

MARKETING GROUNDWATER RIGHTS

ED MCCARTHY *Austin*
McCarthy & McCarthy, L.L.P.

State Bar of Texas
11th ANNUAL
JOHN HUFFAKER AGRICULTURAL LAW COURSE
May 25-26, 2017
Lubbock

CHAPTER 1

Edmond R. McCarthy, Jr.
McCarthy & McCarthy LLP

During the past four decades, Ed McCarthy has focused his practice in natural resources concentrating on water related matters. Ed is currently a partner in the Austin Law Firm of McCarthy & McCarthy LLP.

Ed has done considerable work on matters involving surface and groundwater rights, water conservation and reuse, water and air quality, dam safety, public utilities, water district and political subdivision law, public finance matters, radioactive materials, environmental regulatory issues, eminent domain, and oil, gas and hard mineral rights and titles (including both surface strip and in-situ mining), and endangered species, flood plain regulation and land development. Since 1985, Ed's practice includes real property, environmental and administrative law, and government relations matters with an emphasis on water and water-related matters. He has done considerable work on matters involving endangered species, flood plain regulation and land development, surface and groundwater rights, water conservation and reuse, water and air quality, dam safety, public utilities, water district and political subdivision law, public finance matters, radioactive materials, environmental regulatory issues, eminent domain, and oil, gas and hard mineral rights and titles (including both surface strip and in-situ mining). He regularly practices before various state agencies, including the Texas Commission on Environmental Quality (and its predecessor agencies) and the Texas Water Development Board. Ed also handles matters involving the Texas Attorney General, Texas General Land Office, and the Railroad Commission of Texas and has appeared before Public Utility Commission and the Texas Department of Health. At the local level, Ed's practice includes work with, for and before the governing bodies of Counties, municipalities and local surface and groundwater districts. He has represented individuals, trade associations, and corporate and governmental Clients in the preparation, filing and negotiation of various regulatory permits, and in contested case and rulemaking proceedings before state and federal environmental regulatory agencies. In his representation of water districts and other political subdivisions, Ed regularly counsels and represents Clients in connection with issues arising under the Texas Public Information Act and Open Meetings laws, as well as election and public finance laws.

In addition to his administrative practice, Ed has represented his Clients in both the Courtroom and the Boardroom, as well as in legislative venues. He is a frequent presenter at Continuing Legal Education Seminars on water rights and related topics. Additionally, Ed has regularly appeared as a guest lecturer/teacher in local elementary and junior high schools and universities to discuss water and environmental law issues. As a lobbyist registered with the Texas Ethics Commission, in addition to his work before multiple regulatory agencies, Ed represents Clients before both the Texas Legislature and United States Congress in a variety of water rights, dam safety, and water district/political subdivision issues, as well as endangered species, mining and radioactive materials, and related environmental matters.

After graduating from St. Mary's Law School with distinction in May 1981, Ed served as a Briefing Attorney on the Supreme Court of Texas, assigned to former Texas Supreme Court Justices James Denton (deceased) and Ruby Kless Sondock. Following his tenure with the Court, Ed served as a Captain in the Judge Advocate General's Corps, United States Army assigned to the Government Appellate Division in appellate matters before the United States Court of Military Appeals and Army Court of Military Review. In 1985, Ed joined McGinnis, Lochridge & Kilgore L.L.P., and became a Partner with the law firm in January 1989, where he practiced until 2003 when he joined Jackson, Sjoberg, McCarthy & Townsend as a partner.

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11th Annual John Huffaker Agricultural Law Course

Marketing Groundwater Rights

(“Bring Lawyers, Guns & Money” – Warren Zevon)

