

Chapter 3

Regulatory Dance: Rule of Capture and Chapter 36 District Perspective

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[I]n the fifty years since the Legislature first authorized the creation of groundwater conservation districts . . . [n]ot much groundwater management is going on.

Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75, 81 (Tex. 1999). (Hecht, J. concurring).

Introduction

Groundwater supplied close to half of the water used in the State in 1999.² While groundwater supplies are expected to decrease by 19 percent in the year 2050, the population of Texas is expected to almost double during the same period.³ By 2050, thirteen of the thirty, major and minor, aquifers will show a decline in water in storage.⁴ Groundwater is, and must continue to be, a major source of water for Texas.⁵ Despite the existence of 80 confirmed groundwater districts and 8 groundwater districts awaiting final voter approval,⁶ a significant portion of the State of Texas is still not contained within the boundaries of a groundwater district.

The Texas Supreme Court in 1904 in *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904), adopted the rule of capture as the standard to regulate or, rather, not regulate, Texas groundwater usage. Even after 100 years, this doctrine amazingly is still viable in the parts of

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² Texas Water Development Board, *Water for Texas—2002*, at 38 (January 2002).

³ *Id.* at 25, 38.

⁴ *Id.* at 43.

⁵ *Id.* at 4.

⁶ As of September 1, 2003, the Texas Water Development Board lists on website, <http://www.twdb.state.tx.us/mapping/index.asp>.

Texas outside a groundwater district despite Texas courts' expressions of concern¹ and ridicule from commentators throughout the United States.² Significantly, the Texas Supreme Court in *East* recognized the ability of the Legislature to regulate groundwater and, indeed, over the years the Supreme Court and the Texas Courts of Appeal have invited Legislative intervention.³

In the hundred years since the *East* case, the Texas Legislature has passed several pieces of legislation relating to groundwater regulation. In 1913, the Legislature passed a statute defining and prohibiting waste from artesian wells.⁴ The Legislature in 1931 passed a law authorizing the Board of Water Engineers to promulgate rules to conserve groundwater.⁵ Nevertheless, significant efforts to regulate groundwater production did not occur until 1949, when, in response to concerns over the excessive withdrawal of water from the Ogallala aquifer, the Legislature authorized the creation of underground water conservation districts in the Texas Groundwater District Act of 1949.⁶ Reading the 1949 legislation, it is somewhat surprising, considering the historical lack of aggressive groundwater management by groundwater districts, to find that much of the fundamental authority groundwater districts have today was granted in the original 1949 legislation.⁷ The Act, however, was not a comprehensive approach to groundwater management but rather optional regulation through locally controlled districts. Since the passage of the Act and, after much legislative fine-tuning over the years, criticism continues over the failure of groundwater districts to adequately regulate groundwater production within its jurisdiction. Of course, the areas outside of a groundwater district remain virtually unregulated.

Others in the seminar proceedings are discussing the history and evolution of the rule of capture, alternative methods of regulation of groundwater, and technical issues involved in groundwater regulation. This paper discusses the authority vested in the State and districts to regulate groundwater, and examines court opinions related to groundwater district regulation. The final section makes recommendations for addressing groundwater regulation issues, particularly within groundwater districts.

¹ See *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 78 (Tex. 1999).

² See, e.g., A. Dan Tarlock, *Prior Appropriation: Rule, Principle or Rhetoric?*, 76 N.D.L. REV. 881 (2000) (groundwater resources were initially allocated by a rule of capture out of scientific ignorance); Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?* 17 ST. MARY'S L.J. 1281 (1986) (commenting on need for judicial protection from drainage by other landowners).

³ *Sipriano* at 78; *Pecos County Water Control and Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 507 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

⁴ Act of April 9, 1913, 33d Leg., R.S., ch. 171, §§ 91-95, 1913 Tex. Gen. Laws 358, 378-79 (now codified at TEX. WATER CODE ANN. §§ 11.201-.205 (Vernon 2000)).

⁵ Act of May 28, 1931, 42d Leg., R.S., ch. 261, 1931 Tex. Gen. Laws 5 (now codified at TEX. WATER CODE ANN. ch. 28, §§ 28.001 and 28.011 (Vernon 2000)). Note that although these provisions today relate to protecting groundwater quality, until the Legislature amended §28.011 in 1993, the legislation authorized rulemaking to conserve groundwater. Act of Aug. 30, 1993, 73d Leg., R.S., ch. 914, 1993 Tex. Gen. Laws 3875.

⁶ Act of June 2, 1949, 51st Leg., R.S. ch. 306, § 3(c), 1949 Tex. Gen. Laws 559 (now codified at TEX. WATER CODE ANN. ch. 36 (Vernon 2000 & Supp. 2004)).

⁷ *Id.*

Groundwater and Groundwater District Legislation

In 1985, with the passage of House Bill 2,¹ the Legislature moved Texas closer to more comprehensive local management and regulation of groundwater pumpage than had previously been authorized by the 1949 Act. In general, before 1985, when an area's groundwater problems reached critical mass, the Legislature enacted whatever was politically expedient without regard to legal or management realities. House Bill 2 set up a structure to designate critical groundwater areas and provide economic incentive to create underground water districts.

The 71st Texas Legislature further strengthened the legislation contained in House Bill 2 by adopting changes to what was then chapter 52 of the Water Code which broadened the Texas Water Commission's (now Texas Commission on Environmental Quality) power to designate underground water districts in critical areas.² This legislation provided a method for the Commission to identify critical areas and, if necessary, to determine that an underground water district should be created within the critical areas. While there was still local option to create an underground water district recommended by the Commission, failure to create the district prohibited any use of Texas Water Development Board funds inside the perimeter of the proposed district.³

Significant amendments to groundwater district authority occurred in 1997 with Senate Bill 1⁴ that was followed up with additional legislation in 2001.

Senate Bill 1, among other things, bolstered the critical areas provisions, terming these Priority Groundwater Management Areas ("PGMA").⁵ The Texas Commission on Environmental Quality, along with the Texas Water Development Board, reviews various aquifers and management areas across the State to determine if certain areas are in need of immediate management. If so, these areas are designated as PGMAs. To date, five PGMAs have been designated.⁶ The 1997 legislation also amended provisions relating to state creation of groundwater districts within all or part of a PGMA, apparently in contemplation of more state action creating such districts, although none have yet been created pursuant to this provision.⁷

¹ Act of December 3, 1985, 69th Leg., R.S., ch. 133, § 5.01, 1985 Tex. Gen. Laws 639-652 (now codified in TEX. WATER CODE ch. 35 and ch. 36 (Vernon 2000 and Supp. 2004).

² Act of June 14, 1989, 71st Leg, R.S., ch. 936, § 4, 1989 Tex. Gen. Laws 3981, 3987-94. The Legislature in 1995 repealed Chapter 52 of the Water Code and enacted Chapters 35 and 36 in its place. Act of Sept. 1, 1995, 74th Leg., R.S., ch. 933, § 6, 1995 Tex. Gen. Laws 4701.

