WALKING ON WATER
A JUDGE'S GUIDE TO THE COMING CONTENTIOUS ISSUES ABOUT WATER

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To date, trial courts in Texas have had little involvement in the esoteric world of groundwater regulation. As the State grows, however, the demand for water will correspondingly grow. Surface water is unavailable by law to serve needs beyond the river basin in which it exists, leaving groundwater as the only currently viable option to meet the State's growing needs. As demand pressures increase and resources dwindle, the regulatory bodies charged with parsing out groundwater will come under greater scrutiny, with the likelihood of litigation increasing in a direct proportion to that demand. Simply put, expect lawsuits. The purpose of this paper is to acquaint judges with the type of suits to expect and the procedural and substantive issues surrounding those suits.

I. THE BASICS

Groundwater conservation districts are the State's preferred method of managing groundwater.[2] Currently, there are 98 GCDs in the state, covering virtually all major and many minor aquifers. Each GCD has its own management plan, a document that sets out the overarching management goals and principals of the district. Each GCD also has its own rules, the devices by which a GCD actually regulates groundwater uses within the district. Pursuant to Section 36.101, a GCD has the power to make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells. The degree to which districts adhere to the rulemaking provisions of the Water Code, their own rules and the law generally will likely be the focus of future litigation.

Most GCDs manage groundwater by issuing permits to users within the district. Each district has its own processes for applying for and granting permits to drill wells, to produce water from those wells, and to export water from the district. The degree to which districts adhere to the permitting requirements of the Water Code, their own rules and general legal principles will likely become the subject of future litigation.

[1] The author gratefully acknowledges the able assistance of Timothy C. Williams in revising the substance and citations in this paper.
[2] TEX. WATER CODE § 36.015.

Notwithstanding the existence and separateness of the 98 GCDs, the Legislature has required that the GCDs sharing a "groundwater management area" (or "GMA") to engage in "joint planning," including the establishment of "desired future conditions" for the aquifers within the management area.[3] Based on these DFCs, the TWDB calculates an amount of "managed available groundwater" for the districts of the GMA.[4] In turn, the MAG value becomes the basis for issuing permits to produce water. Accordingly, users in a district will pay great attention to the DFC process. Challenges to the DFCs will likely wend their way into trial and appellate courts at some point.

Finally, and as a related issue, because groundwater is a vested real property right, the regulation of groundwater will be subject to legal principles relating to reasonableness of that regulation both per se and as applied to individual landowners. While only a few takings claims have been reported in the groundwater area, the courts should anticipate more claims as regulation becomes more stringent.

II. CHALLENGES TO RULE MAKING

As noted above, the 98 different GCDs have 98 different sets of rules. A comprehensive analysis of all those rules is a daunting task and will not be undertaken here. Generally, however, every GCD will provide in its rules a methodology to promulgate rules. Panhandle Groundwater Conservation Districts, one of the state's oldest, has rules relating to the rule-making process. Rule 10.8 of the PGCD rules demonstrates that the procedures spelled out for rule-making are fairly simple and should not provide any basis for challenge unless the district simply fails to follow the steps set forth in Section 36.101, relating to rule making. Under that section, a district must give notice of a rulemaking hearing at least 20 days ahead of time and must make the proposed rules available for inspection by the public.[5] Districts are given wide latitude as to how a rulemaking hearing is conducted,[6] but must comply with the notice provisions of Section 36.101. However, under Section 36.101(k), the legislature provides that failure to give notice does not invalidate an action taken by a district at a rulemaking hearing.[7]

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[3] TEX. WATER CODE 36.108.
[4] TEX. WATER CODE 36.108(o).
[5] TEX. WATER CODE § 36.101(d).
[6] TEX. WATER CODE § 36.101(f).
[7] TEX. WATER CODE § 36.101(k).

Is there any valid challenge to a district's rulemaking procedures? The legislature could have, but did not, make the Administrative Procedure Act ("APA")[8] applicable to groundwater district rulemaking. Because the legislature failed to specify any parameters for challenging GCD rules or rulemaking, judicially created scope of review cases provide the basis for such challenges. These would include "validity" and "applicability" challenges.[9]

A "validity" challenge tests a rule on procedural and constitutional grounds, including whether the district has the statutory authority to promulgate the rule.[10] Several possible judicial challenges can be envisioned. First, a rule might be challenged on procedural grounds to the extent that the rulemaking procedure itself failed to afford plaintiff a reasonable opportunity to be heard. Given the provisions of Section 36.101(k), however, merely failing to notify the plaintiff of a rulemaking hearing might not be sufficient to sustain a challenge. It is well settled, moreover, that procedural due process principles in the U.S. and Texas constitutions do not grant the general public a right to be heard by public bodies making decisions of policy.[11]

On the other hand, it is likewise held that rulemaking must be a rational exercise of power, so that an attack on the factual basis of a rule as well as the means chosen to fulfill its goal or objective is facilitated through due process.[12] The Texas Supreme Court has indicated that an individual may challenge the rationality and factual basis of a rule under the Due Process Clause.[13] This issue becomes more pertinent with respect to the activities of a GCD in setting DFCs, a subject explored in more depth below.

