

DEALING WITH GROUNDWATER DISTRICTS
The Shifting Sands of the Water Law Practice

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Chapter ____

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In 1955, the first groundwater conservation districts poked their heads up out of the West Texas desert. Their rules were pretty simple back then, generally no more than a few pages and dealing mostly with how close irrigation wells could be to one another. As the state grew, however, people in rural areas soon realized that the “city folks” would need water to support that growth. More GCDs sprang up, their creation no longer based on aquifer boundaries but now on political boundaries, like county lines. Single county districts became all the rage, and the madness began in earnest. Each GCD promulgated its own rules, and an apparent competition arose among those few Austin lawyers who could write them. By the early part of this century, GCD rules often ran to more than 100 pages. Despite their complexity and diversity, these rules shared three common themes: those of us who are producing don’t want to quit and we don’t want competition for the water and we sure as hell don’t want “our” water being exported. Anywhere.

The desire to accomplish these goals has led to GCD rules that range from the ridiculous to the sublime. The purpose of this paper is to illustrate some of the rules at the “ridiculous” end of the spectrum and to explore the methods for challenging these rules when they result in the inevitable deprivation of constitutionally protected property rights.

I. A SAMPLING OF GROUNDWATER DISTRICT RULES

A. Structure and General Content of GCD Rules

Virtually all GCD rules follow similar patterns in terms of their structure and the topics addressed. From an organizational standpoint, most district rules start with a section describing the purpose and construction of the rules, then proceed to definitions and a discussion of the jurisdiction of the district. Most rules then discuss the type of permits that are needed in the district, including permits to drill wells and to produce water from those wells. Many districts require a separate permit for exportation of water from the district. All districts have rules pertaining to rulemaking procedures, probably because Tex. Water Code Sec. 36.101 details the requirements for

rulemaking. Many districts also provide procedures for contesting the denial of various permits (or the granting of permits to other, less deserving folks). Most districts also include rules for enforcing their rules, usually by way of civil fines of up to \$10,000 per day per violation.

Then there are special rules in various districts. Many have rules that allow the districts to impose special production or drilling limits in areas deemed to be of concern, calling such areas names like “strategic conservation depletion areas (SCDA)”¹ or “extreme decline study areas (EDSA).”² Hill County UWCD uses the expressions “High Historical Groundwater use Areas (HHGUA)” and “Critical Groundwater Depletion Area (CGDA).” In these districts, identification as such an area may lead to special production limitations based on isopach lines on maps. As noted below, however, restricting production of groundwater within an aquifer based on arbitrary lines amounts to a taking; these rules will inevitably lead to litigation.

B. Rules Relating to Production

Most districts impose some sort of limitation on the production of groundwater, usually expressed in the number of acre feet per acre per year that may be used (one acre foot = 325, 851 gallons, or the amount of water needed to put water one foot deep on one acre). Panhandle GCD, for example, imposes a limitation of 1 acre feet per acre per year. At the other end of the spectrum, Llano Estacado UWCD’s production limit is 16.13 acre feet per acre per year.

Some districts are just more creative than others in terms of production limitations. For example, in Guadalupe GCD, production is determined by Rule 5.4:

Carrizo Well Spacing: The dip of the Carrizo beds is defined as having an orientation of 140° true. The strike, being perpendicular to the dip, is defined as having an orientation of 050° true. Around every regulated Carrizo well, existing or proposed, an ellipse (see depiction #1) whose major

¹ Hemphill County Underground Water Conservation District Rule 5.109. The groundwater districts are particularly fond of acronyms and initials, spawning such hieroglyphics as DFC (desired future condition), GMA (groundwater management area) and its cousin GAM (groundwater availability model), HIPP (High Impact Production Permit) and so forth.