³ TEX. WATER CODE ANN. § 52.063 (Vernon 1990). Note that this provision was later amended to state that a political subdivision within one of these areas, where voters approved a district, must be considered for financial assistance from the State. Act of Sept. 1, 1997, 75th Leg., R.S., ch. 1010, § 4.17, 1997 Tex. Gen. Laws 3640, 3641.

⁴ See, e.g., Martin Hubert, *Senate Bill 1: The first big and bold step toward meeting Texas' future water needs*, 61 Tex. B.J. 894 (1998).

⁵ TEX. WATER CODE ANN. §§ 35.001-.013.

⁶ As of September 1, 2003, the Texas Water Development Board lists on website, <http://www.twddb.state.tx.us/mapping/index.asp>.

⁷ See, e.g., TEX. WATER CODE ANN. § 35.008.

The bill also provided for financial assistance to newly confirmed districts not requiring a confirmation election.¹

Senate Bill 1 ushered in a new era of regional planning, and in regard to groundwater districts, required much more comprehensive management plans which address specific management goals and identify specific performance standards and management objectives to achieve these goals.² The district management plans must be consistent with the regional water plans mandated by Senate Bill 1.³

In 2001, in Senate Bill 2, the Legislature, although not adding the kind of broad conceptual changes found in Senate Bill 1, made numerous specific changes throughout Water Code Chapters 35 and 36, many of which strengthen or clarify districts' authority. Senate Bill 2 added to districts' permitting authority the power to impose more restrictive permit conditions on new permit applications and increase use, as long as certain conditions are met.⁴ This legislation also significantly strengthened districts' authority to regulate spacing and production by specifically enumerating several means by which spacing and production may be restricted.⁵ The Legislature also removed the domestic and livestock exemption for wells on tracts of 10 acres or less.⁶ In addition, Senate Bill 2 authorized districts to impose a reasonable fee on groundwater transported out of the district.⁷

Extent of Groundwater District Authority

A groundwater district's authority to regulate is based upon the Texas Constitution, statutes, and police powers. Further, the Texas Constitution, unlike most state constitutions, has a special provision, Article XVI, Section 59, termed the "Conservation Amendment," that provides the Legislature even greater power to regulate specific natural resource areas than the general power to regulate already provided in the Texas Constitution. Among other powers, Section 59 authorizes and, in fact, imposes a duty on the Texas Legislature to regulate both groundwater and oil and gas production.⁸

Authority to regulate, pursuant to these authorities, has long been recognized by the Texas Supreme Court in the regulation of oil and gas production by the Texas Railroad Commission and more recently in the regulation of groundwater.⁹

¹ TEX. WATER CODE ANN. § 36.372.

² TEX. WATER CODE ANN. §§ 36.1071-1073.

³ TEX. WATER CODE ANN. §§ 36.1071.

⁴ TEX. WATER CODE ANN. § 36.113(e).

⁵ TEX. WATER CODE ANN. § 36.116.

⁶ TEX. WATER CODE ANN. § 36.117.

⁷ TEX. WATER CODE ANN. § 36.122(e).

⁸ *Sipriano* at 78. See also *Brown v. Humble Oil and Refining Co.*, 83 S.W.2d 935 (Tex. 1935).

⁹ See, e.g., *Id.*

District Authority Pursuant to Police Powers

All property, including private property, is held, subject to the valid exercise of police powers.¹ These are the powers of the State to protect the health, safety, and welfare of the public.² Regulations made to enforce police powers, although possibly depriving owners of private property the benefit or use of their property to one extent or another, do not affect an unconstitutional taking of property.³ To hold otherwise would, as Justice Holmes declared, relegate the government to regulating by purchase and, thus, render the government ineffective in its necessary role of protecting the public welfare.⁴

How far the government can go, pursuant to police powers, in regulating the use of private property without causing a taking, depends upon the facts of a given situation. The Texas Supreme Court's opinion in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996), is instructive on the use of the police power to regulate groundwater. In *Barshop*, the Texas Supreme Court held the Edwards Aquifer Act, although having some retroactive effect and possibly having an incidental effect on contracts was not unconstitutional for these reasons because the Act constituted a valid exercise of police power. The court found the Act provided that it was "required for the effective control of the [aquifer] to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state" and that the aquifer was "vital to the general economy and welfare of this state."⁵ Based on these legislative findings, the court concluded that the Act is not invalid under the contract clause despite incidental effects on contracts or having some retroactive effect, "because it is a valid exercise of the police power necessary to safeguard the public safety and welfare."⁶ General standards have been established by the U.S. and Texas Supreme Courts regarding the degree of regulation that can occur under the police power before a taking of private property occurs.⁷

¹ *Brown v. Humble Oil & Refining Co.*, *supra* at 941-2 (stating general rule that, "all property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.")

² The Texas Supreme Court in *Brown* explained that, "the police power may be exerted to regulate the use, and where appropriate or necessary prohibit the use, of property for certain purposes in aid of the public health, morals, safety, and general welfare, and that the constitutional limitations form no impediment to its exertion where the enactment is reasonable and bears a fair relationship to the object sought to be attained." *Id.* at 942.

³ *Brown v. Humble Oil & Refining Co.*, *supra* at 942; *See also Ohio Oil Co. v. State of Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729 (1900) (holding state statute restricting waste of natural gas not an unconstitutional taking of property).

⁴ Justice Holmes, in an often quoted passage, declared that, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

⁵ *Barshop* at 634.

⁶ *Id.* at 634-5.

⁷ *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)) *Palm Beach*

Other Constitutional Authority (Conservation, Due Process, Equal Protection)

Besides taking claims discussed above, districts' efforts to manage groundwater face other constitutional challenges. The Texas Supreme Court in *Barshop* addressed a number of constitutional challenges to the Edwards Aquifer Act, in addition to the taking issues. The Court's upholding of this Act will be an important precedent to fend off the likely constitutional challenges to a groundwater district's authority under Chapter 36 to limit production. The Act is far more stringent than Chapter 36 in that, with the exception of domestic and livestock use, it cuts off a new use of groundwater if there has been no historical use on a tract.

In brief, the Edwards Aquifer Act, adopted by the Legislature in 1993 (and amended in various years since) created the Edwards Aquifer Authority and authorized management of the Edwards Aquifer. The original Act, as analyzed by the court in *Barshop* and which remains substantially similar today, set an aquifer wide cap with preference given to existing users. If there was any water remaining to be allocated, it could be permitted to new users. If there was no unallocated water, landowners could only withdraw up to 25,000 gallons per day without a permit under a domestic and livestock exception. Just about every conceivable constitutional challenge to the Edwards Aquifer Act were raised in the *Barshop* case. These include three takings arguments, an equal protection argument, procedural, and substantive due process arguments, ex post facto law, retroactive law, and impairment of contract arguments, two separation of powers, open courts, and trial by jury arguments, and one additional argument that encompassed these final three again. The court rejected each argument in turn and found the Act to be constitutional on its face.