A validity challenge to GCD rules could be predicated on the argument that the GCD promulgated a rule that exceeded its statutory authority.[14] Recall that the Water Code gives GCDs the power to manage groundwater by production limits based on tract size or by spacing of wells. Some GCDs have ventured beyond these basic tools, fashioning rules that attempt to manage groundwater based on such factors as decline in saturated thickness of the aquifer at the

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[8] TEX. GOV'T CODE § 2001.001, *et seq*.
[9] TEX. GOV'T CODE § 2001.038(a).
[10] *City of Alvin v. P.U.C.*, 143 S.W.3d 872 (Tex. 2001); *see also* Beal, *Texas Administrative Practice and Procedure, Section* 3.4, (Lexis Law Pub. 2009).
[11] *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915).
[12] Beal, *supra* note 9, § 4.8.2.
[13] *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935 (Tex. 1935).
[14] *See City of Alvin v. P.U.C. of Tex.*, 143 S.W.3d 872. 878 (Tex. App.—Austin 2004, no pet.) ("The scope of a validity challenge also includes whether the agency had statutory authority to promulgate the rule.").

well bore. Whether such management schemes will pass a validity test remains to be litigated, but the Water Code makes no mention of such a tool.

From a constitutional standpoint, district rules could be challenged on validity grounds if those rules, on their face, violate the constitutional rights of the persons to which they apply. For example, a GCD could pass a rule that only landowners of a particular race or ethnicity could be granted production permits within the district. Obviously, such a rule could not withstand constitutional scrutiny. On a more subtle level, a district could promulgate a rule that only persons who were producing groundwater during some historical period could produce groundwater from their property in the future, leaving all others without any right to produce. Such a rule would violate the constitutionally protected property rights of those left out. Validity challenges are therefore "broad stroke" challenges questioning the facial validity of a rule; such rules are invalid regardless of the particular circumstances of the individual plaintiff.

An "applicability" challenge does not question the validity of a rule, but seeks a judicial declaration regarding the application of the rule to a particular fact situation.[15] A potential example from the groundwater perspective could involve a GCD rule saying that wells must be set back from a property line at least 500 feet. Such a rule would not be invalid on its face and serves a legitimate management purpose. But suppose a landowner owns a strip of property only 750 feet wide and 5 miles long. The rule as applied would prevent the landowner from drilling any wells on his property because he cannot meet the set back requirements. As applied to this landowner, the rule would deprive him of his right to produce water from his land.

Under Section 36.124 of the Water Code, a rule promulgated by a GCD is presumed to be valid and to have complied with applicable statutes and rules if three years have passed since the effective date and no lawsuit to annul the rule has been filed. This three year "statute of limitations" on rules does not apply if the rule was void at the time it was passed. Accordingly, a "validity" challenge would not be barred under Section 36.124.[16] The question becomes whether an "applicability" challenge would be barred after three years. Assume the landowner with the 750 foot wide property bought it four years after the rule was passed requiring a 500 foot set back. Presumably, the owner purchases with knowledge of regulatory requirements, so that the application of the three year limitation on suits would likely withstand scrutiny.

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[15] *Id*; Beal, *supra* note 9, § 4.1, fn 10.
[16] TEX. WATER CODE § 36.124.

A suit challenging a district rule may be brought under Section 36.251 of the Water Code, which provides that a person "affected by and dissatisfied with" any rule or order made by a district is entitled to file suit against the district to challenge the validity of the law, rule or order.[17] The suit must be filed in a county in which the district or any part of it lies. Pursuant to Section 36.252, a suit under Section 36.251 must be "advanced for trial and determined as expeditiously as possible."[18] Most importantly from a GCD perspective, the challenged rule or order is deemed prima facie valid, and the review in governed by the substantial evidence rule "as defined by Section 2001.174, Government Code."[19] Because the substantial evidence rule permeates trial court actions under the Water Code, it will be dealt with separately, below.

Finally, the Water Code provides for attorneys fees to be awarded to the district if a suit against it is unsuccessful, but not the other way around.[20] This substantial disincentive to suits may explain the dearth of decisions relating to groundwater matters.

