Cause No. D-1-GN-10-000819

MESA WATER, L.P. and G&J RANCH, INC., Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
TEXAS WATER DEVELOPMENT BOARD, Defendant.	§	201st JUDICIAL DISTRICT

THE TWDB'S FIRST AMENDED PLEA TO THE JURISDICTION

TO THE HONORABLE SCOTT JENKINS:

The Texas Water Development Board (TWDB) asks the Court to find that it lacks jurisdiction over this suit because the TWDB merely advised local groundwater conservation districts as they planned for future rule-making and permitting activities

SUMMARY OF THE ARGUMENT

1. The Legislature vested authority to regulate withdrawals of groundwater in local groundwater districts, which are charged with first planning to meet future groundwater needs, then adopting their own rules, and then issuing (or not issuing) groundwater-withdrawal permits for existing and future uses. The TWDB provides science-based technical assistance for the local groundwater districts' planning activities. Plaintiffs allege that TWDB's comments to districts in the Panhandle were arbitrary and deprived the Plaintiffs of vested property rights.

2. A state agency generally is immune from suit unless the legislature has waived immunity. The statute that waives immunity for TWDB actions applies only to final orders: orders that fix rights or liabilities as the culmination of the administrative process.

3. Here, the TWDB reviewed the local groundwater districts' planning goals (called desired future conditions) and decided not to recommend changes. The TWDB action didn't fix rights or liabilities, so wasn't a reviewable "final order."

4. The Plaintiffs weren't injured by the TWDB's action. At most, the action satisfied one statutory-checklist item before the four groundwater districts in the Panhandle may adopt rules that might require the Plaintiffs to obtain permits from the districts. The Plaintiffs' rights might be adversely affected in a particularized, concrete way in the future once the districts have adopted rules and have decided whether to issue permits to the Plaintiffs.

5. Finally, because the TWDB merely commented on the local districts' planning goals without even making a recommendation, the "action" could not have taken any property from the Plaintiffs. The Plaintiffs cannot state valid takings claims against the TWDB, because there was neither a physical invasion of their property nor a regulatory command, let alone a command severely restricting economic uses of their property.

LEGAL AND FACTUAL CONTEXT OF THE CASE

I. The statutes establish the TWDB as a technical advisor for groundwater management — not the regulator.

A. Introduction: In the beginning, there were local districts.

6. The Texas Legislature enacted laws to manage use of *surface* water in 1889 and created the Board of Water Engineers in 1913 as a statewide agency to issue permits to appropriate the State's surface water.[1]

[1] Ronald Kaiser, *Handbook of Texas Water Law: Problems and Needs*, pp. 6–7, Milestones in Texas Water Law; Tex. Water Res. Inst., TR-189 (1987). Available at http://twri.tamu.edu/reports/2002/tr189/tr189.pdf (accessed 7/27/2010). App. 7 is a copy of the milestones chart.

7. In contrast, when the legislature addressed management of *groundwater* in 1949, it authorized creation of *local* groundwater conservation districts rather than a statewide agency.[2] Local business and community leaders from the Panhandle promoted the local-control law to prevent regulation by a statewide agency.[3] Local landowners could create a district by petitioning the Board of Water Engineers, which would designate the initial boundaries of a district and set a local election at which the voters in each individual precinct would opt into or out of the district.[4] Three of the four districts whose collective action is challenged in this suit were the first three districts created under the law: the High Plains Underground Water Conservation District (created in 1951), and the North Plains and the Panhandle Groundwater Conservation Districts (created in 1955).[5]

8. The legislature has collected statutes pertinent to groundwater districts in Water Code Chapter 36. It states unequivocally: "Groundwater conservation districts . . . are the state's preferred method of groundwater management *through rules developed, adopted, and promulgated by a district* in accordance with the provisions of this chapter."[6] Thus the legislature anchored groundwater management in local control by local groundwater districts.

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[2] Act of May 23, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 55, *repealed by* Act of April 12, 1971, 62nd Leg., R.S., ch. 58, § 2, 1971 Tex. Gen. Laws 658.

[3] Donald E. Green, *Land of the Underground Rain: Irrigation in the Texas High Plains, 1910–1970*, pp. 173–78, University of Texas Press (1973).

[4] *Id.* at 177–78. The Board of Water Engineers is a predecessor to the TCEQ.

[5] Monique Norman, "Groundwater Management Area Joint Planning," *Essentials of Texas Water Resources*, Mary K. Sahs, ed., p. 452 State Bar of Texas Envtl. & Nat. Res. Law Section (2009) (cited herein as "Norman, 'GMA Joint Planning,' p. 452"). Ms. Norman is an attorney in private practice and represented the Panhandle District during the TWDB's hearing on the Plaintiffs' petition.

The legislature created the Hemphill District in 1997. Act of May 8, 1995, 74th Leg., R.S., ch. 157, 1995 Tex. Gen. Laws 1007.

[6] Tex. Water Code § 36.0015 (emphasis added). App. 4 includes copies of cited statutes.

B. The TWDB was created as a financier for surface-water development and became the state's surface-water planner.

9. Following the record drought of the 1950s, the legislature created the TWDB in 1957 to administer the constitutionally created Water Development Fund.[7] The TWDB issued bonds and deposited the proceeds in the Fund, then used the Fund to provide financial assistance for water conservation and development projects (such as reservoirs) undertaken by river authorities, cities, and other local governments. The legislature also enacted the Texas Water Planning Act of 1957[8] and transferred water-planning functions to the TWDB in 1965.[9] Initially, the state water plan addressed surface-water resources.

10. Groundwater-management planning developed differently. Initially, each landowner determined whether sufficient groundwater was available for withdrawals. In 1989, the legislature required groundwater districts to develop comprehensive groundwater-management plans and to submit them to the TCEQ.[10] The plans generally had to provide for the most efficient use of groundwater and to prevent waste and subsidence.

C. The TWDB only recently became a technical advisor for local groundwater-management planning.

11. The legislature overhauled water planning in 1997.[11] The TWDB now "provide[s] technical assistance to a [groundwater conservation] district in the development of the

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[7] Act of May 21, 1957, 55th Leg., R.S., ch. 425, § 3, 1957 Tex. Gen. Laws 1268, 1269.

[8] Act of Nov. 12, 1957, 55th Leg., 1st C.S., ch. 11, 1957 Tex. Gen. Laws 23.

