

# Varying Panhandle Water Pumping Rules Lead To Talk Of Lawsuits

**By David Bowser**

WHITE DEER, Texas — Carson County rancher Billy Don Crawford cut right to the chase.

"Who are you going to sue?" he asked Amarillo attorney Marvin "Marty" Jones during a Panhandle Groundwater Conservation District meeting here this spring.

Groundwater districts in the Texas Panhandle were voting to adopt differing goals for future conditions of the Ogallala Aquifer that underlies the region.

Panhandle Groundwater Conservation District, High Plains Underground Water Conservation District, North Plains Groundwater Conservation District, and Hemphill County Underground Water Conservation District all voted on a resolution pounded out by Groundwater Management Area 1 representatives from each of the four districts identifying different future conditions for three different areas of the Texas Panhandle.

Amarillo attorney Marvin "Marty" Jones says not treating everyone in the Groundwater Management Area equally concerning what they're allowed to pump is a violation of constitutional protections. He has already filed one lawsuit against the North Plains district for setting up two differing pumping rules in different parts of their district.

It is an exercise the groundwater districts in the area have been through before. In December, the Panhandle and High Plains districts indicated they wanted one uniform desired future condition across the Panhandle. They opted for 50 percent of the water in storage at the end of a 50-year period, the same goal set forth several years ago by the Panhandle Regional Planning Group, which covers basically the same area as the Groundwater Management Area.

The North Plains district proposed one set of criteria for the western part of their district and a different set for the eastern part. They proposed to have 40 percent of the water in storage in their four western counties, which are heavily irrigated, and 60 percent in storage in the aquifer in the eastern counties of the district, mostly rangeland, at the end of the 50-year period. They argued that this would give an average 50-50 districtwide.

The Hemphill County district proposed the most restrictive limits on pumping, with a goal of 90 percent in storage at the end of 50 years.

North Plains has since changed its proposal to 50 percent in 50 years for their eastern counties, but they retain their proposal for 40 percent in the western counties.

Hemphill County, after a Texas Water Development Board study indicated that they would have trouble maintaining their 90 percent storage with surrounding counties pumping at the 50 percent level, amended their proposal to 80 percent of the water in the aquifer at the end of 50 years.

Marty Jones questions whether single-county groundwater districts are appropriate vehicles for regulating water.

Jones admits that the Texas Water Code says there can be different desired future conditions in aquifers, subdivisions of aquifers, geological strata and geographical areas, though Jones notes that geographical areas is not defined in the code.

"I'll tell you what it does not say," Jones says. "It does not say it is permissible to have different desired future conditions for different political subdivisions."

He says that is not in the water code, but that "political subdivision" is a defined term in the water code.

Jones says he thinks the term "geographical area" means something that is consistent with the philosophy of the water code.

Joint planning, he adds, is the philosophy of the statute that established the Groundwater Management Areas.

"If you don't have joint planning," Jones says, "then what you do in the Panhandle district can affect what happens in the Hemphill district."

He says what the Hemphill district does can affect the Panhandle district's desired future condition, just as what the Panhandle district does can affect the Hemphill district.

"You need to be your brother's keeper," Jones says.

As a legal point, Jones notes that in oil and gas law, fields are regulated by formation or subdivisions of a formation. There are field rules that treat everybody equally.

He says the Railroad Commission's field rules prevent people in Roberts County from producing three times as much as people in neighboring Hemphill County.

Those rules prevent the people who live on one side of that county line from being deprived of their rights to produce as much as the people on the other side of the political boundary.

To allow landowners on one side of the county line to produce more than landowners on the other side would be a constitutional taking punishing those who are not allowed to produce as much as their neighbors in the next county.

Jones concedes that a district can write rules that would be more conservative than the GMA's desired future conditions. What he doesn't address is whether those rules could be challenged if the district signs off on a more liberal desired future condition for the aquifer.