III. CHALLENGES TO PERMIT DENIALS

Permits to drill wells or produce groundwater are where the rubber meets the road in terms of GCD interaction with the users and producers of groundwater. Under Section 36.113 of the Water Code, districts must require a permit for drilling, equipping, operating or completing wells.[21] Accordingly, every GCD that has promulgated rules will have specific rules relating to permitting. Many GCDs implement permitting rules that mirror the provisions in Section 36.113(c). That particular section lays out a veritable road map for what may be required in a permit application. It should be noted, however, that many GCDs require much more information than that designated in Section 36.113(c). The question remains whether the list in Section 36.113(c) is exclusive or whether it is merely illustrative.

Section 36.113(d) specifies seven (7) criteria that a GCD must consider before granting or denying a permit.[22] Again, the question is whether the criteria set forth in this particular

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[17] TEX. WATER CODE § 36.251.
[18] TEX. WATER CODE § 36.251.
[19] TEX. WATER CODE § 36.253.
[20] TEX. WATER CODE § 36.066(g).
[21] TEX. WATER CODE § 36.113.
[22] TEX. WATER CODE § 36.113(d). Section 36.113(d) requires the district to consider whether (1) the application conforms to the requirements prescribed by the chapter and is accompanied by the prescribed fees; (2) the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders; (3) the proposed use of water is dedicated to any beneficial use; (4) the proposed use of water is consistent with the district's certified water management plan; (5) if the well will be located in the Hill Country Priority Groundwater Management Area, the proposed use of water from the well is wholly or partly to provide water to a pond, lake, or

section amount to an exclusive list of considerations, or whether a GCD may consider matters outside this list in denying a permit.

This is not merely an academic issue. Some ambitious districts require multiple applications, such as an application to drill a well, an application to produce from the well, and an application to export, if that is the purpose of the well. Further, several districts have expanded the scope of factors that may be considered by the district before granting a production permit. For example, one notable district has expanded the list from seven (7) factors to seventeen (17).[23] Further, many districts impose additional requirements on permits if the groundwater is to be exported from the district. For example, some districts require as a condition precedent to granting an export permit that the applicant demonstrate: "[t]here is insufficient water available, or approximate to, the proposed place of use to substantially meet the actual or projected demand at the receiving area during the proposed term of the groundwater export permit."[24] This leaves the district in the position of second-guessing the city to which water will be transported, *i.e.*, does that city really have a need for the water it is buying? One might surmise that any city willing to spend the large amount of money needed to acquire water and the infrastructure to deliver it has already crossed the bridge of deciding it needs water. In any event, this type of added provision in district rules could give rise to litigation claiming a district exceeds its authority if it denies a permit on the basis that it decided the receiving city doesn't need water.

Further, several conservation districts have imposed a requirement on export permits that the applicant demonstrate that it has an actual project in the form of a water supply contract already secured.[25] Again, none of the above requirements are mentioned in Section 36.113 of the Water Code, but no litigation has yet determined the validity of these additional requirements.

In terms of challenges regarding the denial of permits, Section 36.114 of the Water Code indicates that each GCD must determine whether a hearing on a permit application is required. For applications requiring a hearing, the Water Code specifies that a hearing shall be held within

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reservoir to enhance the appearance of the landscape; (6) the applicant has agreed to avoid waste and achieve water conservation; and (7) the applicant has agreed that reasonable diligence will be used to protect groundwater quality and that the applicant will follow well plugging guidelines at the time of well closure. *Id.*

[23] See Rules of Hemphill County Underground Water Conservation District at Rule 5.118. The Hemphill district is a single county district with virtually no groundwater production, but has rules in excess of 100 pages, for which the district paid over $60,000.00.

[24] Rules of Hemphill County Underground Water Conservation District at Rule 5.609(12).

[25] Rules of Hemphill County Underground Water Conservation District at Rule 5.609(16).

thirty five (35) days after the setting of the date of the hearing and that the district shall act on the application within sixty (60) days after the date the final hearing on the application is concluded.[26]

Section 36.401 and following of the Water Code set out certain required notice and hearing processes with respect to applications for permits.[27] Under the Water Code provisions, GCDs are generally allowed to have a hearing on a permit application before granting or denying the application. These hearings must result in a report,[28] and upon receipt of that report, the board can act on the application. Pursuant to Section 36.416, a district may contract with the State Office of Administrative Hearings (SOAH) to conduct permitting hearings.[29] Section 36.418 of the Water Code specifically states that the Administrative Procedure Act does not apply to a hearing on an application for a permit.[30] On the other hand, Section 36.418 also states that a district may adopt rules establishing procedures for contested hearings consistent with subchapters C, D and F of Chapter 2001 of the Government Code. Most GCDs have in fact adopted rules providing for contested case hearings.