[9] Act of May 27, 1965, 59th Leg., R.S., ch. 297, § 3, 1965 Tex. Gen. Laws 587, 590.

[10] Norman, "GMA Joint Planning," pp. 452–53. (More precisely, in 1989, the plans were submitted to the Texas Water Commission, which became the TNRCC and later the TCEQ.)

[11] Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

management plan . . . ."[12] And a district must use the TWDB's groundwater modeling data to develop the district's management plan.[13] A district now submits its completed plan to the TWDB for review, and the TWDB must approve the plan if it is "administratively complete," that is, if it includes all the required elements.[14] Even though the TWDB provides technical advice and science-based modeling to the districts, the TWDB does *not* review or approve the substantive merits of a district's plan. That remains within the local district's discretion.

12. While the TWDB helps the districts develop management plans, the TCEQ has exclusive jurisdiction over the administrative creation of groundwater districts.[15] The TCEQ also assists new districts during their initial operational phase.[16] That is, the TWDB helps districts plan, whereas the TCEQ helps districts implement and enforce the plans.

D. Since 2005, the TWDB may review and comment on districts' planning goals and calculates the "managed available groundwater" based on those goals.

13. In 2005, the legislature added a new twist, which is at the root of this litigation. It required each district's groundwater-management plan to include "desired future conditions" of groundwater resources ("DFCs"),[17] required districts in a management area to develop the DFCs jointly, and allowed an interested person to ask the TWDB to review the DFCs.[18] The

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[12] Tex. Water Code § 36.1071(c); *accord* Tex. Water Code § 36.1071(d).

[13] Tex. Water Code § 36.1071(h).

[14] Tex. Water Code § 36.1072(a), (b).

[15] Tex. Water Code §§ 36.011–.016.

[16] Tex. Water Code § 36.1071(d).

[17] Act of May 24, 2005, 79th Leg., R.S., ch. 970, § 5, 2005 Tex. Gen. Laws 3247, 3251 (cited herein as "H.B. 1763 (2005) § 5") *codified at* Tex. Water Code § 36.1071(a)(8). App. 6 is a copy of H.B. 1763 (2005).

[18] H.B. 1763 (2005) § 8, *codified* at Tex. Water Code § 36.108(d)–(d-2), (*l*)–(o).

Plaintiffs objected to different DFCs being approved for different geographic areas of the 18-county management area of the Panhandle. They complain here that TWDB should have rejected all but one DFC for the whole area.

14. The legislation did not define "desired future conditions" except to note that the districts' plans must address them "in a quantitative manner."[19] The TWDB's rules define the term as the "desired, quantified condition of groundwater resources (such as water levels, water quality, spring flows, or volumes) for a specified aquifer . . . at a specified time or times in the future . . . ."[20] Examples of possible desired future conditions include:

- spring flows won't ever fall below 25 cubic feet per second;
- water quality won't degrade beyond 1,000 milligrams per liter of total dissolved solids in the next 50 years; or
- 80 percent of the water stored in the aquifer will be available in 50 years.

15. At the legislature's direction, the TWDB has designated groundwater management areas.[21] If a management area includes parts of two or more groundwater districts, those districts review each other's plans annually. The new law requires the districts every five years to establish desired future conditions for the parts of aquifers in the management area.[22]

16. The districts must consider "uses or conditions of an aquifer . . . that differ substantially from one geographic area to another" of the management area.[23] The districts

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[19] H.B. 1763 (2005) § 5, *codified at* Tex. Water Code § 36.1071(a)(8).

[20] 31 Tex. Admin. Code § 356.2(8). App. 5 includes copies of cited rules.

[21] *See* Tex. Water Code § 35.004(a).

[22] H.B. 1763 (2005) § 8, *codified at* Tex. Water Code § 36.108(d)–(d-2).

[23] *Id.*, *codified at* Tex. Water Code § 36.108(d).

may set different DFCs (1) for each aquifer (or each geologically or hydrologically separate subdivision of an aquifer), or (2) for each geographic area overlying any part of an aquifer. If the districts set different DFCs for different geographic areas, the DFCs must be physically possible, individually and collectively.[24]

17. If someone with an interest in groundwater objects to the DFCs, the person may ask the TWDB to review and comment on them.[25] If the TWDB thinks that the DFCs should be revised, the Agency reports its findings and recommendations to the districts.[26] The districts then prepare draft revisions based on the TWDB's recommendations and hold a public hearing in the management area. After considering the TWDB's and the public's comments on the draft revisions, the districts finally revise the DFCs and forward them to the TWDB.

18. When the TWDB has the districts' final DFCs, it uses its groundwater models to calculate the "managed available groundwater" in the management area based on the DFCs and sends the data to districts and regional water-planning groups in the management area.

19. In contrast to the TWDB's role of providing comments and calculations for districts to consider, the TCEQ may order a district to act or refrain from acting, may dissolve a district or its board, or may seek appointment of a receiver to manage a district if the district fails to submit plans to the TWDB, fails to develop DFCs, fails to adopt rules, or fails to adopt rules to achieve the DFCs.[27]

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[24] 31 Tex. Admin. Code § 356.2(8).

[25] H.B. 1763 (2005) § 8, *codified at* Tex. Water Code § 36.108(*l*)–(o).

[26] *See also* 31 Tex. Admin. Code § 356.46.

[27] H.B. 1763 (2005), §§ 8, 13, *codified at* Tex. Water Code §§ 36.108(f)–(k), 36.3011. *See also* Tex. Water Code § 36.303 (actions by the TCEQ).

20. With respect to groundwater districts, the TCEQ enforces while the TWDB advises.

E. The individual districts — not the TWDB — will adopt rules to implement their individual groundwater management plans that include DFCs.

21. The 2005 legislation added DFCs and "managed available groundwater" (MAG) to the districts' toolboxes.[28] DFCs are planning tools; MAGs are regulatory tools.

22. These new tools may affect a groundwater user in the future after districts have taken further actions. Each district must incorporate the final DFCs into its groundwater management plan.[29] Then each district must adopt rules to implement its management plan, including rules designed to achieve the DFCs.[30] Each district must adopt rules specifying what activities within the district will require a permit from the district.[31] Finally, after it has adopted procedural and substantive rules, has accepted permit applications, and has begun to issue permits, the district "to the extent possible" will issue permits "up to the point that the total volume of groundwater permitted equals the managed available groundwater."[32]

23. That is, at the end of the long planning and rule-making road, the *districts* will use the calculated MAG (which is based on *their* DFCs) as a cap on the volume of groundwater for which *they* will issue permits for activities *they* have determined warrant permitting — to the extent it's possible.