² Gateway Groundwater Conservation District Rule 7.2.

and minor radii are correlated to the average projected g.p.m. productive capacity of the well is defined as the well’s Carrizo formation “area of influence”. The major axis of the ellipse is parallel to the dip of the Carrizo beds, while the minor axis of the ellipse is parallel to the strike of the Carrizo beds (see depiction #2). The major radius of the ellipse (the radius along the major axis) is three (3) lateral feet times the average projected g.p.m. productive capacity of the well. The minor radius of the ellipse (the radius along the minor axis) is two (2) lateral feet times the average projected g.p.m. productive capacity of the well. The “areas of influence” of adjacent Carrizo wells, unless they are both existing wells when these rules are approved, may touch, but not overlap (see depiction #2).³

Perhaps even more creative is this rule, copied directly from Brazos Valley Groundwater Conservation District:⁴

Revised Rules
October 7, 2010

(3) Production Based Acreage

A permit holder’s groundwater production for a new non-exempt well drilled in the Simsboro Formation, is limited by the number of contiguous acres that are legally assigned to the well site. A majority of the contiguous acreage assigned to the well shall bear a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science. The amount of groundwater production based on the assigned contiguous acreage will be determined by the following formula:

$$\left(\frac{\text{Well Production Capacity in}}{\text{District Spacing Requirement Between Wells}} \right)^2 \times \pi = \frac{\text{Total number of contiguous acres required to be assigned to the well site}}{43,560}$$

Example: $\frac{(2500\text{gpm} \times 1\text{ ft/gpm})^2 \times \pi}{43,560} = 451$ acres

Therefore, under this example, to be permitted for a well with a maximum capacity of 2500 gpm, the land assigned to that well must encompass 451 contiguous acres.

Hemphill County UWCD’s production limits are more arcane. Production “allowances”⁵ are set according to water use. For agricultural use, the allowance is set by reference to a “water duty” table. If a farmer is raising alfalfa, the water duty is 3 acre

feet per ace per annum. If the farmer is going to raise corn, the water duty is 2 acre feet. Wheat, cotton, soybeans and sorghum will get 1 acre foot. Sunflowers only get ½ acre foot. But what if you’re not a farmer and want to produce water for export? There is no specified amount for that purpose. Manufacturing? Sorry, we don’t see that in the table. The conclusions to be reached are: (1) it’s good to be a farmer in Hemphill County, and (2) every farmer should claim to be raising alfalfa.⁶

Under Texas Water Code Section 36.117, a district may not require a permit for “exempt wells,” generally defined as wells used for domestic or livestock use, and specifically defined as wells that are designed or equipped to produce 17.5 gallons per minute or less. Some districts are reluctant to grant exemptions for just any old “livestock” use, however, and therefore become creative in defining what “livestock” is. Panola County GCD provides the example:

“Livestock” means, in the singular or plural, grass or plant-eating, single- or cloven-hooved mammals raised in an agricultural setting for subsistence, profit or for its labor, or to make produce such as food or fiber, including cattle, horses, mules, asses, sheep, goats, llamas, alpacas, and hogs, as well as species known as ungulates that are not indigenous to this state from the swine, horse, tapir, rhinoceros, elephant, deer, and antelope families, but does not mean a mammal defined as a game animal in section 63.001, Parks and Wildlife Code, or as a fur-bearing animal in section 71.001, Parks and Wildlife Code, or any other indigenous mammal regulated by the Texas Department of Parks and Wildlife as an endangered or threatened species. The term does not include any animal that is stabled, confined, or fed at a facility that is defined by Texas Commission on Environmental Quality rules as an Animal Feeding Operation or a Concentrated Animal Feeding Operation.

³ Guadalupe Groundwater Conservation District Rule 5.4
⁴ For those inclined to preserve their eyesight, a copy of this rule is also attached to this article.

⁵ The term implies that the GCD owns the water and is parceling it out as a favor, like a parent to a child. This is not surprising given the district’s support of the Edwards Aquifer Authority’s position in current litigation regarding the ownership of groundwater.

⁶ In fairness, the ultimate limit on production in Hemphill County is that amount of water that can be produced from a well such that the water level of the aquifer does not decline by greater than 1% per calendar year of the saturated thickness of the aquifer at the point at which the well penetrates the aquifer. Rule 5.107(a)(5).

As an example of how rulemaking can run amuck, note the use of the word “ungulates” in the above definition of “livestock.” Literally, “ungulate” refers to any animal with hooves. However, the definition has expanded over time to include seven different Mammalian orders, some of which have no hooves.⁷ “As a result, the term is now understood to have no taxonomic significance, and its definition has returned to its original descriptive roots: a mammal with hooves.”⁸ So the use of the word “ungulates” in the above definition is basically meant to convey that the drafter was pretty smart, but somewhat not.