Besides the taking question, the most pertinent constitutional challenge was an alleged violation of equal protection based on the preferential treatment for existing users. Under traditional equal protection legal analysis, landowners are not a suspect class; however, the plaintiffs, consisting of landowners and others, argued that the Act infringed a fundamental right and, therefore, should be subject to strict scrutiny requiring the court to determine if the Act was narrowly tailored to achieve a compelling governmental interest. The court held that property regulation is usually analyzed by the *rational basis* test, a less demanding standard of review, and the Edwards Aquifer Act would be judged on that basis. The court found that the Act had a legitimate purpose in protecting the aquifer and historical uses and that the provisions of the act were rationally related to that purpose.¹

Isles Assoc. v. United States, 231 F.3d 1354 (Fed. Cir. 2000); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (holding landowner did not have a reasonable investment backed expectation to develop densely on small lots in a historically rural area.

¹ *Id.* at 631-32. *Accord Beckendorff v. Harris-Galveston Coastal Subsidence District*, 558 S.W.2d 75 (Tex. Civ. App.–Houston [14th Dist.] 1977) (holding legislative classifications are presumed to be constitutional unless they involve fundamental personal rights or “suspect categories” and are to be sustained upon a simple showing of rational relation to a legitimate State interest), *aff'd*, 563 S.W.2d 239 (Tex. 1978), *Creedmoor Maha Water Supply Corp. v. Barton Springs – Edwards Aquifer Conservation Dist.*, 784 S.W.2d 79 (Tex. App.–Austin 1989, writ denied) (“[A] trial court [is] bound to assume the constitutionality of the statute and the official scheme adopted thereunder by the District, and to sustain that scheme if there could exist a state of facts that justified the classifications adopted therein.”); *See also Groundwater Conservation Dist. No. 2 v. Hawley*, 304 S.W.2d 764 (Tex. Civ. App.–Amarillo), *aff'd*, 306 S.W.2d 352 (Tex. 1957) (holding constitutional provisions still allow the

In *Beckendorff v. Harris - Galveston Coastal Subsidence District*, 558 S.W.2d 75 (Tex. Civ. App.–Houston [14th Dist.] 1977), *aff'd*, 563 S.W.2d 239 (Tex. 1978), a number of groundwater users in the Harris-Galveston Coastal Subsidence District filed suit challenging the constitutionality of the District’s enabling legislation. The users argued that Article XVI, § 59 of the Texas Constitution (Conservation Amendment) does not authorize the creation of subsidence districts, and that the user fee, as well as other parts of the Act, violated their equal protection rights. The court found that since the ultimate purpose of the District was to control flooding, an authorized purpose under Article XVI, § 59, there was no constitutional problem with the District’s creation.¹ Finally, the court held that there was no constitutional equal protection violation in the regulation of production within the boundaries of the District while not providing for the regulation of production in areas outside the District, which the users argued contributed more to the subsidence problem, or from the fact that different wells have different effects on groundwater withdrawal. The court noted that equal protection relates to persons and not to areas, and that states have wide discretion “in determining whether laws shall apply statewide or only in certain counties, the Legislature having in mind the needs and desires of each.”² The court also determined that the Legislature may implement its programs step by step, “adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.”³

Statutory Authority

Chapter 36 of the Texas Water Code provides general statutory authority for regulation of groundwater by districts. Additionally, some districts have specific enabling statutes that provide more regulatory powers. Both sources must be checked to determine a particular district’s specific statutory powers.

To determine whether sufficient statutory authority was provided to an agency, a reviewing court first looks at how the Legislature intended the courts to review an agency’s power. The Texas Supreme Court, in *Sipriano*, emphasized that Water Code § 36.0015 explicitly states that groundwater districts are the State’s preferred method of groundwater management.⁴ This provision implies that the Legislature intended a *broad delegation of authority* to these districts, in order for this preference to be achieved. Such a delegation is significant when evaluating a claim that a particular regulation is not specifically authorized by statute.

Similarly, in light of the debate between private property rights and the need for regulation of groundwater, § 36.002 provides a powerful affirmation by the Texas Legislature of groundwater districts’ broad authority to regulate groundwater use and production no matter what degree of ownership rights landowners may ultimately be found to possess. Section 36.002 states clearly

Legislature the power to adopt any classification it sees fit, provided there is any reasonable basis for the classification).

¹ *Id.* at 80.

² *Id.* at 81.

³ *Id.*

⁴ TEX. WATER CODE ANN. § 36.0015.

that whatever those rights are, they *may be limited or altered by district rules*.¹ While the reasonableness of any particular regulation may depend in large part on the facts, it does not appear that it can be argued that a groundwater regulation affects a taking of private property requiring compensation merely because the regulation, in some manner, limits or alters the use or production of groundwater. Again, this is in accord with the kind of regulatory authority that Texas courts have upheld for many years in regard to oil and gas production.²

Regulations may be tailored to specific aquifer characteristics

How a district regulates should depend in part on the type of aquifer regulated. Chapter 36 expressly authorizes districts to take hydrologic differences into consideration.³ In a high-recharge aquifer district, a production limit goal may be to establish levels of discharge equal to recharge, thus, sustaining water levels in the aquifer.⁴ In a low-recharge aquifer, where any use of groundwater depletes the aquifer, a groundwater district may establish different production limits. This may include, for example, implementing rules to assure that 50 percent of reserves in a very low-recharge aquifer are retained for 50 years as set forth in the Panhandle Water Planning Group's Regional Water Plan.⁵

District authority to regulate groundwater production and consider off-site impacts through rulemaking

Groundwater districts' general rulemaking authority is set forth in § 36.101. Pursuant to this section, a district may limit production based on tract size to conserve, preserve, and protect groundwater and to carry out duties under Chapter 36.⁶ Specifically, authorizing production limits to be based on tract size to achieve a district's conservation goal clearly curtails the rule of capture's doctrine allowing a small tract landowner to produce as much water as a large tract owner. Production limits based in part on surface acreage have been in effect for several decades for oil and gas production.⁷ Additionally, Section 36.101(a) requires that, "[d]uring the rulemaking process the board shall consider *all groundwater uses and needs* and shall develop rules which are fair and impartial (emphasis added)." Arguably, the required consideration of "all groundwater uses and needs" includes the uses and needs of landowners overlying an aquifer that may not currently be permitted or producing any groundwater, as well as the uses and needs of future generations.

¹ TEX. WATER CODE ANN. § 36.002.

² See *supra* discussion on police powers and takings.

³ TEX. WATER CODE ANN. § 36.116(e)(1).

⁴ See Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 Tex. Tech L. Rev. 249, 262 (2001) (stating "the concept of groundwater sustainability has universal appeal, but it has proven to be an elusive concept to implement. Several states have struggled with sustainability issues and have adopted different management strategies for dealing with the problem.")

⁵ See Texas Water Development Board, *Water for Texas—2002* at 86 (January 2002).

⁶ TEX. WATER CODE ANN. § 36.101(a).