24. The districts are the deciders; the TWDB is their technical advisor.

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[28] H.B. 1763 (2005), §§ 8, 11, *codified at* Tex. Water Code §§ 36.108(o), 36.1132.

[29] *Id.*, § 8, *codified at* Tex. Water Code § 36.108(d-2).

[30] *Id.*, § 8, *codified at* Tex. Water Code § 36.108(f)(2).

[31] *Id.*, § 10, *codified at* Tex. Water Code § 36.114(a).

[32] *Id.*, § 11, *codified at* Tex. Water Code § 36.1132.

II. The facts of this case show that the TWDB did not determine the Plaintiffs' rights or liabilities; at this point, no one has.

25. The TWDB designated an 18-county region in the Panhandle area as Groundwater Management Area 1 (GMA 1).[33] The area comprised all or part of four groundwater conservation districts: the High Plains Underground Water Conservation District No. 1 (part) (High Plains District); North Plains Groundwater Conservation District (all) (North Plains District); Panhandle Groundwater Conservation District (all) (Panhandle District); and Hemphill County Underground Water Conservation District (all) (Hemphill District).

26. Representatives of the four districts began developing their DFCs in January 2006 and met nineteen times during the next three and a half years.[34] They requested and received from the TWDB seven different groundwater-availability modeling runs to evaluate the impact of different, potential DFCs.[35] The North Plains District recommended two different DFCs for two geographic areas within that district based on differences in intensity of groundwater use (in both current and future demand) across the district.[36] The High Plains District recommended one of those two DFCs for the area within its district to continue the future economic viability of irrigated agriculture.[37] The area of the Hemphill District has low historic and projected demand for groundwater and the community wanted to maintain

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[33] *See* Record of Administrative Decision (ROAD) Item 51 (staff report), Attachment A at 2. App. 2 is a copy of Item 51.

The TWDB asks the Court to take judicial notice of the certified copy of the agency record filed with the Court on June 23, 2010.

[34] ROAD Item 23 (response of North Plains District) at 1 & Exhibit A.

[35] *See* ROAD Item 46 (Hemphill District's post-hearing reply) at 3; Item 51 (staff report) at 8.

[36] ROAD Item 23, Exhibit C.

[37] ROAD Item 25.

aquifer-fed spring flows and to minimize adverse environmental impacts within the district.[38]

27. The district representatives considered these different uses and conditions across the planning area and on July 7, 2009, unanimously adopted the DFCs for the area.[39] The districts set three different planning goals for three parts of the management area:

- 40% volume in storage remaining in 50 years in four northwestern counties of the North Plains District, characterized by intensive irrigated-agriculture use and high historic demand;
- 50% volume in storage remaining in 50 years throughout the remainder of the North Plains District, in all of the Panhandle District, and in all of the High Plains District within GMA 1, characterized by less intensive irrigated-agriculture use; and
- 80% volume in storage remaining in 50 years in the Hemphill District, characterized by virtually no irrigated-agricultural use, by low historic demand, and reliance on aquifer-fed spring flows.[40]

28. Mesa Water, L.P. and G&J Ranch, Inc. (together, Mesa) filed petitions claiming that the DFCs were not reasonable.[41] As required by statute,[42] the petitions included evidence to support the claims. The TWDB convened a hearing in GMA 1 and took testimony and responses regarding the petition.[43] The record remained open for 10 business days so interested persons could submit additional written evidence and briefs.[44]

29. The TWDB staff reviewed the pleadings, evidence, testimony, and exhibits and prepared a report analyzing the factors the Board would consider when it took up the matter,

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[38] ROAD Item 27 (Hemphill District's response) at 10–11 & Exhibit H (affidavit) ¶ 10; Items 36–39, 41–43.

[39] *See* ROAD Item 1 (Mesa's petition), Exhibit 1 (GMA 1 resolution). App. 1 is a copy of the resolution.

[40] ROAD Item 51 (staff report) at 1, 5–6, Attachments A & B (technical and socioeconomic analyses).

[41] ROAD Items 1 & 2. Because the petitions are nearly identical, the TWDB will cite to Item 1hereafter.

[42] Tex. Water Code § 36.108(*l*).

[43] ROAD Items 23, 25, 27, 28, 30 (meeting notice), 31 (transcripts and exhibits).

[44] ROAD Items 35–46; 31 Tex. Admin. Code § 356.44(f).

which was distributed to Mesa and the districts.[45] The staff's report showed that the weight of the factors favored the districts' DFCs. The staff recommended that the Board *not* find that the DFCs were unreasonable (*i.e.*, that the Board not recommend revisions).

30. The Board met at a public meeting and heard from the staff, Mesa, and the districts.[46] After public deliberations, the Board voted 5-1 to approve the staff's recommendation.[47]

31. Importantly, the Board did not issue a written order fixing rights or liabilities. It did not direct any party to do anything.

ARGUMENTS AND AUTHORITY

III. The Court lacks jurisdiction because the Board's recommendation (or non-recommendation) is not a reviewable "final order."

32. Generally, a state agency is immune from suit, unless the legislature has clearly and unambiguously waived sovereign immunity. In *Tooke v. City of Mexia*, the Texas Supreme Court reiterated the venerable legal precept that "'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.'"[48]

33. Mesa cites Water Code § 6.241 as the jurisdictional basis of its lawsuit.[49] That statute states: "A person affected by a ruling, order, decision, or other act of the board may file a petition to review, set aside, modify, or suspend the act of the board." Although the courts

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[45] ROAD Items 51, 52; *see* 31 Tex. Admin. Code § 356.45.

[46] ROAD Item 52, third attachment (procedures for the meeting); Item 53 (video recording of the meeting).

[47] ROAD Item 54 (signed minutes of the meeting). App. 3 is a copy of the signed minutes.

[48] 197 S.W.3d 325, 331 (Tex. 2006) *quoting Hosner v. DeYoung* 1 Tex. 764, 769 (1847) (holding that statutes enabling a city to "sue and be sued" or to "plead and be impleaded" were not clear, unambiguous waivers of governmental immunity).