C. Rules Relating to Historic Use Schemes

Most groundwater districts will grant a production permit based on the number of acres a landowner owns or controls, *i.e.*, the permit will grant the right to produce a certain number of acre feet per year based on the number of acres owned or controlled. While not specifically called such, this is a *de facto* “correlative rights” system—it bases the right to produce on the number of acres owned, and not on other factors. On the other hand, several districts have implemented historic use schemes for allocating production rights. Under these schemes, a producer who was producing water during a designated period will get to continue production, usually at the same rate. Landowners who were not producing during that period are generally given a production permit, but their right to produce may be subordinate to “historic users” either in the amount of production granted or in terms of curtailment in periods of insufficient supply. As will be noted more fully below, historic use schemes may come under scrutiny where adjoining neighbors are granted different production limits, or where non-historic users are denied access to their water altogether.

Historic use schemes take various forms in the rules of groundwater districts. Many districts refer explicitly to “grandfathered use” in issuing permits or setting production limits.⁹ Some districts use a specific period of time during which “historic use” is established. For example, Kinney County GCD Rule

⁷ See www.ultimateungulate.com/whatisanungulate.html.

⁸ *Id.*

⁹ See, for example, Central Texas GCD; Gateway GCD; Goliad GCD; Lone Wolf GCD; Lower Trinity GCD; Mesa UWCD; Middle Trinity GCD; North Texas GCD; Northern Trinity GCD; Panola County GCD; Pecan Valley GCD; Pineywoods GCD; Prairielands GCD; Refugio GCD; Rolling Plains GCD; Rusk County GCD; South Plains UWCD; Southeast Texas GCD; Upper Trinity GCD and Victoria County GCD.

3.01 establishes the time period of January 1, 1960 through December 31, 1991 as its historic use period. Other districts, like Bluebonnet GCD, indicate that the district may impose more restrictive conditions on “new” permits.¹⁰

Southern Trinity GCD has the most prolix historic use rule around. Its rule 5.103 establishes production limits based on “Maximum Historic Use (MHU),” then states:

If, after all Historic Use Production Permit applications have been finally decided by the District, the aggregate of the annual volume of groundwater authorized for production pursuant to Historic Use Production Permits (HUPPTrinity) is less than the volume calculated in Subsection (c) above (Non-ExemptTrinity), then the District may grant Non-Historic Use Production Permits (NHUPPTrinity) in an aggregate annual volume equal to or less than the difference between the volume calculated in Subsection (c) above and the aggregate of the annual volume of groundwater authorized for production pursuant to Historic Use Production Permits (NHUPPTrinity \leq Non-ExemptTrinity - HUPPTrinity). No Non-Historic Use Production Permit applications shall be considered by the District until all Historic Use Production Permit applications have been finally decided by the District.

The test for getting a production permit in Southern Trinity GCD is whether you can interpret the rule.

D. Rules Relating to Export of Water

Virtually all districts have promulgated special rules relating to the export of groundwater to any other place. It is legislatively impermissible to have more stringent rules for export than for local use of water.¹¹ From a private property rights standpoint, a landowner should have the right to use his groundwater for any beneficial, non-wasteful use. The aquifers of the state are indifferent to how water is used or where; their only “interest” is in the amount being withdrawn. From an aquifer standpoint, a gallon of water drawn from a reservoir for irrigating corn for ethanol has exactly the same impact as a gallon withdrawn for a

¹⁰ Bluebonnet GCD Rule 6.1; see also Hill Country UWCD.

¹¹ TEX. WATER CODE § 36.122.

local feedlot or a water bottling plant. Exportation of groundwater is only politically significant; it is not hydrologically significant. Arguably, any rule that imposes even a slightly more stringent requirement on exportation is a violation of property rights. That said, most districts specifically address export or transportation of water outside the district, imposing additional requirements for information on those seeking to move water outside the district. Almost certainly the rules imposed by some districts amount to a taking of private property.

In an apparent attempt to justify more stringent export requirements, many districts put the following mantra in their rules regarding export permits:

In recognition of the fact that the transfer of groundwater resources from the District for use outside of the district impacts residents and property owners of the District differently than use within the District, and in order to manage and conserve groundwater resources within the District and provide reasonable protection of the public health and welfare of residents and property owners of the District, a groundwater transfer permit is required to produce groundwater from within the District's boundaries and to transport such groundwater for use outside the District. (emphasis added).