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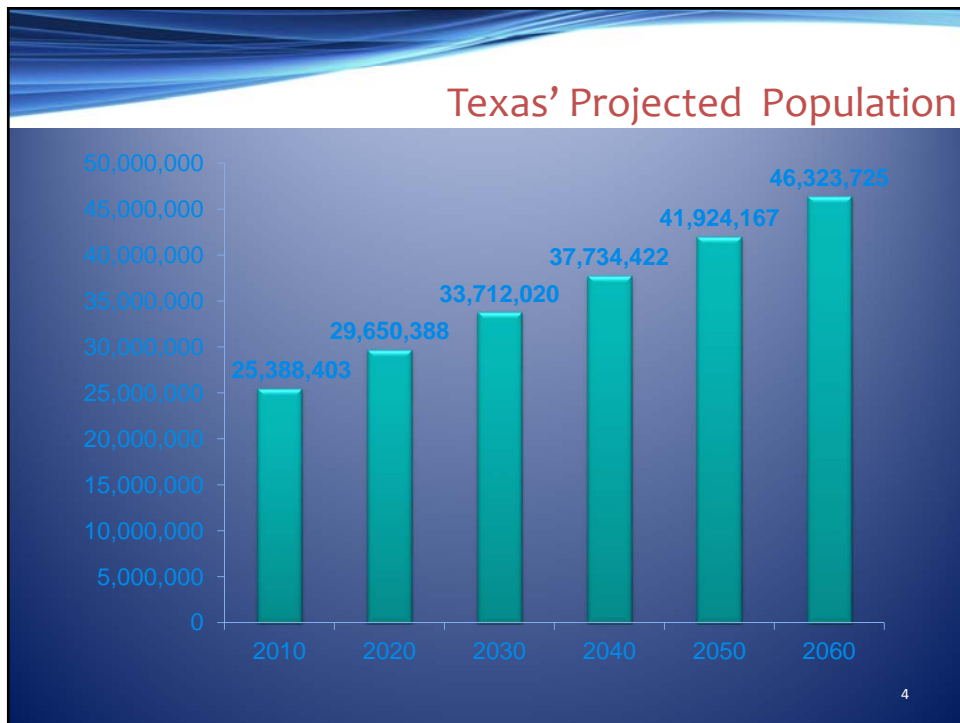
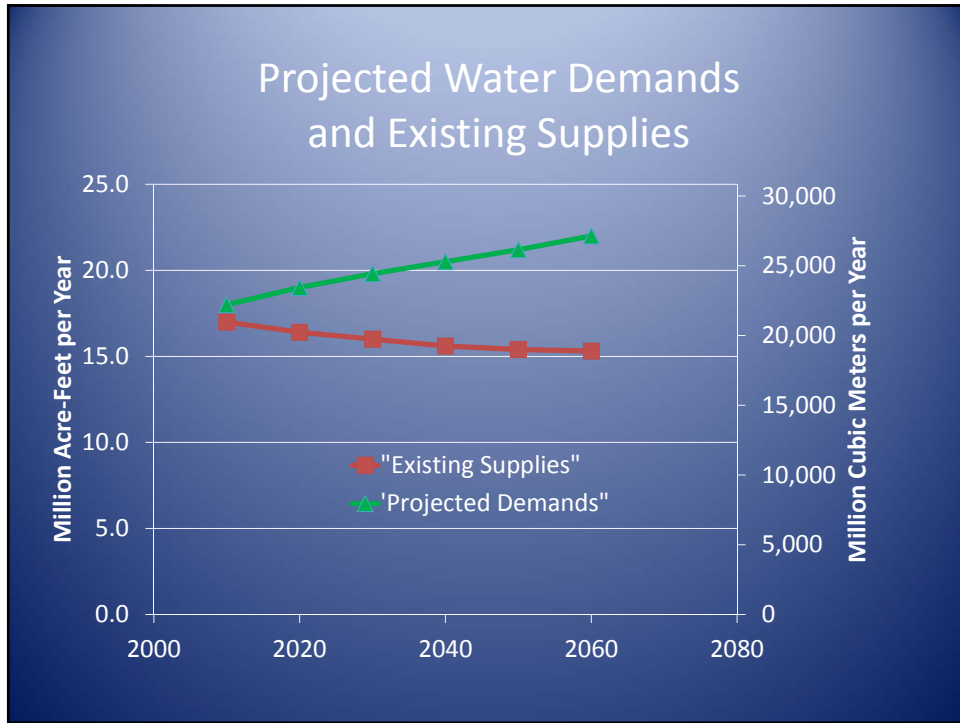
Texas Tech University School of Law

1

Will there be water for growing demand?



2



The Supply-side Issues:

- Texas fastest growth area nationally
- Water is the Limiting Factor for growth
- Recurrent droughts exacerbates availability issue
- Long term needs (2060) - 8-9 million ac-ft

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Issues Facing Landowners & Groundwater Project Developers

- “grass roots politics”,
- market conditions,
- pricing concerns,
- transport considerations,
- permitting hurdles, and
- coordination with local GCDs

Historical Background



The Age Old Adage
“Location, Location, Location”
Gets Mixed Review In
Water Marketing Context
(Do Markets Exist?)