[49] Plaintiffs' First Amended Original Petition ¶ 16.

have not construed the scope of this statute authorizing judicial review of TWDB actions, the courts have construed an *identical* statute authorizing judicial review of TCEQ actions.[50] The case law construing one statute may be applied directly to the other.[51]

34. Despite the statutes' apparent breadth, they authorize review only of final, regulatory actions. In *TNRCC v. IT-Davy*, the Texas Supreme Court held that the language of the statutes does not authorize review of *every* ruling, order, decision, or act of the agency, but rather only authorizes review of *regulatory* decisions.[52] The courts, therefore, lacked jurisdiction over a suit challenging the TNRCC's actions on a contract.

35. Similarly, the Dallas Court of Appeals acknowledged that the language of the statutes is very broad, but held that the legislature intended the language to comport with the general rule that courts will review only an agency's final actions.[53] The courts, therefore, lacked jurisdiction over the preliminary approval of a wastewater-processing plant.

36. "Final order" is a term of art that doesn't reach the TWDB's action here. In *Sun Oil Co. v. Railroad Commission*, the Texas Supreme Court held that a similarly broad statute did not authorize judicial review of the agency's order, because the order did not grant or withhold a right or privilege or impose liability on the plaintiffs.[54]

37. The commission conducted an administrative hearing to investigate the shipping

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[50] *Compare* Tex. Water Code § 5.351 *with* Tex. Water Code § 6.241.

[51] *See, e.g., Tex. Nat. Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 858–59 (Tex. 2002) (the Texas Supreme Court applied the case law of an *analogus* statute to interpret Tex. Water Code § 5.351).

[52] *Id.*

[53] *Payne v. Tex. Water Quality Bd.*, 483 S.W.2d 63, 64 (Tex. Civ. App.–Dallas 1972, no writ).

[54] *Sun Oil Co. v. R.R. Comm'n*, 158 Tex. 292, 297, 311 S.W.2d 235, 238 (1958).

practices of certain oil companies. The commission's order found that through "devious methods" the oil companies sought to evade higher intrastate-shipping rates and that the practices involved intrastate shipping subject the commission's jurisdiction.

38. The oil companies sued to challenge the order. The supreme court noted that the literal language of the statute authorizing review of commission actions would "permit of an appeal from anything whatever that the Commission might or might not do," but the court concluded that the statute "is undoubtedly not intended to be free of all limitation."[55]

39. The court held that statute did not authorize judicial review of the order, because the order did not fix liability on the oil companies.[56] The commission would have to initiate additional administrative proceedings before any liability would accrue to the companies. The companies were in the same position after the order as they were before it, except that "they now have good reason to believe that they will be proceeded against."

40. Like the Railroad Commission's findings in *Sun Oil Co.*, the TWDB's action neither imposed liabilities on Mesa nor granted or withheld rights or privileges. Like the oil companies, any adverse consequences that Mesa may fear must await future rule-making and future actions *by the districts* — not the TWDB.

41. In *Moody v. Texas Water Commission*, the Austin Court of Appeals held that the courts lacked jurisdiction over a suit challenging a decision of the Texas Water Commission because the decision merely recommended that a federal flood-control reservoir was

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[55] *Sun Oil Co.*, 158 Tex. at 293–94, 311 S.W.2d at 236.

[56] *Sun Oil Co.*, 158 Tex. at 297, 311 S.W.2d at 238.

feasible.[57] The Army Corps of Engineers proposed a dam that would inundate the plaintiffs' land. The Corps submitted its proposal to the governor, who referred it to the commission, which was responsible for state water planning then. After a public hearing, the commission entered an order approving the feasibility of the project. The governor forwarded the order to the Corps, and the plaintiffs sued the commission to reverse its order.

42. The district court dismissed the suit for want of jurisdiction. The appellate court affirmed, holding that courts only review final orders of agencies and that the commission's order was merely a recommendation to the Corps.[58] The order was not conclusive and did not commit the Corps to constructing the dam.

43. The TWDB's decision to not suggest revisions to the districts' DFCs — its non-recommendation — was even less conclusive than the water commission's order in *Moody*. And even if the Board had recommended revisions, the districts could have rejected or modified the draft revisions following a local public hearing.[59] So, like the water commission's recommendation to the Corps, the TWDB's recommendation to the districts would not have been conclusive and would not have bound the districts.

44. More recently, the Texas Supreme Court opined that "courts should treat as final a decision which is definitive, promulgated in a formal manner and one with which the agency expects compliance."[60] The supreme court noted that "[a]dministrative orders are generally

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[57] *Moody v. Tex. Water Comm'n*, 373 S.W.2d 793, 797 (Tex. Civ. App.–Austin 1963, writ ref'd n.r.e.).

[58] *Moody*, 373 S.W.2d at 797.

[59] Tex. Water Code § 36.108(n); 31 Tex. Admin. Code § 356.46(e).

[60] *Tex.-N. Mex. Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991) (internal citations and quotation marks omitted).

final and appealable if they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."[61]

45. Under the case law, therefore, the Court lacks jurisdiction because the TWDB's non-recommendation to the districts was not a reviewable order, especially with respect to Mesa. The TWDB didn't expect Mesa or the districts to do anything to comply. The decision didn't determine a right of Mesa or fix a liability. Any consequences that Mesa fears may happen must await the future actions of the local groundwater districts.

IV. The TWDB's action did not grant or deny rights or impose liabilities on the Mesa, so the Court also lacks jurisdiction because the claims aren't ripe or because Mesa lacks standing.

A. Mesa's claims of harm are contingent on future actions, so the claims are not ripe.

46. Courts sometimes analyze final-order issues through the lens of ripeness. For example, in *Texas Utility Electric Co. v. Public Citizen, Inc.*, the Austin Court of Appeals melded both concepts when it concluded that the Public Utility Commission's determination that Texas Utility's applications to build four power plants were feasible and reasonable was not a final order, so Public Citizen's lawsuit challenging the commission's interpretation of its rules was not ripe.[62] Although the commission's order ended a phase of the proceeding, the administrative process had not run its course, because the commission would have to consider individual amendments to Texas Utility's certificate of convenience and necessity for each power plant before the company could begin construction.

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[61] *Id.*

[62] *Tex. Util. Elec. Co. v. Pub. Citizen, Inc.*, 897 S.W.2d 443, 446–47, 448 (Tex. App.–Austin 1995, no writ).

