that forebears beginning with his great-grandfather had farmed that land with aid of irrigation water diverted from the Lampasas. But Ware ultimately concedes that this history does not translate to any modern-day legal claim to water rights. As Ware phrased it in testimony, his family "dropped the ball" by failing to preserve any claims to water rights in the proceedings that followed enactment of the Water Rights Adjudication Act of 1967.[51] Ware attributes this omission to "a tremendously bitter divorce" between his parents—accompanied by efforts by his mother "to destroy the farm," including "cattle being shot, the barns being burnt, . . . a violent situation"—that caused significant disruption and distraction to family and farm during the same time frame.[52]

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[49] This includes Ware's sixth issue, complaining that the order includes findings about the BRA application—the same application that he emphasized during the hearing. In the very least, these findings could not be harmful in light of our disposition of Ware's other issues.

[50] TCEQ points out testimony by Ware acknowledging that he had already acquired 100 acre-feet of water rights—almost as much as he had sought in his permit application—in order to expand his operations.

[51] Act of April 6, 1967, 60th Leg., R.S., ch. 45, §§ 1–15, 1967 Tex. Gen. Laws 86, 86–94 (codified as amended at Tex. Water Code §§ 11.301–.341); *see generally In re Adjudication of Water Rights of the Brazos III Segment of the Brazos River Basin*, 746 S.W.2d 207, 209–11 (Tex. 1988) (recounting the Act's historical background and effect); *Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.3d at 439–42 (same).

[52] There was evidence, in fact, that farm operations largely ceased between the mid-1960s and Ware's acquisition of ownership in 1996, although Ware insisted that some degree of irrigation continued throughout this period.

Consequently, while our analysis of Ware's appeal turns most immediately on application of Texas's regime of water-rights regulation and administrative-law principles, the outcome may be rooted ultimately in the family-law discord of a prior generation. While such turns of events are unfortunate and even tragic for both current and future generations of a family, they are not permissible grounds for any relief this Court can provide Ware here.

We overrule Ware's issues on appeal.

## CONCLUSION

We affirm the district court's judgment affirming the TCEQ's order.

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed

Filed: March 3, 2017