Non-Location Factors

- A. Is the groundwater supply proven?
- B. Do you have an identified Customer?
- C. Do you have local support/opposition?
- D. Are you a private person or entity or a governmental or quasi-governmental entity trying to market the water?
- E. Financial Backing & “Staying Power”
- F. Do you have access to needed infrastructure?

Non-Location Factors (cont’d)

- G. Do you own/control the acreage needed for the project?
- H. Do you possess eminent domain powers?
- I. What is your legal title to the property?
- J. Is the Groundwater severed from the Surface Estate?
- K. Are there any existing rights to use the groundwater, *e.g.*, leases for water use, agriculture and/or oil and gas?
- L. Do you have access to other utilities necessary to produce the water, *e.g.*, electricity?

Non-Location Factors (cont'd)

- M. Pricing Considerations
- N. Has the water been permitted?

Location Factors

- A. Are you in a Groundwater District?
- B. How close are you to your customer and place of use?
- C. Are you in a Subsidence District or a region susceptible to subsidence?
- D. Is your property near, or contaminated by any hazardous waste plants, disposal sites?

Location Factors (cont'd)

- E. Is your property “Habitat” for any endangered species?
- F. How close are your neighbors?
- G. Are there any “common carriers” nearby?
- H. Are you proximate to any type of public right-of-way?
- I. Is there a watercourse available?

Groundwater District Factors

- A. Are you within a Groundwater District?
 - (i) Yes – Do you have permits
 - Do you need amendments
 - Export Authorization
 - District History/Philosophy
 - Export Fees

District vs. Non-District

- (ii) Not in District
 - Risk of Proceeding
 - Build it, they are coming
 - Investment backed expectations
 - Shape a district if created

Reliability/Usability Factors

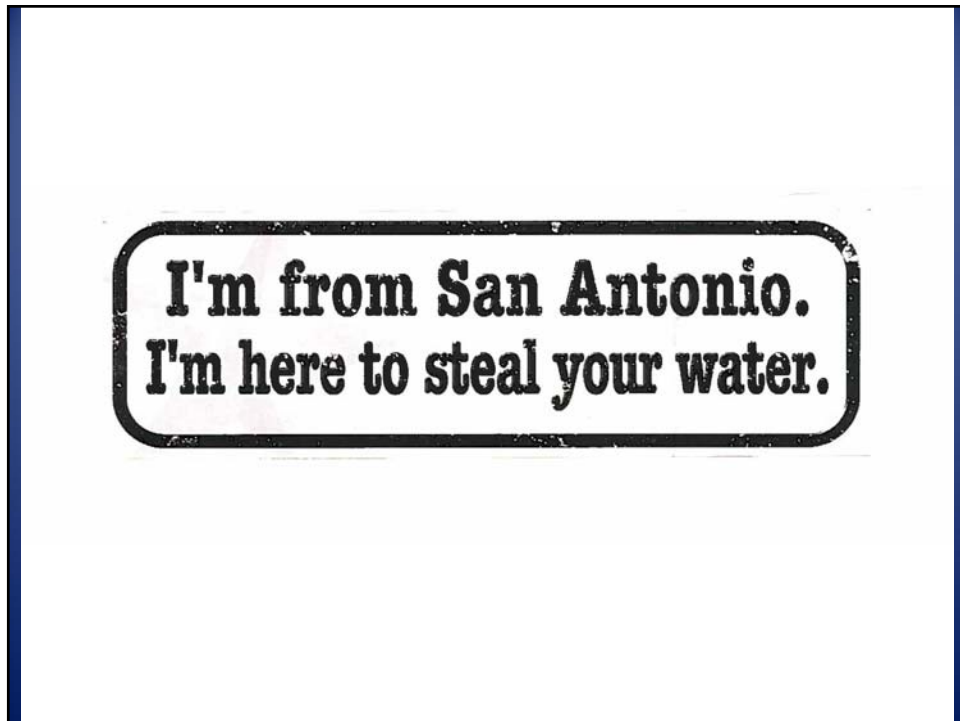
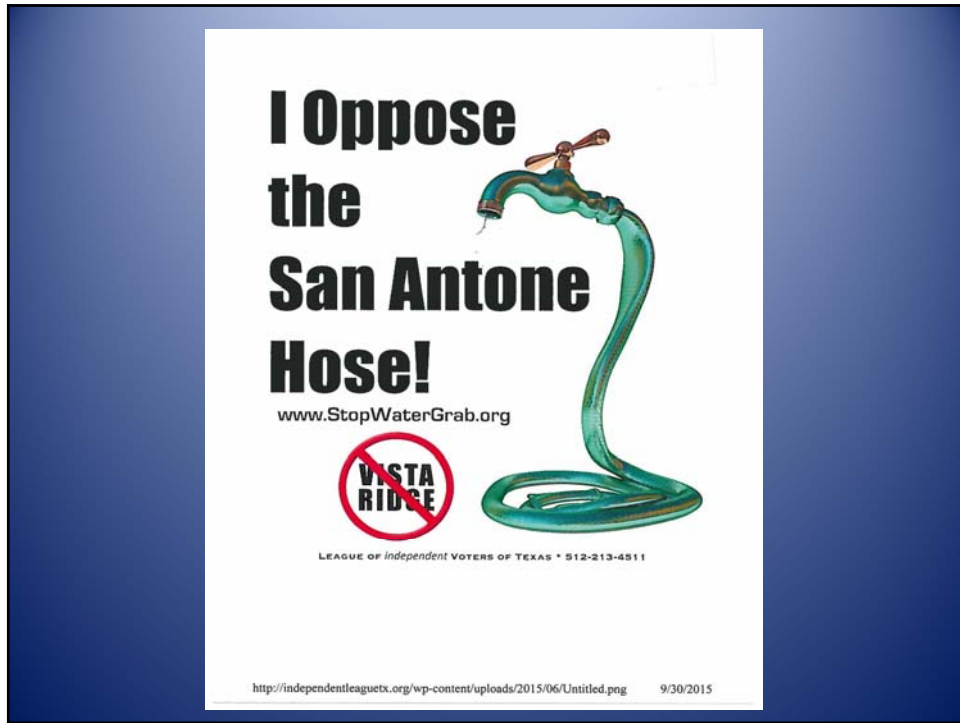
- B. Is the groundwater supply proven?
 - (i) What is the sustainable production capacity?
 - (ii) Is it drought proof?
 - (iii) What is the native water quality?
 - (iv) Is it drought proof?
 - (v) Will drought affect the quality?
 - (vi) What level of treatment is required for the intended use?