47. Similarly, in *Monk v. Huston*, the federal appeals court concluded that plaintiffs' due-process claims were not ripe because the TNRCC had not yet granted or denied the waste company's permit application.[63] Even if the landowners had a vested property right, they wouldn't be adversely affected until a permit was issued, so their claims were speculative.

48. In *Waco ISD v. Gibson*, the Texas Supreme Court held that the parents' challenge to the school board's new student-retention policy was not ripe, because at the time the suit was filed, the policy had not been applied to retain any particular student.[64] The supreme court opined that ripeness "focuses on whether the case involves uncertain or contingent events that may not occur as anticipated or may not occur at all."[65] So even though the plaintiffs believed an adverse impact was coming — "[t]hey feel it coming . . . ." in the words of the district court — the claim was not ripe because the policy had not been applied.

49. The *Gibson* case is especially apt here. The DFCs adopted by the districts are *planning goals*: aspirations guiding future rule-making and permitting decisions. They are more ephemeral and less concrete that the school board's student-retention policy. Even though Mesa may believe that an adverse effect is coming, the adverse consequence is contingent on future events that may or may not occur.

- The districts' rules may or may not require or allow Mesa to apply for groundwater-withdrawal permits.
- If Mesa applies for permits to withdraw groundwater from different properties in different counties, the managed-available-groundwater (MAG) volume for the various

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[63] *Monk v. Huston*, 340 F.3d 279, 282–83 (5th Cir., 2003).

[64] *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000).

[65] *Gibson*, 22 S.W.3d at 852 (internal quotations and citations omitted).

properties may or may not affect Mesa's permits.

- Even if a MAG volume is too low to fully grant Mesa's request, we don't know yet how the districts will elect to implement the MAG.

50. It may well be that Mesa will have ripe claims someday. But that day is not today. And in any event, the claims will not lie against the TWDB.

B. Mesa lacks standing because it has not suffered a concrete, particularized injury and because its alleged injury would be the same as that experienced by the public at large.

1. The harm (should it occur) would be traceable to third-parities not before this Court.

51. The Supreme Court has identified three elements that constitute the "irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an "*injury in fact*" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) *actual or imminent, not "conjectural or hypothetical."* Second, there must be causal connection between the injury and the conduct complained of — *the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.* Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.[66]

Mesa's lawsuit fails at least the first two elements. First, as described above, the adverse consequences Mesa fears are contingent of the future actions of groundwater districts that might not play out as Mesa expects. The consequences are neither actual nor imminent.

52. Second, the adverse consequences (should they occur) would be directly traceable to the actions of the various districts, which are not before the Court today. The injury that

[66] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations and citations omitted, emphasis added); *accord Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.–Austin 2010, pet. filed).

Mesa fears would be traceable to the districts' individual regulatory decisions, not to the TWDB's advice and comments on the districts' planning goals.

2. The harm Mesa alleges is common to the public at large, so cannot support standing.

53. In *South Texas Water Authority v. Lomas*, the Texas Supreme Court reiterated an essential element of judicial standing: "[T]o have standing an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large."[67] The supreme court held that the courts lacked jurisdiction over a suit by a Kingsville resident and an association of residents in which they alleged that the regional water authority's rates unfairly discriminated against them. The supreme court held that because the alleged effect was suffered by the whole community, the plaintiffs lacked standing. Nothing indicated that the individual was treated any differently than any other Kingsville resident.

54. Similarly, in *Brown v. Todd*, the Texas Supreme Court held that the courts lacked jurisdiction over a citizen's suit challenging the mayor's executive order that allegedly reversed a successful public referendum.[68] The citizen's alleged injury as a voter on the prevailing side was indistinguishable from the injury sustained by anyone else who had voted in favor of the referendum, so could not support standing.

55. Here, Mesa claims that the present market-value of its rights to future groundwater withdrawals in Hemphill County decreased because the applicable DFC sets a goal of

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[67] *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007); *accord Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) ("Our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large.")

[68] *Brown*, 53 S.W.3d at 302; *see also id. at* 305–06 (councilman's alleged injury not particularized either).

preserving more groundwater than the DFC applicable within neighboring districts (80% remaining after 50 years, as opposed to 50% or 40% remaining). But even accepting the allegation *arguendo*, that injury would be sustained by every person who claims a right to withdraw groundwater in Hemphill County. It's an injury sustained by the public at large, so cannot support judicial standing.

56. In another case directly on point, *Tx DOT v. City of Sunset Valley*, the Texas Supreme Court held that claims based on geographically disparate treatment cannot support an equal-protection claim.[69] The alleged injury is sustained by everyone within the geographic area, so cannot support standing. The plaintiff must show that he or she was intentionally singled out from the crowd and treated differently from others similarly situated.

57. Similarly, an appellate court upheld the boundaries of a groundwater district by persons within the district who complained of unfair discrimination because the district did not include the whole aquifer.[70] The court wrote: "First, it is well established that constitutional equal protection relates to persons as such, and not to areas. States have wide discretion in determining whether laws shall operate statewide or only within certain counties . . . ."[71] The Texas Supreme Court expressly affirmed that holding.[72]

58. Although Mesa does not use the term "equal protection" in its petition, its claims sound in that constitutional safeguard. Mesa claims that the DFCs adopted by the districts

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[69] *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646–47 (Tex. 2004).

[70] *Beckendorff v. Harris-Galveston Subsidence Dist.*, 558 S.W.2d 75, 81 (Tex. Civ. App.–Houston [14th Dist.] 1977) *holding affirmed, but writ ref'd n.r.e. on other grounds* 563 S.W.2d 239, 240 (Tex. 1978).

[71] *Beckendorff*, 558 S.W.2d at 81 (internal quotations omitted).

[72] 563 S.W.2d 239, 240 (Tex. 1978) *writ ref'd n.r.e. on other grounds.*

(and commented on by the TWDB) unreasonably and arbitrarily discriminate among persons who hold rights to withdraw water from different counties and that those persons should be treated alike because they all would withdraw water from the same aquifer.

59. The Court, therefore, lacks jurisdiction because Mesa's claims are not ripe and because Mesa lacks standing to complain about harm sustained by the public at large.

V. Because Mesa cannot state a valid taking claim, sovereign immunity bars Mesa's claim, which must be dismissed for lack of jurisdiction.