Subchapter C of the Texas Government Code Section 2001, beginning at Section 2001.051, specifies the general procedures for contested case hearings.[31] Again, most GCDs have either adopted procedures by reference or have adopted rules mimicking Subchapter C. Because Subchapters C and D of Section 2001 of the Government Code provide for important procedural and substantive due process protections, a litigant in a contested case hearing may choose to appeal the result of that contested case hearing to a trial court. This is, of course, where trial courts get involved.

The first question for a trial court when presented with an appeal from a contested case hearing is to determine whether the decision in the contested case is final. Under Section 2001.144 of the Government Code, a decision in a contested case is final on expiration of the time for filing a motion for rehearing if one has not been filed, or when the motion for rehearing is either overruled by a specific order or by operation of law.[32]

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[26] TEX. WATER CODE § 36.1132(f).
[27] TEX. WATER CODE § 36.401, *et. seq.*
[28] TEX. WATER CODE § 36.410.
[29] TEX. WATER CODE § 36.416.
[30] TEX. WATER CODE § 36.418.
[31] TEX. GOV'T CODE § 2001.051, *et. seq.*
[32] TEX. GOV'T CODE § 2001.144.

The second question a trial court must answer is the scope of judicial review available from an appeal from a contested case hearing. Under Section 2001.172, the scope of judicial review in a contested case is as provided by the law under which review is sought.[33] Currently, Chapter 36 of the Water Code does not specifically designate the type of review applicable to an appeal from the denial of a permit in a contested case hearing. Accordingly, Section 2001.174 of the Government Code provides a default to the substantial evidence rule as the scope of review.[34]

So, what is the role of a trial court in connection with review of a contested case decision under the substantial evidence rule? According to Section 2001.174 of the Government Code, a court may not substitute its judgment for the judgment of a GCD on the weight of the evidence on questions committed to the GCD.[35] However, the court may reverse the result of a contested case if the 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;

B. to the agency's statutory authority;

C. made through unlawful procedures;

D. affected by other error of law;

E. not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole;

F. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[36]

Thus, it appears a substantial evidence review bears remarkable similarity to a review concerning validity of a rule. Clearly, if the decision of a GCD in a contested case hearing exceeds the statutory authority granted to districts in general, the trial court may reverse the decision. Likewise, if the application of GCD rules to the applicant results in violation of constitutional rights, the trial court may and should reverse the contested case determination.

A more gray area is presented in a challenge that the decisions of a GCD are not reasonably supported by substantial evidence. Here, the provisions of Section 2001.175 become pertinent. That section provides the procedures for review under the substantial evidence rule.

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[33] TEX. GOV'T CODE § 2001.172.
[34] TEX. GOV'T CODE § 2001.174.
[35] *Id.*
[36] *Id.*

The first step is to receive a certified copy of the entire record of the proceeding under review.[37] Either party may then apply to the court to present additional evidence.[38] The trial court must be satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the GCD.[39] Finally, a trial court must conduct the substantial evidence review sitting without a jury.[40] The court is confined to the record from the GCD except to the extent the court receives evidence of procedural irregularities alleged to have occurred before the GCD that are not reflected in the record.

Once a trial court determination has been made with respect to the result of the contested case hearing, a party may appeal the court's judgment under Section 2001.901 in the manner provided for civil actions generally.[41]

The fundamental concept with respect to a substantial evidence review is that the district court may only determine the validity or invalidity of the decision made in the contested case hearing. A court may not vacate the result of the contested case hearing and render judgment, nor may it modify an order or ruling in such a way that the court is directing the GCD to take specific action.[42] A trial court has no authority to vacate a GCD judgment which was determined to have exceeded the district statutory authority.[43] Simply put, the court has the power to review the legal conclusions of the GCD for errors of law and the power to review its findings of fact for support by substantial evidence.[44]

Summarizing, in an appeal from a contested case hearing before a groundwater conservation district, the trial court sits as though it were an appellate court. There is no jury, and the parties are confined to the record made at the contested case hearing, unless the court allows supplementation. The court may affirm the agency decision, or it may reverse the district decision if the district has made an error or law. The trial court may also reverse the district decision if the record from the contested case hearing does not substantially support the decision. As to the meaning of "substantial evidence," the rule is generally stated in terms that a court may

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[37] TEX. GOV'T CODE § 2001.175(a).
[38] TEX. GOV'T CODE § 2001.175(b).
[39] *Id.*
[40] TEX. GOV'T CODE § 2001.175(e).
[41] TEX. GOV'T CODE § 2001.901.
[42] *City of Stephenville v. Texas Parks and Wildlife Department*, 940 S.W.2d 667 (Tex. App.—Austin 1996, no pet.); *City of Allen v. P.U.C. of Tex.*, 161 S.W.3d 195 (Tex. App.—Austin 2005, no pet.).
[43] *In Re: Edwards Aquifer Authority*, 217 S.W.3d 581 (Tex. App.—San Antonio 2006, orig. proceeding).
[44] *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied).