⁷ See, e.g., *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940).

Districts authorized to minimize drawdown as far as practicable

Sections 36.116(a)(2) and (e)(2) set forth a variety of specific means by which groundwater districts may limit groundwater production for certain statutorily specified purposes.¹ Section 36.116(a)(2) specifically authorizes a district *to minimize as far as practicable the drawdown of the water table* by setting production limits on wells by rule and limiting production based on acreage, among other things. The concept of minimizing drawdown as far as practicable will have very different applications in high-recharge aquifers than low-recharge aquifers. In high-recharge aquifers, it is reasonable to exercise this authority in a manner that requires that aquifer levels be sustained. In aquifers with virtually no recharge, if any use is to be made of the water, some drawdown will occur. However, in such a situation, the authority to *minimize* drawdown as far as practicable appears to be clear authority for districts to restrict the *rate* of decline in a low-recharge aquifer.

District powers to regulate production through its approved management plan

Since their inception in 1949, groundwater districts have been authorized to develop plans for the management of groundwater within the district.² Amendments to Chapter 36 in Senate Bill 1 required much more specific detail in these plans. These amendments also appear to provide districts significantly expanded rulemaking authority to implement its required plan.³ Before granting or denying any permit, a groundwater district is required to determine whether it is consistent with its management plan.⁴ A particular management plan, therefore, may establish the district policy regarding what types of permits it will and will not issue. This may include permits which deplete an aquifer at a certain rate. By mandating regulation in conformity with a greater plan on a district, regional, and statewide level, this process necessarily nudges districts forward in their regulatory efforts and, hopefully, will encourage regional consistency.

District powers to regulate production through permitting

Significant aspects of groundwater districts' statutory powers are found in provisions regarding its permitting authority. A district "shall consider" in its decision to grant or deny a permit, impacts on (1) groundwater resources, (2) surface water resources, and (3) existing permit holders.⁵ This constitutes an apparently broad delegation of authority to condition and, even deny permits, based on concerns regarding *anticipated off-site impacts* from proposed production. It appears that authority to deny a permit could particularly be exercised in instances where a

¹ TEX. WATER CODE ANN. §§ 36.116(a)(2) and (e)(2).

² Act of June 2, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (now codified at TEX. WATER CODE ANN. ch. 36 (Vernon 2000 & Supp. 2004)).

³ Specifically, Section 36.1071(f) states that, "[t]he district shall adopt rules necessary to implement the management plan." In addition, the Texas Supreme Court in *Sipriano*, in anticipating significant changes in groundwater regulation as a result of Senate Bill 1, arguably has interpreted Senate Bill 1 as giving groundwater districts in 1997 a broad new delegation of power. *Sipriano* at 79-80.

⁴ TEX. WATER CODE ANN. § 36.113(d)(4).

⁵ TEX. WATER CODE ANN. § 36.113(d)(2).

district has developed a written rule outlining what constitutes unreasonable impacts on ground or surface water resources or existing permit holders.

Permits may be issued subject to a district's rules under § 36.113(f).

Perhaps, most significantly, regarding a district's permitting authority, Chapter 36 makes clear that a permit issued by a groundwater district may be later modified by rules adopted by the district. Section 36.113(f) states that permits may be issued subject to the rules of the district. This provision is critical to effective and meaningful groundwater regulation as new studies results of tests and monitoring, changes in management goals, including changes for consistency with regional and state plans, may all require that permits be brought in line with these changes or new information. Again, what is reasonable in terms of modifying permits depends greatly on the facts of the situation.

Under § 36.113(e), districts may impose more restrictive conditions on new permits

Within a district's permitting power, as well, under § 36.113(e) is authority for a district to impose more restrictive conditions on new permit applications and increased use by historical users as long as certain criteria are met.¹ These authorizations obviously allow districts to protect historical use. Such protections have the ability to radically change the way most groundwater districts have regulated production. How a court treats such a regulation, if similar areas have a different approach, will be interesting. An example of how a district with very specific powers to treat existing use differently than new use is the Edwards Aquifer Act.²

Districts specifically authorized to limit rate and amount of withdrawal as condition of permit

Section 36.1131(b)(8) authorizes districts to include in a permit, conditions and restrictions on the rate and amount of withdrawal. This authorizes districts to include in permits, the pumping restrictions authorized under §§ 36.116(a)(2) and (e)(2). Compliance with an annual acceptable decline rate in a low-recharge aquifer is an example of one such restriction.

Districts may not impose more restrictive permit conditions on transporters of groundwater

Groundwater districts, pursuant to § 36.122(a), apparently have authority to consider additional factors in their decision to grant or deny a permit that proposes the transfer of groundwater outside of a district's boundaries.³ However, with the exception of authority to impose a reasonable export fee on water transported out of the district, under § 36.122(c) "the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users."⁴

¹ TEX. WATER CODE ANN. § 36.113 (e).

² Act of Sept. 1, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350-2372.

³ TEX. WATER CODE ANN. § 36.122(a).

⁴ TEX. WATER CODE ANN. § 36.122(c).

Case Law Regarding Groundwater District Regulation

In evaluating the regulatory action of a groundwater district, attacks can be based on constitutional grounds, district creation issues, lack of statutory authority to promulgate a specific rule, or lack of reasonableness of an otherwise valid rule. The constitutional basis for regulation has been discussed above. The cases discussing the remainder of the potential challenges are discussed below.

Challenges to a District's Creation or Authority to Promulgate a Specific Rule

There have been very few cases addressing the subject of the validity of a groundwater district's creation or the propriety of the district's rules. These cases are summarized for your reference:

1. *Board of Water Engineers v. Colorado River Municipal Water District*, 254 S.W.2d 369 (Tex. 1953). CRMWD alleged that the Board of Water Engineers' order creating an underground water district was not supported by substantial evidence, thus the district did not validly exist and all its rules and regulations were void. The Court dismissed the case because CRMWD had permitted seven months to elapse from the time of the order creating the district, and because CRMWD had tacitly recognized the district by having representatives meet with the district's directors.
2. *Bryson v. High Plains Underground Water Conservation District No. 1*, 297 S.W.2d 117 (Tex. 1956). At the request of the district, the trial court permanently enjoined a landowner from producing water from a well without obtaining a permit from the district. The landowner appealed directly to the Supreme Court. In order for the Supreme Court to have jurisdiction of a direct appeal, a question of the constitutionality of a state statute or order of a state board of commission must have been raised in the trial court. Although properly raised and ruled upon by the trial court, the landowner's grounds for appeal did not raise an issue with regard to the constitutionality of the statute. As a result, the Supreme Court dismissed the landowner's appeal.
3. *Ground Water Conservation District No. 2 v. Hawley*, 304 S.W.2d 764 (Tex. Civ. App.—Amarillo, writ ref'd n.r.e.), *aff'd*, 306 S.W.2d 352 (Tex. 1957). A landowner within the district filed suit against the district seeking to have his land of 12,105 acres excluded from the district. The district had denied the landowner's application for exclusion. After institution of the suit another landowner, owning 300 acres, intervened when the district denied his application for exclusion because his land was less than 640 acres. Article 7880-3c provided that only tracts more than 640 acres could not be excluded. The court held that there was no reasonable basis for discriminating against the small landowner and that the statute violated equal protection rights.