A. Introduction.

60. Mesa alleges that the DFCs adopted by the districts take their property without compensation in violation of the state and federal constitutions. Mesa contends specifically that the differing DFCs diminish the present market-value of groundwater rights in Hemphill County and threaten drainage of groundwater to neighboring counties. Because this allegedly condemns property, Mesa asserts that TWDB was precluded from validly finding multiple DFCs to be reasonable.

61. To the extent Mesa seeks to adjudicate a taking claim based on the DFCs, jurisdiction is lacking. Even assuming *arguendo* that Mesa has the property interests alleged, Mesa cannot state a facially viable taking claim, either directly against the TWDB or against the Agency as a proxy for the future actions of the districts. Thus, Mesa's claim is barred by the TWDB's sovereign immunity and must be dismissed.

B. Sovereign immunity bars facially invalid takings claims.

62. As set out above, sovereign immunity generally shields the TWDB from suit.

Although this immunity does not extend to a constitutionally based taking claim,[73] the claim must be facially valid. The courts require Mesa to articulate in the pleadings a viable taking claim against the TWDB, *i.e.*, allegations that demonstrate a legally cognizable taking claim. Otherwise, sovereign immunity obtains and jurisdiction is lacking to adjudicate the claim.[74]

63. In *State v. Holland*, for example, the Texas General Land Office contracted to use an oil-spill-cleaning process, but declined to pay royalties to Holland, the process's patent holder. Although Holland plainly framed his claim against the agency as a taking under Tex. Const. art. 1, § 17, the supreme court reversed the lower court rulings denying the agency's plea to the jurisdiction. The court observed that, as described in Holland's pleadings, the agency was acting under color of contract and in that capacity could not, as a matter of takings law, be liable for a constitutional taking. Since a viable taking claim did not lie against the agency, sovereign immunity applied and the courts lacked jurisdiction over the claim.[75] This result harmonizes with current plea-to-the-jurisdiction practice: if the pleadings and undisputed evidence negate jurisdiction, then the plea should be granted.[76]

C. Mesa cannot plead a legally cognizable taking claim against the TWDB.

1. Local groundwater districts — not the TWDB — regulate groundwater under Chapter 36.

64. As detailed in the Legal and Factual Context section, the groundwater regulation

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[73] *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

[74] *Id.* at 643-644.

[75] *Id.; see also, e.g., City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395, at *3 (Tex. App.–Austin Feb. 15, 2007, no pet.) (mem. op.) (dismissing taking claim because, "[w]hen a plaintiff does not allege a valid claim under the takings clause . . . sovereign immunity does apply.")

[76] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004).

scheme under Chapter 36 is anchored in local control by the respective groundwater districts. Mesa complains specifically in this suit about the alleged taking effect of adopting a different DFC for the Hemphill District than the other districts. These DFCs are the creatures of Hemphill and the other districts, not the TWDB. The districts — not the TWDB — determined the goals with respect to the groundwater resource within their jurisdictions and articulated those goals through locally adopted DFCs. Under Chapter 36, it will be up to Hemphill and the other districts individually — not the TWDB — to implement these general planning goals through specific rules, permits, spacing orders, and other regulatory measures applied to the water users within the district.

65. The TWDB's role in the DFC process is informational rather than regulatory and is not specific to any particular property. Although the TWDB staff quantifies the available groundwater based on the DFCs, the starting point for the calculation and the eventual application of the TWDB data remain with the districts. This is true regarding DFC applicable within the Hemphill District.

66. And while the legislature authorized the TWDB to review the "reasonableness" of a district's DFCs, the review is advisory. When opining whether the districts' DFCs are reasonable, the TWDB dictates no particular DFC to the districts and exercises no direct regulatory authority over the groundwater. The review process does not convert the TWDB into the districts' overlord. At all times, the direct authority and control over the groundwater resources rests with the districts. The districts remain the deciders.

2. TWDB's action is not a current, direct restriction on Mesa's use of its property.

67. Under the current legislative scheme, any viable taking claim based on the DFCs can run only against the districts — the entities having the direct regulatory control over the subject property. The TWDB's review of the districts' DFCs does not qualify as the kind of regulatory action giving rise to taking liability. The Austin Court of Appeals recently applied this principle to negate a taking claim against the TWDB regarding a planning activity.

68. In *State v. Hearts Bluff Game Ranch, Inc.*,[77] plaintiff Hearts Bluff alleged it owned land intended for mitigation banking, wherein land is used to offset adverse environmental impacts from development projects elsewhere. The Army Corps of Engineers must approve the land use for banking. However, concurrent state-level planning activities involving the TWDB promoted designation of the Hearts Bluff land as a future reservoir site. When the Corps denied the mitigation-banking permit, Hearts Bluff sued the TWDB for a taking under the state and federal constitutions. The TWDB filed a plea to the jurisdiction contending that Hearts Bluff's petition failed to allege a viable taking claim, thus leaving intact the agency's sovereign immunity. The Austin Court of Appeals agreed.[78]

69. Central to the TWDB's argument and the court's decision in *Hearts Bluff* was the lack of any current, direct restriction of the subject property by the TWDB. The court reviewed the relevant takings case law and explained that:

> [I]mplicit in the test for inverse condemnation are two understood requirements: (1) the governmental entity against whom the claim is brought

[77] 313 S.W.3d 479 (Tex. App.–Austin 2010, pet. filed).

[78] *Id.* at 486–90.

> must possess —— or have possessed during the relevant time period — the regulatory power that effected the taking, and (2) the governmental entity's exercise of its own regulatory authority must have imposed the current, direct restriction that gave rise to the taking.[79]

Observing from the pleadings and jurisdictional facts that the Corps rather than the TWDB had the final say in the mitigation-banking matter, the court concluded that a viable taking claim did not lie against the TWDB, despite the TWDB's demonstrated support for Corps's action.[80] Accordingly, absent a facially valid taking claim, sovereign immunity applied and the courts lacked jurisdiction over the claim.[81]

70. The guidepost in the *Hearts Bluff* analysis was the Texas Supreme Court's decision in *Westgate, Ltd. v. State*,[82] in which a landowner claimed substantial economic damage (particularly lost profits) tied to a state agency's announcement that it planned to expand a highway through the landowner's shopping center. However, the court rejected the theory that the agency's actions gave rise to a taking, since they imposed no "direct restriction on the use of the property."[83]

71. In other words, a taking claim is not a catch-all cause of action for every public act

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[79] *Id*. at 487.