not substitute its judgment on a finding of fact adopted by the district.[45] The court specifically must assume that the factual findings of the district are supported by substantial evidence, and the burden is on the appellant/plaintiff to demonstrate to the contrary.[46] Even if the trial court believes that the weight of evidence actually preponderates against the district's findings, these findings will not be disturbed if there is more than a mere scintilla of evidence to support them.[47] The test is not whether the district reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken.[48]

All the above discussion regarding the substantial evidence ruling as it applies to contested case hearings before groundwater conservation districts assumes that the provisions of the Government Code relating to appeals from contested case hearings apply. This assumption does not, however, find much root in Chapter 36 of the Water Code. Chapter 36 is in fact silent regarding the specific appellate remedies available to a disappointed permit applicant.

IV. ENFORCEMENT OF RULES BY GCD'S

Another type of action relating to groundwater regulation that might find its way into a trial court relates to enforcement of rules by a groundwater conservation district. Section 36.102 of the Water Code provides that a groundwater district may enforce its rules against any person by injunction, mandatory injunction or other appropriate remedy in a court of competent jurisdiction.[49] Thus, a groundwater conservation district might seek to enjoin a party from producing water from a well that has not been registered or for which a permit has not been issued. A groundwater conservation district might seek a mandatory injunction requiring a groundwater producer to place a meter on a well consistent with a district's rules regarding meters.

Under Section 36.102(b), a GCD has authority to set civil penalties against producers for breach of a rule of a district. Such penalties may not exceed the modest sum of $10,000.00 per day per violation, with each day of a continuing violation constituting a separate violation.[50] Thus, a GCD might institute an action to enjoin production from a well having no permit, and may couple the injunction action with a claim for civil penalties.

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[45] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198 (Tex. 2002).
[46] *City of El Paso v. P.U.C. of Texas*, 883 S.W.2d 179 (Tex. 1994).
[47] *Railroad Commission v. Torch Operating Co.*, 912 S.W.2d 790 (Tex. 1995).
[48] *City of El Paso*, 883 S.W.2d at 185.
[49] TEX. WATER CODE § 36.102.
[50] TEX. WATER CODE § 36.102(b).

Aside from producing without a permit, a producer might exceed production limits set by a GCD. Again, a GCD might bring an action in a trial court against such producer, claiming that every day of production in excess of applicable production limits constitutes a violation for which a civil penalty of up to $10,000.00 per day could be requested.

Section 36.102 of the Water Code does not provide for any specific type of action or review. Accordingly, ordinary rules of procedure and evidence presumably govern any such action.

As noted previously, under Section 36.066(g) of the Water Code, a person bringing suit against a district may be required to pay the district's attorney's fees.[51] No comparable provision exists requiring a GCD to pay attorney's fees in an unsuccessful enforcement action under Section 36.102.

V. DFC APPEALS

As previously noted, the legislature in Section 36.108 provided a requirement that districts in a groundwater management area jointly plan the desired future conditions of the aquifers within their GMA.[52] This joint planning process results in the establishment of specific desired future conditions for each aquifer. The DFC process is spelled out in some detail in Section 36.108. That same section spells out two (2) avenues of appeal from DFC determinations, one with the TECQ and the other with the TWDB. What is not clear under Section 36.108 is the nature of the determinations made by either TECQ or TWDB, or the availability or type of appeal from the determinations of those state agencies.

An initial question might be whether an appeal to a district court is either contemplated or appropriate with respect to the DFC process. Some argue that DFCs amount to no more than rules or policy decisions for which review should be narrowly circumscribed. However as is noted above, the establishment of DFC's leads to a calculation of managed available groundwater. Once this MAG calculation is made, districts are circumscribed in terms of the permits that can be issued relating to that managed available groundwater. Accordingly, although DFCs have some policy aspects, they also have regulatory implications.

The anomalous position of DFCs as both rules and regulations was noted by the Sunset Advisory Commission in its report on TWDB. There, the Sunset Advisory Commission noted:

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[51] TEX. WATER CODE § 36.066(g).
[52] TEX. WATER CODE § 36.108.