4. *Shaddix v. Kendrick*, 419 S.W.2d 908 (Tex. Civ. App.—El Paso 1967), *rev'd*, 430 S.W.2d 461 (Tex. 1968). Resident taxpayers in a district challenged the formation and operation of the district. The trial court held that as a result of an adverse vote in the confirmation election, the district was not validly created. The trial court also held that the debts of the district should be paid pro rata by the county commissioners court of each county within the district. The Supreme Court upheld the trial court's order with regard to the confirmation election but reversed the trial court with regard to the payment of the district's expenses.
5. *Jackson v. Texas Water Rights Commission*, 512 S.W.2d 696 (Tex. Civ. App.—Beaumont 1974, no writ). Landowners challenged the validity of an order of the Texas Water Rights Commission creating an underground water district. The case was dismissed for mootness after a majority voted against confirmation of the district.
6. *Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation District No. 1*, 538 S.W.2d 659 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.). An owner of an irrigation well sued for a declaratory judgment regarding enforcement of a district's order that he close or re-equip his well so the well could not produce more water than allowed by the district's spacing rules. The district's order was issued nearly seven years after the district granted a permit for the well authorizing production in excess of the spacing rules. The court rejected an argument that the district was barred by the statute of limitations, laches, and estoppel to enforce the spacing rules. The court held that underground water districts stand on the same footing as counties and that neither the statute of limitations, laches, nor estoppel was available to prevent enforcement of the order.
7. In *Creedmoor Maha Water Supply Corp. v. Barton Springs – Edwards Aquifer Conservation Dist.*, 784 S.W.2d 79 (Tex. App.—Austin 1989, writ denied), the Austin Court of Appeals sustained both the constitutionality of the legislation creating the Barton Springs – Edwards Aquifer Conservation District and the District's rules. The court found the fees to be charged to support the District constitutional, that is, they were not a tax, but rather were fees reasonably related to the regulation of groundwater within the district.¹ The court also found the classifications between levels of water users to be neither arbitrary nor unreasonable. *Id.* at 82.

Reasonableness of a District's Rule

Whether a groundwater regulation that is otherwise valid is a reasonable exercise of a district's regulatory authority is ultimately decided by the courts based upon an assessment of the facts in

¹*Accord Beckendorff v. Harris-Galveston Coastal Subsidence District*, 558 S.W.2d 75, 82 (Tex. Civ. App.—Houston [14th Dist.] 1977), *aff'd*, 563 S.W.2d 239 (Tex. 1978) (user fee was a regulatory measure because district's enabling legislation contemplated regulation of groundwater production to be achieved in large part by conditioning the issuance of annual permits upon payment of fee).

a particular situation. A regulation facing judicial review is required to meet a reasonable basis test under the substantial evidence rule. Challenges solely to the reasonableness of a regulation are very difficult to win. As can be seen below, with one exception, these opinions reflect judicial deference to agency decisions and support for groundwater regulation. The one exception, *High Plains*, appears to be an aberration, more likely the result of the bad facts for the district than of a trend away from judicial deferral to a groundwater district.¹

Substantial evidence test requires that a groundwater district's actions have a reasonable basis to withstand judicial review

Water Code § 36.253 establishes that judicial review of any law, rule, or order of a groundwater district is governed by the substantial evidence rule as defined under the Administrative Procedure Act.² In a substantial evidence review, the Texas Supreme Court in *Railroad Commission v. Torch Operating Co.*, 912 S.W.2d 790 (Tex. 1995) has held that “[t]he issue for the reviewing court is not whether the agency reached the correct conclusion, but rather whether there is some reasonable basis in the record for the action taken by the agency.”³

At dispute in *Torch Operating Co.* was whether the Texas Railroad Commission had authority to exempt an operator from temporary field rules based on lack of notice when Commission rules did not specifically require notice.⁴ The court examined whether substantial evidence existed in the record to support the agency’s decision. Regarding this review, the court explained that, “[t]his is a limited standard of review that gives *significant deference* to the agency in its field of expertise (emphasis added)”⁵ and does not allow a court to substitute its judgment for that of the agency. The court further explained that, “[s]ubstantial evidence requires only more than a mere scintilla, and ‘the evidence on the record actually may preponderate against the decision of the agency and, nonetheless, amount to substantial evidence.’”⁶ Regarding whether the record provided a reasonable basis for the agency decision, the court held that, “[g]iven the *circumstances* in this case, it was not unreasonable for the Commission to determine that [the leaseholder’s] rights were materially affected by the proposed temporary field rules, and that [the leaseholder] was therefore entitled to notice of the hearing (emphasis added).”⁷

¹ How a court would interpret statutory authority, when uncertain, should depend upon how a district interprets the statute. The court in *Beckendorff v. Harris-Galveston Coastal Subsidence District*, 558 S.W.2d 75, 82 (Tex. Civ. App.—Houston [14th Dist.] 1977), *aff’d*, 563 S.W.2d 239 (Tex. 1978) held in the instance of a subsidence district, like groundwater districts created pursuant to the Conservation Amendment, that, “where the meaning of the provisions of an act is unclear the interpretation given them by the administrative agency charged with its implementation is entitled great weight.”

² Importantly, under § 36.253, the challenged law, rule, order, or act is deemed *prima facie* valid and the burden of proof is on the petitioner.

³ *Id.* at 792.

⁴ *Id.* at 790-1.

⁵ *Id.* at 792.

⁶ *Id.* at 792-3.

⁷ *Id.* at 793.

High Plains justice—court finds a groundwater district’s actions unreasonable

The *South Plains Lamesa Railroad v. High Plains Underground Water Conservation District No. 1*, 52 S.W.3d 770 (2001) case provides an example of what happens when a district acts in a fashion that a court finds to be unreasonable. In this case, after a permittee had drilled and equipped a well at a cost of \$30,000, the district passed a motion revoking the permit and, upon the applicants’ re-filing of an application that remedied the alleged deficiencies, denied the new application “to prevent a disproportionate taking of water.”¹ The district’s action in revoking and denying a permit were found to be improper by the *High Plains* court, as the district’s rules contained no provisions that would authorize denial or revocation of a permit because a well would produce a disproportionate amount of water.² In addition, the court held that: the action of the District prohibiting “a disproportionate amount of water to be pumped as it relates to tract size” was not otherwise authorized by statute because (1) such authority was not clearly authorized by the Legislature, (2) the statute did not provide reasonable standards to guide the District in exercising its powers, (3) the District was not authorized to deny a permit to prohibit the pumping of a disproportionate amount of water to be pumped as it relates to tract size based upon its alleged discretionary power.³