[80] *Id.* at 488–89.

[81] *Id.* at 489–90.

[82] 843 S.W.2d 448 (Tex. 1992).

[83] *Id.* at 453; *see also, e.g.*, *Tex. Bay Cherry Hill v. City of Forth Worth*, 257 S.W.3d 379, 396 (Tex. App.–Fort Worth 2008, no pet.) ("[T]he Plan currently exists only on paper, and unless and until the Plan is implemented, [the plaintiff] cannot allege facts that constitute a regulatory taking.") Similarly, the Austin court of appeals, in *Buffalo Equities, Ltd. v. City of Austin*, No. 03-05-00356-CV, 2008 WL 1990295 at *7–*8 (Tex. App.–Austin May 9, 2008, no pet.) (mem. op.), dismissed a taking claim based on a city employee's letter opining that a developer's plans would not comply with zoning restrictions. Although viewed through the lens of ripeness rather than lack of direct, regulatory effect, the result was the same — no jurisdiction.

that may adversely affect private-property interests. Rather, an inverse condemnation action provides redress for specific kinds of direct-regulatory or physical governmental-incursions.

72. Federal taking holdings are in accord.[84] For example, in *Breneman v. United States*,[85] a landowner sued the Federal Aviation Administration, in part for the agency's administrative finding that the owner's construction of a hill and fence would constitute hazards to air navigation. These federal hazard-determinations, alleged the owner, caused a state transportation agency to deny the owner a state permit to construct the hill. The owner brought a federal taking claim against the FAA. In dismissing the claim, the federal court agreed with the FAA's description of its hazard determinations as "advisory" and without "enforceable legal effect." The court reasoned that, absent direct FAA authority to regulate construction activity, no takings liability could be assigned to the FAA for the state agency's permit denial, notwithstanding the FAA's apparent influence on the decision.[86] This holding compels the conclusion that Mesa's taking challenge here has no legal legs.

3. Taking liability may not be imputed to the TWDB or otherwise applied to invalidate its decision.

73. If the TWDB's own planning activities cannot create taking liability, someone else's potential taking liability may not be imputed to the TWDB. Even assuming *arguendo* that the differences between the DFCs constitute a current, direct restriction on Mesa's property,

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[84] Texas courts interpreting the state Takings Clause at Tex. Const. art. 1, § 17, may look for guidance to federal decisions interpreting the "comparable" federal Takings Clause at U.S. Const. amend. 5. *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2007), *citing Sheffield Devel. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004).

[85] 57 Fed.Cl. 571 (2003), *aff'd* 97 Fed.Appx. 329 (Fed. Cir. 2004), *cert. denied* 543 U.S. 1021 (2004).

[86] *Id.* at 583–85.

the TWDB's advisory support for the DFCs does not render them a restriction imposed by the TWDB. And neither does TWDB's acquiescence give rise to some kind of "enabler" liability for a taking or otherwise invalidate the TWDB's decision. Relevant case law points in a contrary direction.

74. In *City of Keller v. Wilson*,[87] landowners were flooded by storm-water runoff from a new residential subdivision development. They sued the municipality that approved the developer's drainage plan, asserting a taking. The supreme court reversed a jury verdict in favor of the landowners because there was no evidence of the requisite takings intent on the part of the city.[88] In her concurrence, Justice O'Neill further observed that the city's "mere approval" of the developer's drainage plan could not give rise to takings liability by virtue of the subsequent flooding.[89] From a legal causation perspective, Justice O'Neill regarded the nexus between the city's plan approval and the flooding of the downstream properties as too indirect. "[T]he City's mere approval of the private development plans did not result in a taking for public use, as the constitutional standard requires. . . The City did not appropriate or even regulate the use of the Wilson's land, nor did it design the drainage plan for the proposed subdivisions." Accordingly, city approval "did not transfer responsibility for the content of those plans from the developer to the City."[90]

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[87] 168 S.W.3d 802 (Tex. 2005).

[88] *Id.* at 829–30. The general elements for a taking claim under Tex. Const. art. 1, § 17 are: (1) the government intentionally performed certain acts, (2) that resulted in a "taking" of property, (3) for public use. *General Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *accord Hearts Bluff*, 313 S.W.3d at 486.

[89] *City of Keller*, 168 S.W.2d at 833–35.

[90] *Id.*

75. In the same vein, the Austin Court of Appeals rejected an analogous takings argument in *FPL Farming, Ltd. v. TNRCC*.[91] A neighboring landowner challenged the agency's decision to permit a nonhazardous-waste-injection well, over the neighbor's objection that a subsurface trespass would occur.[92] The appellate court rejected the claim, agreeing with the trial court that the agency's approval of the permit did not authorize a taking. The court reasoned that the permit itself imposed no restriction on the landowner's property, and the landowner had recourse against the permittee should subsurface migration occur.[93]

76. A like attempt to impute takings liability failed in *State v. Sledge*.[94] A landowner complained about the deposit of dredged material on his property and sued for a taking. Although the deposits were made by the Army Corps of Engineers, the landowner sued the State of Texas on the theory that the state sponsored the deposits by contracting with the Corps to facilitate the dredging. The Beaumont Court of Appeals rejected the notion that the state could be vicariously liable under takings law for the Corps's actions, despite the State's cooperation in the dredging operations. Nothing in the State's activities, including the contract with the federal government, waived the state's sovereign immunity from the landowner's facially invalid taking claim.[95]

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[91] No. 03-02-00477-CV, 2003 WL 247183 (Tex. App.–Austin Feb. 6, 2003, pet. denied) (mem. op.).

[92] However, in subsequent litigation, a jury found the landowner's subsurface trespass claims meritless. *See FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 305 S.W.3d 739 (Tex. App.–Beaumont 2009, pet. filed).

[93] *FPL Farming*, 2003 WL 247183 at *5. *See also Berkley v. R.R. Comm'n*, 282 S.W.3d 240, 242–43 (Tex. App.–Amarillo 2009, no pet.) (noting the "limited effect" of permits, opining that administrative permitting does not adjudicate property rights, and holding that the RRC permit did not authorize a trespass or taking).

[94] 36 S.W.3d 152 (Tex. App.–Houston [1st Dist.] 2000, pet. denied).

[95] *Id.* at 157-58. Consistent with these authorities, *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.–Austin 1999, pet. denied) illustrated the proper approach. The riparian landowners properly directed their taking claim against the wastewater-permit-receiving city – not the permit-issuing agency.