Of course, withdrawal of groundwater resources impacts the aquifer equally whether the water is used locally or is exported. It is difficult to imagine why withdrawing a gallon of water for export impacts the residents and property owners differently than use within the district. Districts with this export language are ripe targets for equal protection litigation. Included in this suspect group are Glasscock County GCD, Lower Trinity GCD, Neches & Trinity Valley GCD, Pineywoods GCD, and Southeast Texas GCD.

So what do exportation rules look like? Generally, a district will expressly prohibit export of water without a permit.¹² This special export permit is in addition to the permit needed to drill or produce from a well. Most districts impose additional information requirements on applicants who wish to export water. This is expressly allowed under Texas Water Code Section 36.122, relating to "Transfer of Groundwater Out of District." While that section

states that a district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users, it also mandates that a district consider additional factors in evaluating a proposed transfer out of the district. Three such factors are listed:

1. the availability of water in the district and in the proposed receiving area during the period for which the water supply is requested;
2. the projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the district; and
3. the approved regional water plan and certified district management plan.

Note that in-district users, such as irrigators, do not have to provide information on the projected effect of their proposed use of groundwater on aquifer conditions, depletion, subsidence or the effects on existing permit holders or other users. Yet in-district use for irrigation, industry, cattle feeding or lawn watering will impact the aquifer in precisely the same manner, all other things being equal. No one has challenged this aspect of Section 36.122 to date.

Also note that Section 36.122 only includes 3 factors for districts to consider. Most districts, on the other hand, have expanded the list of additional information well beyond the statutory specifications. Hemphill County UWCD, for example, lists a total of 17 considerations for export permits, including "the activities for which the groundwater will be beneficially used will be constructed, operated, and maintained to preserve, protect, prevent the pollution, degradation, or harmful alteration of, control and prevent the waste of, prevent the escape of, and achieve the conservation of groundwater in the aquifer." Whatever that means.

Rule 23 of the Bee GCD provides an interesting example of an unusual information request. There, the applicant for an export permit must "identify any other liquids that could be substituted for the fresh groundwater and possible sources of such liquid including quantity and quality." Live Oak Water Control District's Rule 22 imposes a similar requirement. Groundwater district proponents often recite a mantra about how water must be protected

¹² Hemphill County UWCD, for example, says that exporting groundwater without the required permit is "illegal, wasteful per se, and a nuisance." Rule 5.607(a).

because we cannot live without water; these districts appear to be looking for the next big thing in water substitutes. Maybe beer for the boys and Gatorade for the crops?

Many districts differentiate between water that is just flat out piped out of the county and water that is removed in different forms. For example, several districts except water incorporated into manufactured goods from export regulation.¹³ Many of these districts then specifically note that water put in bottles is not water incorporated into manufactured products.¹⁴ Obviously, this type of rule targets water bottlers, whose total use is generally a rounding error from irrigation use. Other districts exempt water used for agricultural products from export rules, implicitly recognizing that the sale of agricultural products outside the district is a de facto export of water.

Fayette County GCD provides an interesting twist on export restrictions. Its Rule 10.1 allows the district to “restrict a Transport Permit by limiting the annual production of groundwater for transport outside of the boundaries of the District to a quantity of water based on the ability to maintain the desired future condition of the aquifer from which the groundwater will be withdrawn.” No similar restrictions are placed on locally used water, even though Sec. 36.108 requires every district to pass rules that are designed to achieve the established DFC for that district. Rule 10.1, by specifically mentioning the ability to maintain the DFC, appears to be causing exporters to shoulder the burden of conservation necessary to attain the district-wide DFC goals.

Kinney County GCD Rule 6.01 requires that the applicant for an export permit be a party to a contract with the end user. This means that before the putative exporter can get an export permit, he must obtain a contract with an end user. As a practical matter, however, end users will not commit the resources to

¹³ See, for example, Bluebonnet GCD Rule 10.2; Brazos Valley GCD Rule 10.2; Brewster County GCD; Kinney County GCD Rule 6.01; Lost Pines GCD Rule 9.2; Lower Trinity GCD Rule 14; Medina County GCD Rule 5.33; Neches Trinity Valleys GCD Rule 14; Pecan Valley GCD Rule 10.2; Pineywoods GCD Rule 5.5; Post Oak Savannah GCD Rule 8.1; Refugio GCD Rule 8.2; Rusk County GCD Rule 11.2; Southeast Texas GCD Rule 5.4; Southern Trinity GCD Rule 5.401; Uvalde County UWCD Rule 9.3; Victoria County GCD Rule 5.2.