> Desired future conditions serve both as a planning and regulatory mechanism. Desired future conditions are joint decisions by locally run districts as to the planned condition of their aquifers in the future, which the legislature requires to be used in the water planning process (as discussed in Issue 2). The process also has regulatory components on two levels. First, the DFC serves as a regulatory mechanism at a district level, as statute requires districts to issue permits up to the managed available groundwater determined by the DFC. Second, the process has quasi-regulatory hoops that GMA's must jump through at the state level. Statute requires action by GMA's to develop DFC's by certain time frames and provides appeal mechanisms for evaluating the reasonableness and implementation of these decisions.
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> Despite these regulatory underpinnings, the [TWDB]'s process does not lead to a clear administrative conclusion as is common in other regulatory approaches. Without the ability to finally resolve petitions of the reasonableness of DFC's, the State cannot ensure the fundamental fairness of the process-especially for those harmed to seek redress. Because of the link between DFC's and district permitting decisions, the DFC can directly affect the amount of groundwater available for use by landowners, current and potential permit holders, RWPG's, and other districts beyond the GMA. Those affected risk being deprived of basic due process protections for harm they suffer as a result of the desired future conditions. These protections are standard in other administrative processes. [53]

Again, Chapter 36 is silent concerning any appeal from the decisions of TWDB or TCEQ regarding the establishment of DFCs. Nevertheless, Chapter 6.241 of the Water Code specifically provides that persons affected by a ruling, order or decision of the TWDB may file suit in a Travis County District Court to set aside that decision, order or ruling.[54] One such suit has been filed.[55] In that particular case, the plaintiff/appellant argued that it had been affected by a refusal of TWDB to set aside an unreasonable DFC established by the districts of a groundwater management area. TWDB filed a plea to the jurisdiction, arguing that Section 36.108's appellate provisions did not give TWDB any authority to force groundwater districts to change the DFC's established by them, even if TWDB found them to be unreasonable. Agreeing with that analysis, the Travis County District Court dismissed the suit. In an ironic twist, TCEQ dismissed an appeal from the same DFCs on the basis that TWDB had already made a binding decision.

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[53] *Sunset Advisory Commission, Commission Decisions regarding Texas Water Development Board*, pgs. 30, 31 (Dec. 2010).

[54] TEX. WATER CODE § 6.241.

[55] *See Mesa Water, L.P. v. Texas Water Development Board*, Cause No. D-1-GN-10-000819, in the 201st District Court in and for Travis County, Texas.

Will appeals from DFC's reach trial courts in the future? Several bills have been filed in the current legislative session addressing this issue. Senator Hegar has filed Senate Bill 660, essentially tracking the Sunset Advisory Commission's decisions and recommendations. Under that bill, appeals from the establishment of DFC's would go directly to a trial court in the county in which a district lies in whole or in part, and such appeals would be determined according to the substantial evidence rule. The deficiency in Senate Bill 660 is that Section 36.108 is not otherwise modified to provide the type of record necessary for a meaningful substantial evidence review. Section 36.108 currently does not provide any kind of contested case hearing regarding the reasonableness of an established DFC. The essence of a substantial evidence appeal is that the evidence that is being reviewed has been subjected to the tests of due process, *i.e.*, the right to confront and cross examine witnesses, the right to bring forward a party's own witnesses, the right to object to irrelevant or incompetent evidence and so forth.[56] Without these procedural safeguards, a substantial evidence review is meaningless.

A similar bill, House Bill 1755, would take appeals of the reasonableness of DFC's directly to a trial court for a trial de novo. Obviously, in this type appeal, the parties would be entitled to a jury if properly requested, and the standard rules of procedure and evidence would be applicable.

While it is difficult to predict the results of the current legislative session in terms of appeals from DFC's, it seems clear that Section 36.108 will be amended in such a way that reasonableness appeals will no longer go to TWDB, and it is likely that no such appeals will be routed to TCEQ. It would accordingly appear that trial courts might get this piece of business.

VI. TAKINGS CLAIMS

Another category of groundwater litigation likely to be seen by trial courts in the future is litigation claiming that groundwater conservation district actions have resulted in a taking of private property for either public or private purposes and without compensation. It is not the purpose of this paper to explore all the subtleties and ramifications of takings claims. Rather, the purpose is to discuss the few takings claims that have been asserted with respect to groundwater, and to delineate the manner in which similar claims might find themselves in a trial court.

[56] *Beal*, *supra* note 9, § 9.3.6, pg. 9-66.