77. As these precedents demonstrate, Mesa is misguided in the contention that, by authorizing a taking, the TWDB's decision is invalid.[96] This misstep derives from Mesa's misconception of the fundamental nature of a taking claim. Typically, a taking claim is for compensation, not for invalidation. The constitutional infraction is not taking private property for a public use, but rather failing to pay for it.

> [T]he Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. In other words, it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.[97]

Thus, the Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose."[98] So even if Mesa's takings argument were correct, that result would not necessarily invalidate the TWDB's decision or block its implementation.[99] Rather, the result would set up a claim to compensate the Plaintiffs for the value of their property interests acquired by the government via an act of inverse condemnation.

78. Mesa may attempt to fall back on its suggestion of a private-purpose taking to support

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[96] Of course, Mesa assumes that the DFCs have already effected a taking of groundwater rights or will do so. But whether a set of facts constitutes a taking is a question of law. *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 241 (Tex. 2002). The Court is not bound by Mesa's legal conclusions.

[97] *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 536–37 (2005) (internal citations and quotations omitted).

[98] *Id.* at 543; *accord Combs v. B.A.R.D. Industries, Inc.*, 299 S.W.3d 463, 470-71, 72-73 (Tex. App.–Austin 2009, no pet.) (dismissing a taking claim based on allegations of "unlawful" Comptroller action because valid taking claims presume authorized government acts).

[99] *See, e.g., Hardwicke v. City of Lubbock*, 150 S.W.3d 708, 713–15 (Tex. App.–Amarillo 2004, no pet.) (analyzing landowner's request for declaratory and injunctive relief against city's reinvestment zone condemnation activities alleged to serve no public use). Declaratory and injunctive relief are not the usual remedies for a taking. The Supreme Court has said that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). *See also, e.g., City of Anson v. Harper*, 216 S.W.3d 384, 396 (Tex. App.–Eastland 2006, no pet.) (rejecting attempt in a taking suit to enjoin city's construction of a landfill).

the request for declaratory relief.[100] Although equitable relief may be available under a proper private-purpose claim,[101] Mesa fails to allege a legally sufficient taking claim that links the actions of the TWDB with any direct impact on the Mesa's property rights. That required nexus is simply absent under the terms of Chapter 36 and Mesa's pleadings. Thus, whatever species of taking claim Mesa has lodged, its legal deficiencies negate jurisdiction.

4. Neither Water Code § 6.241 nor the UDJA provide jurisdiction for a facially invalid taking claim.

79. The constitution itself serves to waive the sovereign's immunity from inverse condemnation actions.[102] If, as held in the cited authorities, there is no jurisdiction over a legally deficient claim under the Taking Clause, neither is there jurisdiction under Water Code § 6.241. The statute does not authorize review of the non-final order, and it would be irrational to allow a taking claim not legally cognizable under takings law to create jurisdiction under the statute. Moreover, Section 6.241 contemplates setting aside TWDB decisions, which is not the office of a typical taking claim.[103] Section 6.241 should not be misconstrued to salvage jurisdiction for Mesa's otherwise dismissible claim.

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[100] Plaintiffs' First Amended Original Petition, ¶¶ 10, 21.i., j.

[101] A claim of private-purpose taking departs from a true taking claim and more resembles a challenge based on unauthorized, *ultra vires* government action. Justice O'Connor, in explaining how a just-compensation-taking claim assumes an *authorized* government act, contrasted a private-purpose-taking claim: "Conversely, if a governmental action is found to be impermissible — for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543.

[102] *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

[103] *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128-29 (1985) (explaining that "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those instances where a taking has occurred.")

80. Similarly, neither is the UDJA a jurisdictional safety net for Mesa's facially defective taking claim. The Texas Supreme Court has held repeatedly that the UDJA is itself not a grant of jurisdiction, but rather is a procedural device for deciding cases already within a court's jurisdiction.[104] As observed previously, the remedy characteristic of a takings claim is compensation, not a declaration of a taking.[105] An inverse condemnation action subsumes a taking declaration, making a separate UDJA claim redundant surplusage.[106]

D. Conclusion

81. The TWDB action that Mesa challenged directly regulates nothing, either currently or in the future. The TWDB's determination that the districts' DFCs needed no revision is at most an advisory opinion concerning the planning goals of a separate governmental entity that have yet to be implemented. Under the relevant authorities, Mesa is legally unable to connect any takings liability with TWDB's action. Thus Mesa's pleadings negate the Court's jurisdiction over the takings claim. Since sovereign applies to bar adjudication of Mesa's claim, it must be dismissed for want of jurisdiction.

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[104] *IT-Davy*, 74 S.W.3d at 855 *citing State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994); *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

[105] *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (noting that the Taking Clause "waives immunity only when one seeks adequate compensation for property lost to the State"); *MBP Corp. v. Bd. of Trustees of Galveston Wharf*, 297 S.W.3d 483, 491 (Tex. App.–Houston [14th Dist.] 2009, no pet.) ("[T]he appropriate recovery under a constitutional-takings claim is 'adequate compensation.'").

[106] *See, e.g., State v. Allodial L.P.*, 280 S.W.3d 922, 928 (Tex. App.–Dallas 2009, no pet.), *citing Tex. Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 151-52 (Tex. App.–Austin 1998, no pet.) (dismissing declaratory judgment claim that mirrored taking claim); *City of Houston v. Tex. Land & Cattle Co.*, 138 S.W.3d 382, 392 (Tex. App.–Houston [14th Dist.] 2004, no pet.) (same).

CONCLUSION

82. The Texas Legislature vested authority to regulate groundwater withdrawals in local groundwater conservation districts, not the TWDB. The Agency respects that choice. It offers advice and comments about the districts' planning goals, not commands or controls. The TWDB's decision *not* to recommend changes to those goals did not fix rights or liabilities. Its advice, therefore, is not a reviewable final order, did not affect the Mesa (if at all) any differently than the public at large, and could not have taken vested property rights. Mesa might suffer a legal injury and have a claim someday, but the claim would lie against a local groundwater district, not the TWDB.

PRAYER

The TWDB respectfully asks the Court to dismiss this suit for lack of jurisdiction. Defendant further prays for all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing TWDB's first amended plea to the jurisdiction has been served on the persons listed below, by the method indicated, this 13th day of August, 2010:

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