Justice Quinn, in a concurring opinion, made it clear that the court did not consider the *actions* of the district reasonable. The Judge further explained that:

[The District’s] Rule 8 said nothing about a minimum number of acres needed to obtain particular well permits. So, to use that factor as a basis to revoke a permit *already issued* and deny another application pending issuance constitutes a deprivation of fundamental fairness.⁴

Again, the determination of reasonableness ultimately turned on the facts. The fact that the district had issued a permit and allowed the permittee to spend \$30,000 in completing a well and then revoked the permit, as can be gleaned from Justice Quinn’s concurring opinion, offended the court’s sense of justice. It is important to note that, in 2001, the Legislature made significant amendments to the Water Code authorizing districts to regulate groundwater production on tract size, and these make much of the analysis in *High Plains* irrelevant.⁵ It must be observed as well that some of the analysis and conclusions in the *High Plains* opinion has dubious value as precedent. No writ was filed for the *High Plains* case, so there is no indication of approval of its analysis by the Texas Supreme Court. The court also may have been guided more by a desire to do justice in a particular instance, than conducting a completely fair analysis of groundwater districts’ statutory authority. For example, the *High Plains* court concluded that, pursuant to § 36.002 recognizing landowners’ rights in groundwater, the rule of capture was the *favored* public policy and thus groundwater could not be otherwise regulated in absence of “reasonable

¹ *Id.* at 774.

² *Id.* at 778.

³ *Id.* at 778-79.

⁴ *Id.* at 782.

⁵ See above discussion on district authority to regulate under Chapter 36 of the Water Code. Districts now have express authority to regulate production on tract size.

standards to guide the agency.”¹ The court’s assertion in *High Plains* appears to be at odds with the more express statement of public policy that groundwater districts are the Legislature’s preferred method of groundwater management, as affirmed by the Texas Supreme Court in *Sipriano*. Additionally, the court in the *Comanche Springs* case recognized that, contrary to the *High Plains* court, the rule of capture gave way to a correlative rights concept in a groundwater district.²

Despite the explicit legislative preference for management by districts, rather than by the rule of capture or otherwise, the court in *High Plains* appears to take the position that, without very clear statutory authority, a district cannot regulate in a manner contrary to the rule of capture. In this regard, the court appeared to find support for its narrow reading of a district’s authority by referring to the statutory powers of types of water districts designed for utility provision having very limited regulatory power, instead of the powers of a regulatory agency, invoking the police powers. A groundwater district is primarily a regulatory agency equivalent to the Railroad Commission, albeit with a smaller territorial jurisdiction. An administrative agency has such powers as are expressly granted or are necessarily implied to effectuate the objectives of those powers expressly granted.³ In determining the validity of a rule, a court must give consideration to all applicable sections of its enabling authority, not just one particular section.⁴ Texas court have held that, “[t]he determining factor . . . whether . . . a particular administrative agency has exceeded its rule-making powers is that the rule’s provisions must be in harmony with the general objectives of the Act involved.”⁵ The court in *Beckendorff* held in the instance of a subsidence district, like groundwater districts created pursuant to the Conservation Amendment, that, “where the meaning of the provisions of an act is unclear the interpretation given them by the administrative agency charged with its implementation is entitled great weight.”

¹ The court in *High Plains* acknowledged that pursuant to § 36.002 in effect at that time any ownership rights in groundwater were “subject to the rules promulgated by the district,” however the court concluded that, “the statute does not establish reasonable standards to guide the agency in exercising its rule making power as applied to the expressed public policy favoring the rule of capture.” *Id.* at 780.

² The court in *Pecos County Water Control and Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.) explained that, “[i]n the field of oil and gas correlative production was created by specific statutory authority, which authority expressly recognizes the ownership of the surface owner and merely regulates the production of said oil and gas and is therefore administrative in nature. There is no similar statute in this field except such as is found in those permitting creation of a water district.”

³ See, e.g., *Stauffer v. City of San Antonio*, 344 S.W.2d 158, 160 (Tex. 1961) (City Civil Service Commission); *Sexton v. Mount Olivet Cemetery Ass’n*, 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ ref’d n.r.e.); *State Board of Insurance v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App.—Austin 1982, writ ref’d n.r.e.) (“an agency can adopt only such rules as are authorized by and consistent with its statutory authority.”); *Dallas County Bail Bond Bd. v. Stein*, 771 S.W.2d 577, 580 (Tex. App.—Dallas 1989, writ denied) (holding an agency’s authority to promulgate rules and regulations “may be expressly conferred on it by statute or implied from other powers and duties given or imposed by statute.”); *Railroad Comm’n v. Atchison, Topeka*, 609 S.W.2d 641, 643 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.); See also *State v. Jackson*, 376 S.W.2d 341, 344 (Tex. 1964); *Stauffer v. City of San Antonio*, 162 Tex. 13, 344 S.W.2d 158, 160 (1961); *Dallas County Bail Bd. v. Stein*, 771 S.W.2d at 580; *Gerst v. Oak Cliff Savings & Loan Ass’n*, 432 S.W.2d 702, 706 (Tex. 1968) (“The only requirement is that an agency’s rules must be consistent with the laws of this state.”).

⁴ *Gerst v. Oak Cliff Savings & Loan Ass’n*, 432 S.W.2d 702, 706 (Tex. 1968).

⁵ *Id.*; *State Board of Insurance v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App. 1982).

The Texas Supreme Court has stated the test for reviewing the validity of administrative rules as follows:

Courts must uphold “legislative” administrative rules if they are reasonable. The rules need not be, in the court’s opinion, wise, desirable, or even necessary. [1 K. Davis, *Administrative Law Treatise*, § 5.05 (1958)]. Such rules need only be based on some legitimate position by the administrative agency involved. *Day v. United States*, 611 F.2d 1122 (5th Cir. 1980). Moreover, courts will presume that facts exist which justify the rules’ promulgation. *Texas Liquor Control Board v. Attic Club, Inc.*, 457 S.W.2d 41 (Tex. 1970).

The Rule at issue is a “legislative” administrative rule because it is based on a grant of legislative power. 1 K. Davis, *supra*, at § 5.03. *Bullock v. Hewlett-Packard Co.*, 628 S.W.2d 754 (Tex. 1982).

When a regulatory agency is exercising its police power, the presumption of existence of facts is further strengthened where the regulation is adopted after notice and hearing.¹

In light of the broad powers given to a district in the first place in issuing permits, it would be virtually impossible for the Legislature to list all the factors that a board could consider when deciding whether to require a permit. The most obvious ones are set out in Chapter 36. So long as the district’s rules provide adequate standards for the board to consider when exercising its discretion and the district’s action is otherwise defensible, a court in the future should not have such a constrained view of a district’s regulatory powers.