¹⁴ See, for example, Gateway GCD Rule 8.1; Kinney County GCD Rule 6.01; Lower Trinity GCD Rule 14; Neches Trinity Valleys GCD Rule 14; Refugio GCD Rule 8.1; Pineywoods GCD Rule 5.5; Post Oak Savannah GCD Rule 8.1; Southeast Texas GCD Rule 5.5; Uvalde County UWCD Rule 9.3.

buy water and build infrastructure until the seller has a permit to export water. The requirement of a contract with an end user as a condition precedent to a permit, therefore, is tantamount to the “chicken and egg” conundrum.

Many districts require additional information from applicants for export permits as compared to in-district applications. For example, in Gonzales County GCD, an application for transport outside the district must show “the projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the District.” No other class of user is required to provide similar information. Medina County GCD, with 108 pages of rules, requires the export applicant to prove “there is insufficient water available in the proposed receiving area to substantially meet the actual or projected demand during the proposed term of the groundwater exportation permit.” This is a decision to be made by the Medina County board as to whether a city in a different area has sufficient water available, regardless apparently of whether that distant city has made a different determination about the sufficiency of its water supplies. Medina County GCD is not, however, alone in allowing its Board to second guess thirsty cities.¹⁵

Post Oak Savannah GCD imposes the following information requirement on proposed transport of water, which speaks for itself:

Provide a description of the applicant's service area, metering, leak detection and repair program for its water storage, delivery and distribution system, drought or emergency water management plan, and information on each subsequent customer's water demands, including population and customer data, water use data, water supply system data, alternative water supply, water conservation measures and goals, conjunctive use, and the means for implementation and enforcement of all applicable rules, plans, and goals. (emphasis added).

Again, every gallon removed from an aquifer is equal. Only the people above ground care whether that gallon is used for crops or human consumption in some

¹⁵ See, for example, Gateway GCD Rule 8.4; Goliad County GCD Rule 8.4; Gonzales County UWCD Rule 15; Guadalupe GCD Rule 13; Headwaters GCD Rule 13.5; Hemphill County UWGD Rule 5.609; Southern Trinity GCD Rule 5.407.

distant city. Requiring those who transport water outside a district to provide more—and more onerous—information in order to receive a permit is a de facto failure to afford equal protection.

II. CHALLENGES TO RULE MAKING

Several avenues are available for challenging the rules and actions of groundwater districts, including challenging the rulemaking process itself. The 98 different GCDs have 98 different sets of rules. Generally, every GCD provides in its rules a methodology to promulgate rules. The procedures spelled out for rule-making are fairly simple and should not provide any basis for challenge unless a district simply fails to follow the steps set forth in Section 36.101, relating to rulemaking. 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.¹⁶ Districts are given wide latitude as to how a rulemaking hearing is conducted,¹⁷ 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.¹⁸

Is there any valid challenge to a district's rulemaking procedures? The legislature could have, but did not, make the Administrative Procedure Act ("APA")¹⁹ 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.²⁰

A "validity" challenge tests a rule on procedural and constitutional grounds, including whether the district has the statutory authority to promulgate the rule.²¹ 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.²²

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.²³ The Texas Supreme Court has indicated that an individual may challenge the rationality and factual basis of a rule under the Due Process Clause.²⁴ 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.²⁵ 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 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.

¹⁶ TEX. WATER CODE § 36.101(d).

¹⁷ TEX. WATER CODE § 36.101(f).

¹⁸ TEX. WATER CODE § 36.101(k).

¹⁹ TEX. GOV'T CODE § 2001.001, *et seq.*

²⁰ TEX. GOV'T CODE § 2001.038(a).

²¹ *City of Alvin v. P.U.C.*, 143 S.W.3d 872 (Tex. 2001); *see also* Ronald L. Beal, *Texas Administrative Practice and Procedure*, § 3.4, (Lexis Law Pub. 2009).