"Maybe when the state was setting up districts in the first place, it should have thought about having a district that covers an aquifer or a subdivision of an aquifer instead of having single-county districts on top of common aquifers," Jones says. "I think that's going to cause problems."

While the GMA 1 resolution has wording that alludes to the different characteristics of the aquifer and the variety of uses of the water from the aquifer, Jones says those are simply words added by an Austin attorney in an effort to try to get around what he says is the inescapable fact that there are only two subdivisions in the part of the Ogallala Aquifer beneath the Texas Panhandle. Those subdivisions are essentially divided by the Canadian River, which bisects the Panhandle and several counties in the Panhandle, including Hemphill County, as it flows from New Mexico to Oklahoma.

"You're trying to create an illusion with those words that there's some big division in the aquifer out there that justifies the different desired future conditions," Jones says.

He counters that there is no division in the aquifer within the North Plains district that justifies pumping more in its western counties than in its eastern counties. Jones has a lawsuit on behalf of a landowner in the eastern half of the North Plains district against the district based on that point.

Jones says that line can't be drawn along a political boundary such as a county line.

"Anywhere you draw that line and make some kind of different regulation on one side compared to the other, you're going to be unfair to somebody," Jones says, "because their conditions are the same."

He says the county line doesn't mean anything to the aquifer.

"It's not a division of the aquifer," Jones says. "It's a political division."

Jones doesn't think the North Plains district can justify the lines they've drawn between 40-50 and 50-50 storage areas based on the aquifer.

"It doesn't meet the criteria," Jones says.

He notes that the North Plains is splitting sprinkler systems in fields with their line. There is no topographical difference from one side of the county line to the other, nor is there a hydrological difference.

"The words used in the resolution just don't match the reality of the ground out there," Jones says.

He says the same problem exists between Hemphill County district lines and the surrounding groundwater districts, North Plains to the north and Panhandle to the west and south.

"Variations in the aquifer uses in every district are the same in this GMA," Jones says, "You have irrigation. You have municipal use. You have livestock use and domestic use. The uses are the same, but the extent of the uses are different."

Jones says the GMA resolution is saying that conditions vary and that justifies drawing lines on a map.

"I don't think conditions, whether they're surface conditions or aquifer conditions, justify drawing a line and saying 80 percent must remain in storage on this side and 50 percent on that side," Jones says.

Texas Water Development Board studies indicate that if Hemphill County keeps its 80 percent goal for storage in 50 years and the surrounding counties can pump more water because their goal is only 50 percent in storage, then water will flow from Hemphill County to the surrounding counties.

Jones says he has clients other than Mesa Water who have property in Hemphill County, and they are upset about the possibility of their groundwater being sucked out by pumping in surrounding counties.

"They don't want to contribute their water to your district," Jones says. "They're nice, generous folks, but they're not that generous."

Jones says the proposed situation would create a sacrificial zone around the Hemphill County line that would lose water to neighboring counties.

He accuses the Hemphill County district of sacrificing water in those areas to

keep 90 percent of the groundwater in the interior of the county.

"If you start moving along that path that's been suggested," Jones says, "you're really endorsing a taking of property in Hemphill County."

He says his clients own the water beneath their land, and it's constitutionally protected.

As to the question raised by Billy Don Crawford, a member of the Panhandle Groundwater Conservation District board of directors, Jones says the Groundwater Management Area is not a legal entity, so it can't be sued. It's only a planning committee. Districts, however, are political subdivisions of the state.

Obviously, a district that sets up rules that someone disagrees with could be the target of a lawsuit, but the question remains as to whether a district that votes for a resolution supporting another district's proposal would itself be liable.

"I think the GMA process, the joint planning process, is supposed to have a single desired future condition for each aquifer and each subdivision," Jones says, despite his earlier acknowledgement that the statute allows for differing desired future conditions. "I don't think you can justify different desired future conditions in different areas just because of the political will of the people. I would also suggest that the folks in Hemphill County can vote to take my clients' water, but it's not going to make any difference to the court system, because it's still a constitutional taking."