The *High Plains* court’s analysis of the district’s authority pursuant to § 36.113(d)(2) particularly seems to miss the mark. This section, at that time, required a district in granting or denying a permit to consider whether the proposed use of the water unreasonably affected existing groundwater and surface water resources.² The court interpreted narrowly the district’s authority under the provision, finding it “not applicable because it is concerned with the proposed use of water and not the size of the tract where the well is located.”³ Setting aside the unfortunate actions of the district, a broader interpretation of the authority under § 36.113(d)(2) would conceivably provide districts the power to deny an application to produce a significant amount of groundwater from a small tract based on unreasonable effects to existing groundwater resources. A supporting rationale would arguably be that, if numerous small tract landowners produced disproportionately large amounts of groundwater, the total impact might unreasonably affect groundwater resources in an aquifer.⁴

¹ *Texas Liquor Control Board v. Attic Club, Inc.*, 457 S.W.2d 41, 43-44 (Tex. 1970).

² In 2001, the Legislature added the requirement that districts also consider existing permit holders.

³ *Id.* at 781.

⁴ The court in *Beckendorff v. Harris-Galveston Coastal Subsidence District*, 558 S.W.2d 75, 81 (Tex. Civ. App.—Houston [14th Dist.] 1977), *aff’d*, 563 S.W.2d 239 (Tex. 1978), held that “[a]n individual’s action may be lawfully regulated when it works in concert with others’ actions to produce an effect, even though the individual action of itself would be incapable of producing the effect, or is de minimus.”

In a still more constrained reading of this provision, the court stated that this requirement “does not apply because water withdrawal may be limited to prevent waste, but prevention of waste was not the basis of the district’s action.”¹ The court’s language suggests that production limits could *only* be for the purpose of preventing waste. The opinion failed to mention the district’s authority to regulate production for *other* purposes, including minimizing drawdown of the aquifer, which would appear to be particularly applicable and which the court earlier in its opinion had recognized as a valid reason for restricting production.² Production limits based on tract size are a practical means for limiting production and, thus, minimizing drawdown. This basis had been commonly used for several decades in oil and gas regulation in conjunction with other factors. The court’s analysis here seems to also say that a permittee can cause unreasonable effects on groundwater or surface water as long as they do not cause waste.

Railroad Commission production limits upheld by U.S. Supreme Court

Of interest regarding a determination of reasonableness of groundwater districts’ actions, particularly regarding the setting of production limits, are two U.S. Supreme Court decisions, which determined that field proration schemes issued by the Railroad Commission did not constitute a violation of due process rights under the Fourteenth Amendment. These are *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 60 S.Ct. 1021 84 L.Ed. 1368 (1940) (herein “*Rowan I*”), and *Railroad Commission v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 61 S.Ct. 343 85 L.Ed. 358 (1940) (herein “*Rowan II*”). The Court in *Rowan I* specifically noted that the “reasonable basis” requirement for proration schemes in the Texas statute opened up the same inquiry resulting from the claims under the Due Process Clause.³ In *Rowan I*, the Railroad Commission had issued rules that had given a greater allowable to marginal wells, many of which were on smaller tracts, on the basis that, without the allowable, it would not have been economical to even drill the marginal well. The production limits in the proration scheme were based in part on amount of surface acreage and in part on an allowable issued by the Commission. The alleged result of the greater allowable for marginal wells was that wells on small tracts could essentially produce the same amount of oil as wells on larger tracts; a situation which the larger tract leaseholders claimed was confiscatory. The Court noted conflicting expert opinion on the effects of the exception for marginal wells and ultimately concluded that, “[i]t is not for the federal courts to supplant the Commission’s judgment even in the face of convincing proof that a different result would have been better.”⁴ In *Rowan II*, the Commission had adjusted its proration scheme and added factors which took into consideration “two other factors—bottom hole pressure and the quality of the surrounding sand of the wells . . .”⁵ The Court again gave deference to the expertise of the Commission declaring that: “[t]he real answer to any claims of

¹ *Id.*

² Regarding § 36.116 the court stated, “[t]his section authorizes a district to provide for well spacing and regulation of production to (1) minimize the drawdown of the water table or (2) the reduction of artesian pressure (3) to control subsidence or (4) to prevent waste.” *Id.* at 777.

³ *Id.* at 584.

⁴ *Id.*

⁵ *Rowan II* at 573.

inequity or to any need of adjustment to shifting circumstances is the continuing supervisory power of the expert commission.”¹

Should Texas courts give the same level of deference to groundwater districts and their methods of setting well production limits as given by the U.S. Supreme Court to actions of the Railroad Commission in its *Rowan I* and *Rowan II* opinions, then groundwater districts would apparently have broad authority to regulate production by various means.

Recommendations

Numerous gaps persist in the Texas groundwater regulatory scheme. Recently, Professors Kaiser and Skillern have identified three critical areas of concern in Texas groundwater law related to the effects of the rule of capture: well interference, aquifer over-drafting, and aquifer mining.² In describing these areas of concern, these commentators observed that, “[m]ost well interference problems arise when high-capacity commercial, irrigation, and municipal wells are located near lower-capacity domestic wells.”³

The consequences of over-drafting include progressively higher water costs, subsidence, and water quality degradation.⁴ In addition, aquifer mining reduces the State’s options when responding to dry spells and drought and may impact future economic opportunities.⁵ In most instances, groundwater districts can alleviate these problems if they are created in areas of concern. Nevertheless, there is room for improvement in the legislation authorizing groundwater districts and the State’s general approach to groundwater district regulation. Some areas for consideration that have been identified are discussed below.

Further Support for Creation of Additional Districts or Annexation to Existing Districts and Additional Guidance for Consistency

Groundwater districts are increasing, but are still a patchwork quilt over Texas. The Legislature may want to consider providing further support for the establishment of additional groundwater districts or annexation of areas having groundwater supplies into existing districts. With more districts, there will be an even greater patchwork quilt of district rules than now. For this reason and for the sake of consistency among similarly situated districts, the Legislature may want to provide guidance to districts by setting forth both the statutory powers and duties of groundwater districts in more detail.

¹ *Id.* at 577.

² Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 255-58 (2001) (stating “[o]ver-drafting of aquifers is a significant Texas problem. This condition results from withdrawing water from an aquifer at a rate faster than its natural, or artificial, recharge rate. If this practice continues for a long period of time or, if the aquifer has limited or little recharge, over-drafting is called mining.”)

³ *Id.* at 255.

⁴ *Id.* at 257.

⁵ *Id.*

More Authority to Districts for Protecting Other Landowners from Drainage

Currently, Chapter 36 of the Water Code lacks sufficient guidance regarding the extent that groundwater districts can protect landowners¹ from unreasonable effects of drainage by others' wells on adjacent or nearby property, especially landowners not currently using their groundwater rights. Chapter 36 does require districts in the permitting process to consider whether a proposed use unreasonably affects existing permit holders, but provides no further direction regarding what constitutes an unreasonable effect and what action a district may take if it determines unreasonable impacts exist. While district regulation of production or aquifer depletion provides ancillary benefits to non-producing landowners, there may be a limit to district rulemaking to provide this protection. This objective may be accomplished by districts simply by providing explicit authority to consider unreasonable impacts on other landowners, whether currently producing or not, and authority to take reasonable and appropriate action in setting production limits through the planning, rulemaking, and permitting process which are reasonably protective of other landowners' continuing access to groundwater, if such protection is possible. More radical approaches may be to authorize compulsory pooling or field unitization.