Only a pair of cases have broached the subject of takings in the groundwater context. One is *Barshop v. Medina County Underground Water Conservation District.*[57] There, landowners filed a declaratory judgment action asserting that the Edwards Aquifer Act was facially unconstitutional because it deprived them of property rights in underground water.[58] Generally, the Edwards Aquifer Act imposes an aquifer wide cap on water production. The total amount of water permitted was allocated by determining the amount of water produced during a specified historical period. Simply put, if landowners were producing water during the historical period, they could continue producing prorated amounts under the new caps. On the other hand, landowners who were not producing groundwater during the historical period were denied permits to produce anything other than domestic and livestock amounts.[59] Plaintiffs in the Barshop case were not historical users. They challenged the Edwards Aquifer Act itself as being facially unconstitutional; their challenge was not whether the act was unconstitutional when applied to a particular landowner. Accordingly, the Barshop plaintiffs were required to establish that the statute, by its terms, always operates unconstitutionally. The Texas Supreme Court held that plaintiffs did not meet that burden. In so holding, the court noted:

> Assuming without deciding that Plaintiffs possess a vested property right in the water beneath their land, the State still can take the property for a public use as long as adequate compensation is provided. The act expressly provides that the Legislature "intends that just compensation be paid if implementation of the act causes a taking of private property or the impairment of a contract in contravention of the Texas or Federal constitution." Based on this provision in the Act, we must assume that the Legislature intends to compensate plaintiffs for any taking that occurs. As long as compensation is provided, the act does not violate Article I, Section 17.[60]

Thus the Barshop decision does not hold that a landowner can never assert a valid taking claim related to regulation of groundwater.[61] It simply holds that the EAA, on its face, is not unconstitutional because it provides for compensation for takings if they occur.[62]

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[57] 925 S.W.2d 618 (Tex. 1996).

[58] *Id*. at 623. It should be noted that the Edwards Aquifer Act is statutorily separate from Chapter 36 of the Water Code; that separateness may or may not have a bearing on the validity of future takings claims against the Edwards Aquifer authority.

[59] Domestic and livestock amounts are statutory defined as no more than seventeen point five (17.5) gallons per minute, or approximately twenty five thousand (25,000) gallons per day.

[60] *Barshop*, 925 S.W.2d at 630-31 (internal citations omitted).

[61] *Id*.

[62] *Id*.

The prospect of a takings claim is also raised in a case currently pending before the Texas Supreme Court, *Edwards Aquifer Authority v. Day*. The *Day* case arises as a result of the Edwards Aquifer Act and actions of the Edwards Aquifer Authority, as did Barshop.[63] Unlike Barshop, Day challenged the denial of a permit to produce his water and alternatively claimed that the action of the district in denying a permit amounted to a taking of his private property without compensation. Thus, Day's challenge is an "as applied" challenge as compared to Barshop's "facially unconstitutional" challenge.

In *Day*, the trial court denied Day's taking claim on summary judgment. It was EAA's position that there could be no taking because Day had no vested property interest in groundwater in place.

The Court of Appeals reversed the trial court's summary judgment. The San Antonio Court of Appeals stated:

> This court recently held landowners have some ownership rights in the groundwater beneath their property. *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, #04-06-00782-CV, 2008 W.L. 508682, (Tex. App.-San Antonio Feb. 27, 2008, No PET. H.) (*Houston & T.C.Ry.Co. v. East,* 98 Tex. 146, 81 S.W. 279, 281 (1904)). Because Applicants have some ownership rights in the groundwater, they have a vested right therein….Applicants' vested right in the groundwater beneath their property is entitled to constitutional protection….Because the Authority moved for summary judgment only on the ground applicants have no vested property right, we must remand applicants' constitutional taking claim for further proceedings.[64]

The *Day* case was argued in the Texas Supreme Court on February 17, 2010, and remains pending. A plethora of briefs have been filed regarding the question of whether underground water amounts to a vested property interest in Texas. It is respectfully submitted that such determination was initially made in 1860 in *Williams v. Jenkins*, wherein the Texas Supreme Court stated "we may, with confidence, appeal to the time honored legal maxim, *Cujus est solum, ejus est usque ad caelum*; which has given to the term *land* an extension bringing within its scope everything which exists naturally, or has been fixed artificially, between the center of the earth and the confines of the atmosphere."[65]

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[63] *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. granted).
[64] *Id*. at 756.
[65] 25 Tex. 279, 1860 WL 5835 (1860) (emphasis in original).

In 1904, the Texas Supreme Court specifically recognized groundwater ownership in *Houston & T.C. Railway Co. v. East*, where the court held that a landowner has "absolute ownership" of groundwater under his property.[66] Subsequent Texas cases have adhered to the *East* holding.

Trial courts may see takings claims asserted against groundwater conservation districts in a variety of contexts. For example, landowners may file cases resembling *Day*, where groundwater conservation districts have denied them an equal right to produce groundwater as compared to others in the district. This type of case would present constitutional arguments grounded in the takings clauses of the Texas and Federal Constitutions as well as the equal protection clauses.

