**Look Before You Lease**
**New publication explains groundwater leasing**
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College Station - Groundwater leasing is relatively new, and as is the case of any new endeavor involving people's pocketbooks, scoundrels see a golden opportunity to take advantage of the uninformed.

Judon Fambrough, an attorney at law with the Real Estate Center at Texas A&M University, warns landowners to approach a groundwater lease with great caution. Even when signing up with a reputable water production company, groundwater owners should know how to protect their interests.

"Be very careful what you sign because groundwater production may last for generations," Fambrough says. "Unlike oil and gas wells, which go dry, water wells recharge, making the length of the lease indefinite."

Fambrough suggests the following.

* Be careful to sign a groundwater lease, not a groundwater deed. Many times the wording of a lease and a deed appears similar. The owner may be selling the water rights, not leasing them. Leases, generally "grant, lease and let" to the company the right to explore, produce and sell water for a limited time. Deeds "grant, sell and convey" the water or water rights to the company forever.

* Know the difference between negotiating a lease covenant and a lease condition. If a covenant is breached, the only remedy is to sue for damages. If a condition is breached, the lease terminates automatically. When possible, negotiate lease conditions instead of covenants. To be considered a condition and not a covenant, the provision must state that the lease terminates if a certain event or breach occurs.

* Remember all proposed provisions in the lease are subject to negotiation. The owner's power to negotiate depends on the amount of land owned; the amount, quality and depths of groundwater; and the number of companies vying for the lease.

* Do not feel obligated to accept the first offer the company makes. Remember the first offer the company makes may not be the best offer, especially in terms of lease provisions. For example, the company may pay the same for a lease whether or not restrictions are placed on the depths of production. Landowners might make more money by restricting the depth of the production and allowing for other leases at other depths.

* Avoid ambiguous terms. These may lead to misunderstanding and litigation. For example, some leases require groundwater companies to compensate landowners for "actual damages" to the land. However, no mention is made of how to calculate the damages, when the

damages are due and payable or how to settle damage claims when a dispute arises.

* Make sure that any terms or provisions negotiated by the groundwater owner are in writing and attached to the lease form. Do not accept oral modifications to a lease. Generally, oral agreements are unenforceable.

More specific suggestions can be found in Secrets of Negotiating Groundwater Leases, a 2002 Center publication by Fambrough. This guide takes the reader through each lease provision paragraph by paragraph and notes how certain items may be negotiated in the landowner's favor. Because of the newness of the water production and leasing business, there are few guides like this. The publication can be downloaded for free from the Center's website, **http://recenter.tamu.edu**.

Fambrough explains the differences and similarities between oil and gas leasing and groundwater leasing in this publication. There are no standard groundwater lease forms as there are for oil and gas leases, and much of the terminology and provisions lack legal definitions and precedents, making groundwater leasing riskier.

Fambrough is also the author of Hints on Negotiating an Oil and Gas Lease, a best-selling publication, which is now available for free on the Center's website.

The Real Estate Center at Texas A&M University has been providing solutions through research for more than 30 years. Funded primarily by Texas real estate licensee fees, the Center was created by the state legislature to meet the needs of many audiences, including the real estate industry, instructors, researchers and the general public.