²² *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915).

²³ Beal, *supra* note 21, § 4.8.2.

²⁴ *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935 (Tex. 1935).

²⁵ *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.").

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.²⁶ 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.²⁷ This three year “statute of limitations” on rules does not apply if the rule was void at the time it was passed.²⁸ Accordingly, a “validity” challenge would not be barred under Section 36.124. 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.

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.²⁹ 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.”³⁰ Most importantly from a GCD perspective, the challenged rule or order is deemed prima facie valid, and the review is governed by the substantial evidence rule “as defined by Section 2001.174, Government Code.”³¹ 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.³² 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.³³ 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 information 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.³⁴ Again, the question is whether the criteria set forth in this particular 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

³² TEX. WATER CODE § 36.066(g). This provision could be open to challenge as a denial of due process and equal protection, or as a violation of the open courts provision of the Texas Constitution.

³³ TEX. WATER CODE § 36.113.

³⁴ 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 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.*

²⁶ *Id.*; Beal, *supra* note 21, § 4.1, fn 10.

²⁷ TEX. WATER CODE § 36.251.

²⁸ TEX. WATER CODE § 36.124.

²⁹ TEX. WATER CODE § 36.251.

³⁰ TEX. WATER CODE § 36.251.

³¹ TEX. WATER CODE § 36.253.

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).³⁵ 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.”³⁶ 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.³⁷ 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 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.³⁸

Section 36.401 and following of the Water Code set out certain required notice and hearing processes with respect to applications for permits.³⁹ 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,⁴⁰ 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.⁴¹ 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.⁴² 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, beginning at Section 2001.051, specifies the general procedures for contested case hearings.⁴³ 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.

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.⁴⁴

³⁵ 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.

³⁶ Rules of Hemphill County Underground Water Conservation District at Rule 5.609(12).

³⁷ Rules of Hemphill County Underground Water Conservation District at Rule 5.609(16).

³⁸ TEX. WATER CODE § 36.1132(f); the Water Code does not, however, place any limit on the amount of time a district may hold an application while determining that it is “administratively complete.”

³⁹ TEX. WATER CODE § 36.401, *et. seq.*

⁴⁰ TEX. WATER CODE § 36.410.

⁴¹ TEX. WATER CODE § 36.416.

⁴² TEX. WATER CODE § 36.418.

⁴³ TEX. GOV’T CODE § 2001.051, *et. seq.*

⁴⁴ 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.⁴⁵ 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.⁴⁶

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.⁴⁷ However, the court must 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. in excess of 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.⁴⁸

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 must reverse the decision. Likewise, if the application of GCD rules to the applicant results in violation of constitutional rights, the trial court must 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. The first step is to receive a

certified copy of the entire record of the proceeding under review.⁴⁹ Either party may then apply to the court to present additional evidence.⁵⁰ 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.⁵¹ Finally, a trial court must conduct the substantial evidence review sitting without a jury.⁵² 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.⁵³

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.⁵⁴ A trial court has no authority to vacate a GCD judgment which was determined to have exceeded the district statutory authority.⁵⁵ 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.⁵⁶

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 of law. The trial court may also reverse the district decision if the

⁴⁹ TEX. GOV'T CODE § 2001.175(a).

⁵⁰ TEX. GOV'T CODE § 2001.175(b).

⁵¹ *Id.*

⁵² TEX. GOV'T CODE § 2001.175(e).

⁵³ TEX. GOV'T CODE § 2001.901.

⁵⁴ *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.).

⁵⁵ *In Re: Edwards Aquifer Authority*, 217 S.W.3d 581 (Tex. App.—San Antonio 2006, orig. proceeding).

⁵⁶ *City of San Marcos v. Texas Commission on Environmental Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied).

⁴⁵ TEX. GOV'T CODE § 2001.172.

⁴⁶ TEX. GOV'T CODE § 2001.174.

⁴⁷ *Id.*

⁴⁸ *Id.*

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 not substitute its judgment on a finding of fact adopted by the district.⁵⁷ 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.⁵⁸ 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.⁵⁹ The test is not whether the district reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken.⁶⁰

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. DFC APPEALS

In Section 36.108, the legislature provided a requirement that districts in a groundwater management area jointly plan the desired future conditions of the aquifers within their GMA.⁶¹ 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, 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:

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.