Another circumstance that might give rise to takings litigation in the groundwater context is the DFC process itself. As noted previously, the process has some aspects of policy or rule making, and some aspects of regulation. As the process is played out around the state, single county groundwater conservation districts have tended to establish their own unique DFCs, which often substantially differ from the DFC's established by adjacent single county groundwater conservation districts. In that circumstance, the groundwater conservation districts will be required to achieve the DFC's by changing their management plans and rules as necessary. Obviously, to the extent that these GCDs sit on the same aquifer, the result will be different production standards existing on either side of county lines. The aquifers, of course, pay no attention to county lines, as water flows according to certain specific hydrologic principles. If a landowner finds himself in a county with an extremely restrictive set of rules designed to achieve a very conservative DFC, he may be drained by his neighbor across the county line, where the GCD rules are much more liberal in terms of production because the DFC is more liberal. In that circumstance, the very establishment of the DFC is the first step toward a physical taking of his groundwater and may immediately affect the fair market value of his property.

Takings claims may also arise where groundwater conservation districts continue to adhere to historic use schemes. Obviously, if one landowner is allowed to produce at his historic rates while his neighbor is denied a permit to produce, the drainage that results is the consequence of the GCD rules and could amount to a taking.

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[66] 98 Tex. 146, 81 S.W. 279 (1904).

Yet another example of groundwater takings cases might arise where GCDs have varying production rates for landowners in the same aquifer, based on criteria that are arbitrary or unreasonable. Several GCDs currently have rules relating to declines in aquifer saturated thickness. Their rules contemplate limiting production in designated areas smaller than the aquifer itself, measured by localized declines in saturated thickness. Depending on the circumstances, these rules might establish artificial lines on the surface where one land owner is able to produce more than his neighbor. This type of GCD action could be challenged as a taking.

The fundamental constitutional issues concerned here were discussed in the oil and gas context in *Marrs v. Railroad Commission.*[67] There, certain mineral rights owners challenged a ruling by the Texas Railroad Commission concerning production allowances in a field long known to be productive of oil.[68] In somewhat simplified terms, a group of mineral owners in the northern portion of the field had established early production from numerous wells, thereby establishing a "pressure sink" that would cause oil to migrate toward their wells.[69] Owners in the southern portion of the field had developed wells at a slower pace, but were able to demonstrate that substantial reserves of oil existed in their area, particularly as compared to the northern area which had been subject to greater depletion over the years.[70] Before the regulatory action in question, the owners in the southern area had established a line of wells between the two areas that produced at maximum capacity and essentially established a "shield" protecting them from drainage from the northern area. The railroad commission then established field rules which prevented this line of "shield" wells from producing at their maximum capacity.[71] The effect was to permit oil from the southern area to once again migrate toward the pressure sink in the northern area. The suit was predicated on the theory that production in the south area was so restricted by the commissions proration orders that the owners there were unable to recover their oil before it drained away to more densely drilled areas in the north.[72]

Striking down the Railroad Commission's field rules, the Texas Supreme Court stated:

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[67] 177 S.W.2d 941 (Tex. 1944).
[68] *Id*. at 943.
[69] *Id*. at 944-46.
[70] *Id*.
[71] *Id*. at 945.
[72] *Id*.

> Under the settled law of this date oil and gas form a part in parcel of the land wherein they tarry and belong to the owners of such land or his assigns and such owner has the right to mine such minerals subject to the conservation laws of this state. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.[73]

As to the practical implications of this "confiscation," the Court continued:

> As the oil is taken from the depleted Church-Fields area it is replaced by oil drained from petitioners' property. If petitioners were free to fend for themselves they could mine the oil under their land and thus prevent its escape to the adjoining area. But the orders of the Railroad Commission here complained of prevent petitioners from so doing. As a result, petitioners are being forever deprived of their property. It is the taking of one man's property and the giving it to another.[74]

The court concluded: "this court has many times said that the Railroad Commission cannot indulge in unjust, unreasonable, or arbitrary discrimination between different oil fields, or between different owners in the same field."[75]

Application of oil and gas law to the groundwater arena will likely yield the same result. Applying the *Marrs* decision in groundwater cases, one can see a variety of ways for cases to be lodged against GCDs.

VII. CONCLUSION

As groundwater law evolves both in the courts and in the legislature, new opportunities will arise for litigants to air their grievances in district courts of this state. While many of the legal issues have been decided in the oil and gas context, creative litigants will undoubtedly wrestle with the applicability of well established precedent to what appears to be an emerging area of law. Because groundwater evokes a more visceral reaction than even oil and gas, there will be a predictable uptick in groundwater litigation as the resource becomes more and more in demand.

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[73] *Id.* at 948 (internal citations omitted).
[74] *Id.*
[75] *Id.* 949.