Customer-Related Factors

- C. Do you have an identified Customer?
 - (i) Some GCD required demonstrated need
 - (ii) May need for financing
 - (iii) Build it cuz they are coming
 - (iv) Affects project timing

Political Factors

- D. Do you have local support/opposition?



Non-Location Factors

- E. Are you a private person or entity or a governmental or quasi-governmental entity trying to market the water?
- Financing Options – Staying Power
 - Reception from Local GCD
 - Eminent Domain

Non-Location Factors (cont'd)

- F. Do you own/control the acreage needed for the project?
- Do you have access to other utilities necessary to produce the water, *e.g.*, electricity?

Non-Location Factors (cont'd)

- G. What is your legal title to the property?
 - (i) Is the Groundwater severed from the Surface Estate?
 - (ii) Are there any existing rights to use the groundwater, *e.g.*, leases for water use, agriculture and/or oil and gas?

Non-Location Factors (cont'd)

- H. Has the water been permitted?
 - Amendments
 - Transport authorized

Non-Location Factors (cont'd)

- I. Are there any large groundwater projects nearby?
 - Competition for the Aquifer
 - Competition for infrastructure
 - Competition for Market Share
 - Competition for Permits
 - Competition for MAG/DFC Share

Non-Location Factors (cont'd)

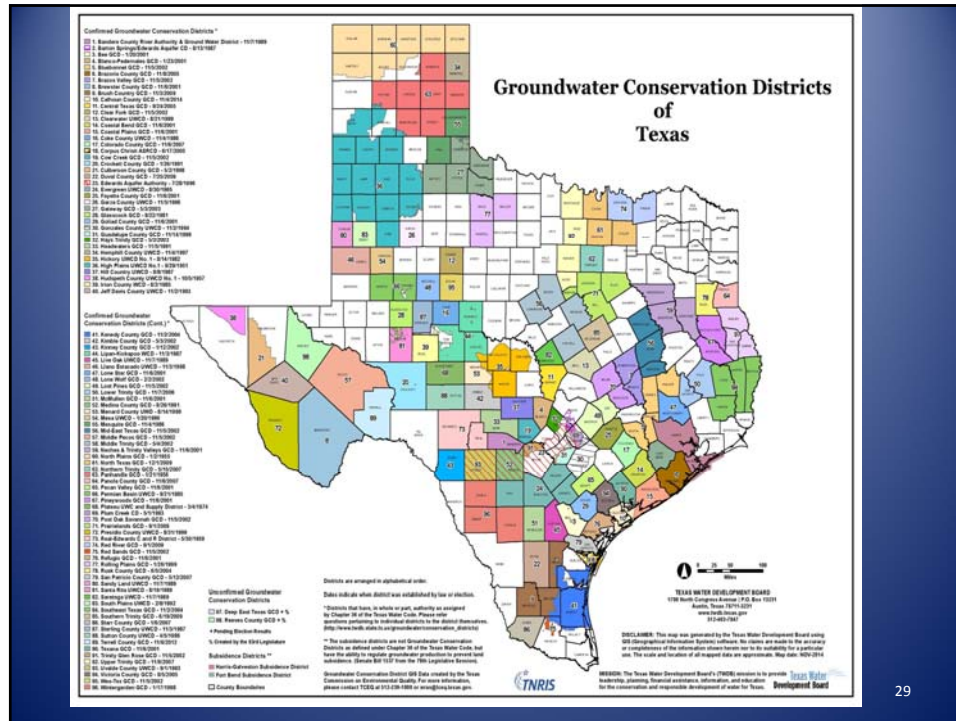
- J. Pricing Considerations
 - Water is the “new oil”
 - Liquid Gold
 - Costs other than royalties
 - lifting/pumping
 - treatment
 - infrastructure to transport
 - permit/export fees
 - What is Fair Market Value

Location Factors

- A. How close are you to your customer and place of use?

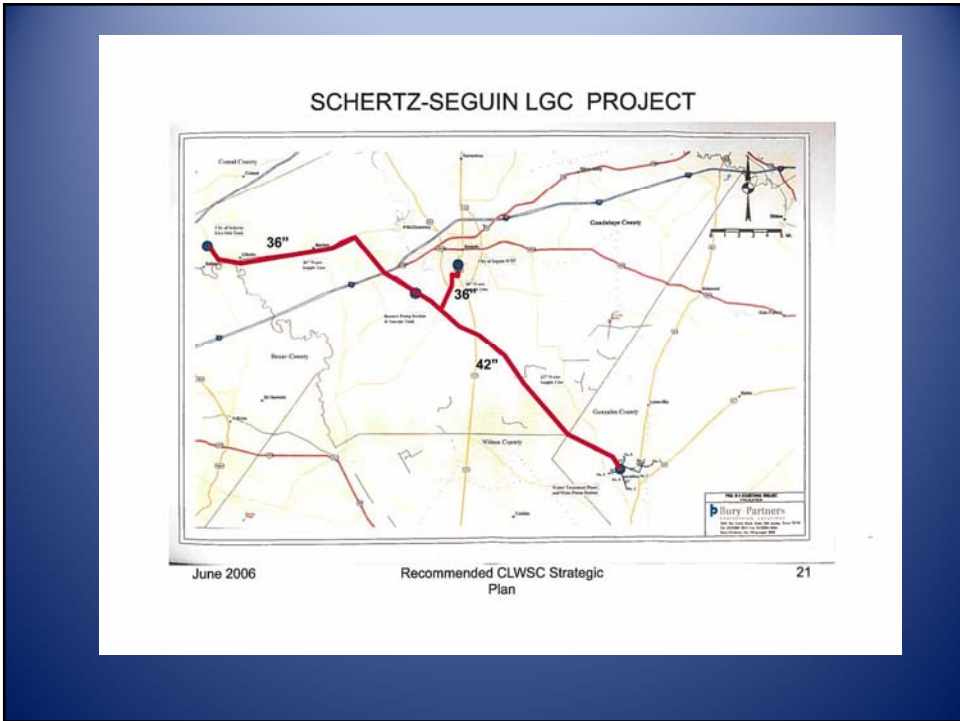
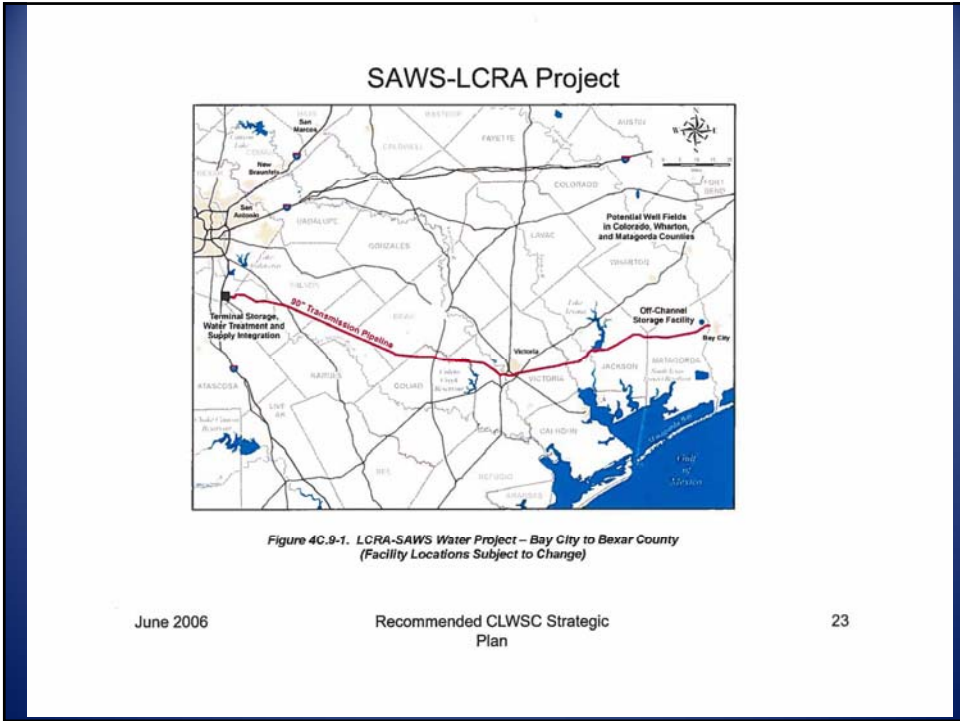
Location Factors