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

⁵⁷ *Butmaru v. Ford Motor Co.*, 84 S.W.3d 198 (Tex. 2002).

⁵⁸ *City of El Paso v. P.U.C. of Texas*, 883 S.W.2d 179 (Tex. 1994).

⁵⁹ *Railroad Commission v. Torch Operating Co.*, 912 S.W.2d 790 (Tex. 1995).

⁶⁰ *City of El Paso*, 883 S.W.2d at 185.

⁶¹ TEX. WATER CODE § 36.108.

suffer as a result of the desired future conditions. These protections are standard in other administrative processes.⁶²

Again, Chapter 36 is silent concerning any appeal from the decisions of TWDB or TCEQ regarding the establishment of DFCs. Nevertheless, Section 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.⁶³ One such suit has been filed.⁶⁴ 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.

At the time this paper is being written, the legislature is considering various options for the DFC appeals process. It is impossible to know the outcome of the legislative process, but the three most likely results are (1) create a SOAH hearing process for challenging the reasonableness of DFCs, with an appeal to a district court on substantial evidence grounds; (2) create a direct appeal to a trial court on the same basis as a rulemaking appeal; or (3) do nothing and allow pending and future litigation to shape the debate.

V. 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.

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*.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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

⁶² *Sunset Advisory Commission, Commission Decisions regarding Texas Water Development Board*, pgs. 30, 31 (Dec. 2010).

⁶³ TEX. WATER CODE § 6.241.

⁶⁴ *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.

⁶⁵ 925 S.W.2d 618 (Tex. 1996).

⁶⁶ *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.

⁶⁷ 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.

Legislature intends to compensate plaintiffs for any taking that occurs. As long as compensation is provided, the act does not violate Article I, Section 17.⁶⁸

Thus the *Barshop* decision does not hold that a landowner can never assert a valid taking claim related to regulation of groundwater.⁶⁹ It simply holds that the EAA, on its face, is not unconstitutional because it provides for compensation for takings if they occur.⁷⁰

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*.⁷¹ 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.⁷²

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."⁷³

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.⁷⁴ 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.

⁶⁸ *Barshop*, 925 S.W.2d at 630-31 (internal citations omitted).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. granted).

⁷² *Id.* at 756.

⁷³ 25 Tex. 279, 1860 WL 5835 (1860) (emphasis in original).

⁷⁴ 98 Tex. 146, 81 S.W. 279 (1904).

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.

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*.⁷⁵ 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.⁷⁶ 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.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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 commission’s proration orders that the owners there were unable to recover their oil before it drained away to more densely drilled areas in the north.⁸⁰

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

Under the settled law of this State 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.⁸¹

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.⁸²

⁷⁵ 177 S.W.2d 941 (Tex. 1944).

⁷⁶ *Id.* at 943.

⁷⁷ *Id.* at 944-46.

⁷⁸ *Id.*

⁷⁹ *Id.* at 945.

⁸⁰ *Id.*

⁸¹ *Id.* at 948 (internal citations omitted).

⁸² *Id.*

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.”⁸³

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.

VI. CONCLUSION

Groundwater regulation through groundwater districts will produce the need for challenges both at the GCD level and in the courts. 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.

⁸³ *Id.* 949.

(3) Production Based Acreage

A permit holder's groundwater production for a new non-exempt well drilled in the Simsboro Formation, is limited by the number of contiguous acres that are legally assigned to the well site. A majority of the contiguous acreage assigned to the well shall bear a reasonable reflection of the cone of depression impact near the pumped well, as based on the best available science. The amount of groundwater production based on the assigned contiguous acreage will be determined by the following formula:

$$\left(\frac{\text{Well Production Capacity in}}{\text{District Spacing Requirement Between Wells}} \times \pi \right)^2 = \frac{\text{Total number of contiguous acres required to be assigned to the well site}}{43,560}$$

Example: $\frac{(2500\text{gpm} \times 1 \text{ ft/gpm})^2 \times \pi}{43,560} = 451 \text{ acres}$

Therefore, under this example, to be permitted for a well with a maximum capacity of 2500 gpm, the land assigned to that well must encompass 451 contiguous acres.