Provide More Explicit Authority to Districts for Regulating Depletion in Low-Recharge Aquifers

One approach to more extensive regulation in low-recharge aquifers is to have a state or regional policy developed after local and regional input to establish depletion targets. Another approach may be more specific legislative support to districts for depletion management of low-recharge aquifers, in addition to existing authority that include production limits and management plan implementation.

Authorization to Require Mitigation to Offset Impacts

The Legislature may want to consider providing clear authorization for mitigation to offset impacts of particular types of high impact projects comparable to the Texas Commission on Environmental Quality mitigation requirements for surface water projects.

Further Clarify District Authority to Apply New Regulations to Existing Uses

In Chapter 36 of the Water Code, the Legislature has authorized districts to issue permits subject to the district's rules. Despite the fact that districts have issued permits which are explicitly subject to the districts rules, especially regarding depletion, permittees in districts continue to argue that a district cannot require additional production limitations or requirements. If existing wells or production amounts are off limits to imposition of production limits, it may make it impractical for a district to properly respond to changed circumstances, or implement the State-mandated planning process. The Legislature may want to further clarify districts' authority in applying new regulations to existing uses, especially in fulfilling management objectives required to be developed and implemented under the State-mandated planning process.

¹ References to "landowner" herein include landowners and their assigns.

Expressly Provide that Chapter 36, along with the Rulemaking Authority Provided, Should be Interpreted Broadly

The Legislature may want to assist a broad interpretation of district authority by stating *explicitly* in Chapter 36 that districts' powers pursuant to that chapter are to be interpreted *broadly* and that the delegation of rulemaking authority by the Legislature to groundwater districts is to be considered a broad delegation, including rulemaking required to effectuate district management plans.

Protection of Springflows and Prevention of Federal Intervention in Groundwater Regulation

Many believe there is a need, through groundwater regulation, to protect springflows, especially when necessary to prevent federal intervention under the Endangered Species Act. Threat of such intervention is reported as a factor in the establishment of the Edwards Aquifer Authority.¹ Besides the Edwards Aquifer Act,² Chapter 36 may be interpreted to have a similar intent in its requirement that a district, in granting or denying a permit, consider impacts on surface water resources.³ Undeniably, in some areas, groundwater pumpage negatively impacts springflow and, as a result, affects surface water rights and the environment. Protection of springflows from some aquifers, however, may be very difficult.

Authority to Prevent Waste of Groundwater Needs Clarification

In *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955), the Texas Supreme Court, interpreting a statute restricting the use of artesian well water, upheld the transportation of groundwater in a watercourse even though up to 74% of the groundwater produced was lost in transit. Significant transportation and storage losses of groundwater impact groundwater resources in the district of origin because much more groundwater must be extracted to deliver the same amount of water. Some proposed projects may lead to serious groundwater waste, particularly groundwater from aquifers being mined.⁴ Groundwater districts may already have the authority to prevent such waste,⁵ however, further clarification will ensure that another scenario like that litigated in *Corpus Christi* is prevented or to prevent unnecessary restrictions when the aquifer is not being mined. For areas still currently outside any groundwater district,

¹One article noted that, "[t]he Federal district court opinion also included threats of federal intervention if Texas failed to change State law to control water use in the Edwards Aquifer." *McCleskey*, *supra* at 219.

² Act of Sept. 1, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350-2372.

³ See TEX. WATER CODE § 36.113(d)(2) (Vernon Supp. 2004).

⁴ The Star-Telegram reported, for example, that a representative for Mesa Water, Inc. stated they, "could build a pipeline from its planned Roberts County well field to a location on the Brazos, releasing water into the river north and west of Possum Kingdom Lake." Bob Cox, *Pickens' Water Plan is Getting Attention*, FT. WORTH STAR-TELEGRAM, Nov. 26, 2003, at <http://www.dfw.com/ml/dfw/business/7358165.htm>.

⁵ See Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281 (1986).

either a statutory prohibition against such waste needs to be adopted or areas susceptible to this type of groundwater transportation need to be included within a district.

District Regulation of Transportation Should be Clarified

Section 36.122 regarding transportation of groundwater out of district, as a whole, is highly convoluted, and a district's practical authority under this statute needs clarification. Under § 36.122(f), the Legislature requires districts to consider additional factors in reviewing a proposed transfer of groundwater out of districts. Despite the authority to consider, among other things, the "projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the district,"¹ the statute does not permit a district to "impose more restrictive permit conditions on transporters than the district imposes on in-district users."² Thus, if a district does find under § 36.122(f)(2) that a "proposed transfer" negatively impacts aquifer conditions or permit holders, the district has no additional authority to address the special impacts. It would appear that the Legislature should authorize a different treatment for a transfer if a district finds that a proposed transfer would have a unique and negative impact in a district. This finding should serve as a rational basis under the State and Federal Constitutions for regulating that transfer in a manner different from in-district uses not causing such impacts.

Changing the Big Picture—A Job for a Select Legislative/Executive Committee?

In terms of bigger changes, several commentators have recommended more sweeping reforms based upon a review of groundwater management systems used in other states which include correlative rights, reasonable use, and prior appropriation systems, among other things. Various forms of these systems have been recommended for implementation in Texas over the years, based upon an examination of the effectiveness in other states and the compatibility with Texas current regulatory scheme. This issue requires careful study. For example, in many parts of the State, adoption of a form of regulation based on land ownership, such as reasonable use or correlative rights, could cripple municipal and industrial groundwater users that have wells on small tracts of land. These types of issues are of such a complex nature that they may be beyond the ability of a fast-paced legislative committee to handle. The Governor, Lt. Governor, and Speaker of the House may wish to establish a select groundwater committee to take up this subject. Such a committee should include a broad based group of legal and technical experts and stakeholders so that a well reasoned analysis can be provided that fairly assesses where Texas needs to go.

¹ TEX. WATER CODE § 36.122(f)(2).

² TEX. WATER CODE § 36.122(c).

Conclusion

The need for groundwater regulation in Texas is manifest and becomes more urgent with each passing year. Despite increasing numbers of groundwater districts in Texas, many areas of the State are still outside of any district boundary and are essentially subject only to the rule of capture. If these areas are to benefit from the evolving public policy to protect groundwater supplies, then it would be prudent to include these areas within a groundwater district.

Where there are districts, the Legislature has vested in groundwater districts significant authority to regulate production. If groundwater districts are indeed the Legislature's preferred method of groundwater regulation, the Legislature may quiet some of the unnecessary disputes by placing district authority to regulate in certain manners beyond any doubt, as recommended herein. The need for such action is urgent, and is better taken now rather than in the midst of a water crisis when harsh restrictions on groundwater production may become a necessity.