- B. Are you in a District?
- a GCD
 - a Subsidence District or a region susceptible to subsidence
 - ASR District
 - Other District with Jurisdiction



Infrastructure Factors

- A. Do you have access to needed infrastructure?
 - (i) Well Field
 - (ii) Collection System
 - (iii) Treatment System
 - (iv) Storage & pressurization
 - (v) Transmission Pipeline



GBRA Lower Guadalupe Basin Project



Figure 4C.8-1. Increased LGWSP Capacity for GBRA Needs

June 2006

Recommended CLWSC Strategic Plan

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Hays County Pipeline Alignment in 2016 Region K Plan and 2016 Region L Plan

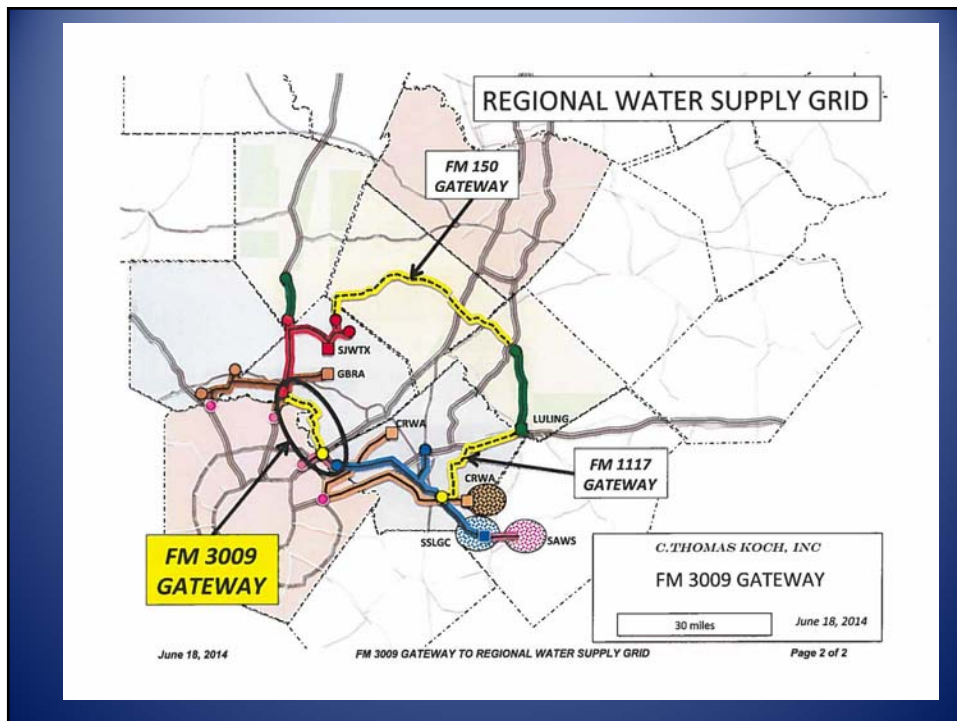
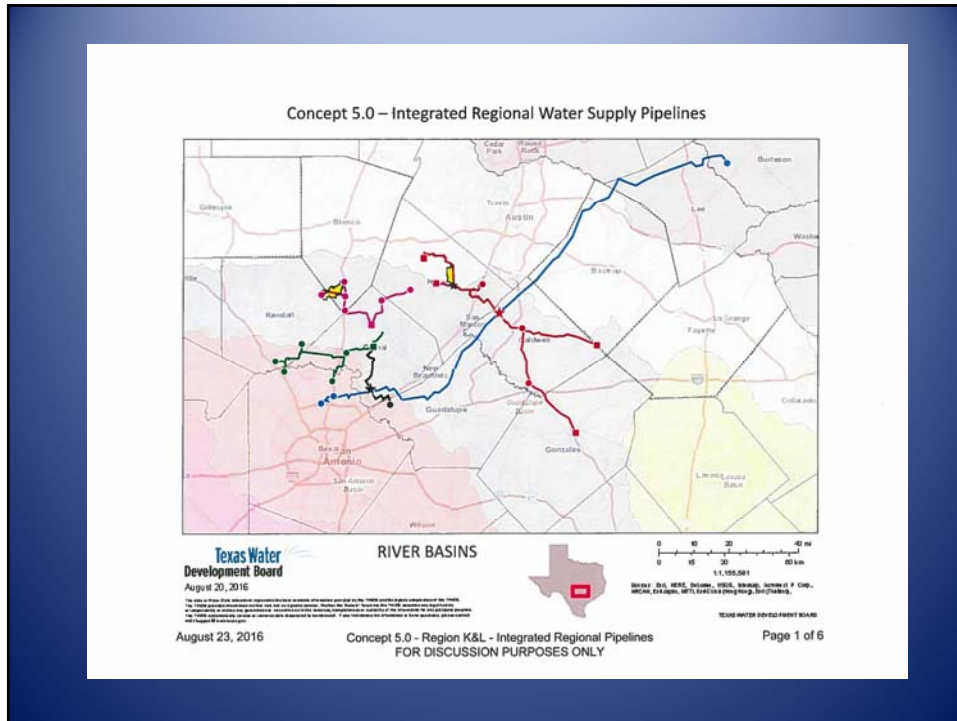


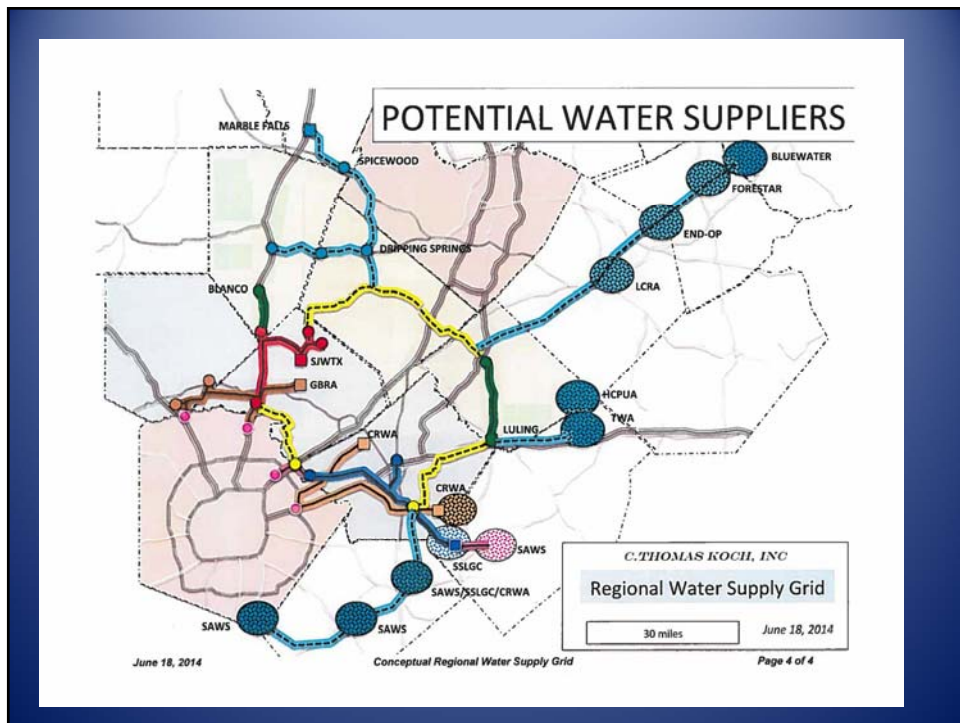
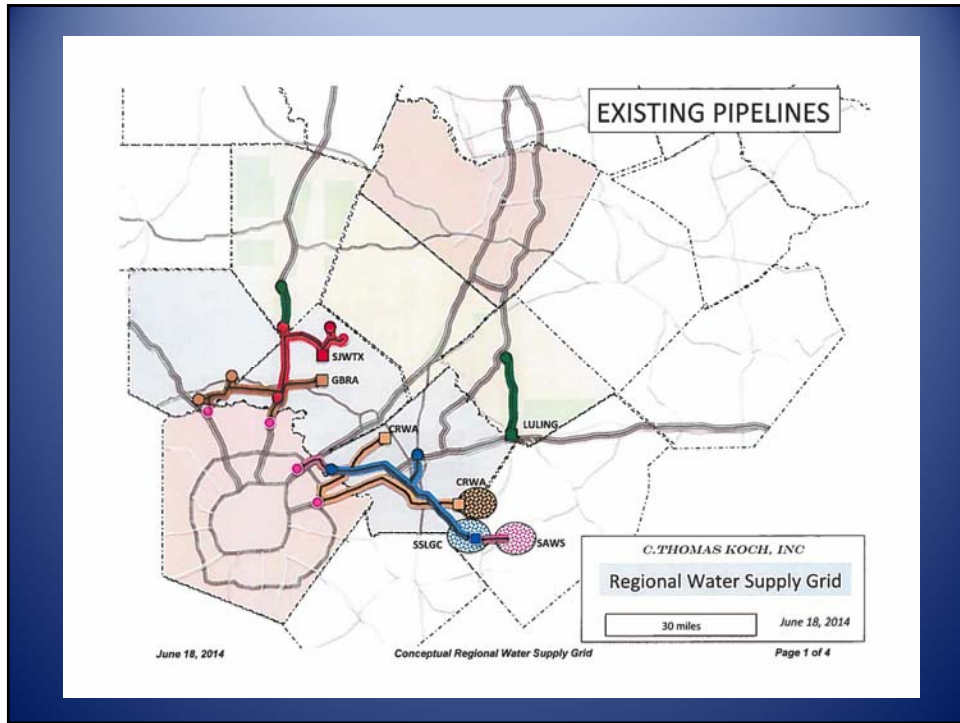
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Texas Water Development Board
October 16, 2016

C. THOMAS KOCH, INC
OCTOBER 17, 2016

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0 4 8 10 KM
1:200,000
BUT NOT DIAL HERE. DELIVER, INSTALL, MAINTAIN, OPERATE & ABANDON. DESIGNER, REVIEWER & APPROVER: SEE DRAWING FOR CHANGES.
TEXAS WATER DEVELOPMENT BOARD





HB 3298/SB 1907 - \$2 million study to develop a water market & conveyance network in the Texas

SECTION 3. STUDY. (a) The board shall conduct a study to evaluate:

(1) improvements to:

(A) the transfer of water entitlements; and

(B) the functioning of statewide and regional water markets; and

(2) the opportunities for and barriers to the potential establishment of a statewide or regional water grid, including an integrated network of natural and constructed works, including pipelines, pumping stations, and reservoirs, for the conveyance of water between and within river basins, water sources, and areas of water use in the state.

HB 3298/SB 1907 – The “Naysayer” Response

“GRIDIZILLA”



